STATE OF CONNECTICUT *v.* RICARDO CORREA (SC 20246)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The defendant was convicted, following a conditional plea of nolo contendere, of the crimes of conspiracy to possess a controlled substance with intent to sell, conspiracy to possess narcotics with intent to sell by a person who is not drug-dependent, and conspiracy to operate a drug factory. During surveillance of a motel for illegal activity, a police officer, observing an individual, T, quickly enter and exit the defendant's motel room at around 1 a.m., believed that he had witnessed a drug transaction. After T exited the motel room, he entered a vehicle driven by another individual, which departed from the motel. A short distance from the motel, the police stopped the vehicle. When the police approached the vehicle, they smelled a strong odor of marijuana emanating from inside

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

the vehicle. After T was removed from the vehicle, he admitted to possessing marijuana. A search of T's person revealed, inter alia, marijuana and heroin. The police ultimately detained T, who, at that time, denied being in or having any connection with the defendant's motel room. The police then went to the house of T's grandmother, where T was living. After T's grandmother consented to a search of T's bedroom, the officers searched that room and found numerous plastic bags with the corners cut off, as well as other bags containing an off-white powder residue. The officers went back to the motel and spoke with the manager, who advised them that the defendant paid cash to rent a room there for a week and provided them with a copy of the defendant's driver's license. The manager also indicated that a guest registration card for that room included the name of an individual with T's surname, which the police believed was most likely T. The officers then went to knock on the defendant's motel room door. The officers observed a light on, but no one answered. One of the officers then retrieved a canine officer and conducted a canine sniff of the motel walkway in the vicinity of the defendant's room. The canine alerted that it had detected contraband at the bottom of the door to the defendant's room. On the basis of all that had transpired since observing T enter and exit the defendant's room, the police decided to apply for a warrant to search the defendant's room. Before the police submitted their application for a warrant, however, one of the officers noticed the defendant walking away from the motel. The defendant was ultimately detained, and the officers found a large wad of cash on his person, as well as a motel room key. The police informed the defendant that T had admitted to them that he was storing his supply of marijuana in the defendant's motel room, and the defendant responded that nothing in the room was his. The defendant agreed to open the door to the room for the officers but then changed his mind and refused to grant them entry. The defendant also indicated at that time that no one was in the room. To ensure that there was no one in the room who might destroy evidence before the officers could obtain a warrant, one of the officers used the defendant's key to open the door. After opening the door, and without entering, an officer looked inside for approximately fifteen to thirty seconds and then closed the door. While the door was open, the officer observed evidence of drug activity. The defendant was then informed he could leave. Thereafter, the police prepared an application for and obtained a search warrant for the room. The application had been based on the results of the canine sniff of the door of the motel room, the observations made during the visual sweep of the room, and T's admission to the police that he had kept his supply of marijuana in the room. A search of the room revealed a large quantity of heroin, among other items related to drug activity. The defendant filed a motion to suppress the evidence that had been seized from the motel room, claiming, inter alia, that the search violated his rights under the Connecticut constitution (art. I, § 7) because

the search warrant application contained information obtained from an allegedly unlawful, warrantless visual sweep of the motel room. The trial court denied the motion, concluding that the visual sweep was necessary to prevent the imminent destruction of evidence and, therefore, was justified by the exigent circumstances exception to the warrant requirement. The court also determined that, even if the visual sweep was not justified under that exception, the evidence seized during the execution of the search warrant was admissible under the independent source doctrine. The defendant appealed to the Appellate Court from the judgment of conviction, claiming, as he had in the trial court, that he was entitled to suppression of the evidence found in the motel room because the search warrant derived from the allegedly unlawful visual sweep of the room. The defendant also asserted, for the first time, that he was entitled to suppression of the evidence because the search warrant application included information obtained from the warrantless canine sniff conducted by the police outside of the door of his motel room. The Appellate Court affirmed the trial court's judgment, concluding that the visual sweep was constitutionally permissible under the exigent circumstances exception and that a warrant was unnecessary with respect to the canine sniff because the sniff was not a search under the state constitution. On the granting of certification, the defendant appealed to this court. *Held*:

1. The canine sniff of the exterior door to the defendant's motel room was a search for purposes of article first, § 7, of the Connecticut constitution: the protection against a canine sniff that is afforded to a resident of a multiunit condominium complex under the state constitution in accordance with *State* v. *Kono* (324 Conn. 80) also extends to the occupant of a motel room, as motel guests have a reasonable expectation of privacy in their rooms, the fact that motel guests typically do not keep all of their personal effects in their rooms did not mean that the personal effects that guests do keep there should be subject to less protection under the law, a room occupied by a motel guest is not more vulnerable to a warrantless canine sniff than an apartment, condominium or house simply because other guests occupy nearby rooms or because rooms may be entered by motel staff to perform certain functions, and motel guests reasonably do not expect that the foot traffic generally associated with an open-air walkway abutting the motel's guestrooms includes law enforcement officers trolling the walkway with a trained canine in search of contraband.
2. The state could not prevail on its claim that, even if the canine sniff of the door to the defendant's motel room was a search, such a search could be conducted without a warrant, as long as the search was based on reasonable and articulable suspicion that there were illicit drugs in the room: although cases from other jurisdictions hold that a canine sniff of the door to an apartment or a condominium unit in a multiunit building is lawful if it is based on reasonable and articulable suspicion

rather than on probable cause, this court determined that those cases were incompatible with its reasoning and holding in *Kono*; moreover, under article first, § 7, searches conducted without a warrant based on probable cause are presumed to be unreasonable, the state's heavy burden of overcoming that presumption is met only in certain exceptional or compelling circumstances, and the few recognized exemptions from the warrant requirement under the state constitution invariably have involved searches conducted under circumstances requiring immediate action by the police, generally, in the interest of police or public safety, a consideration that was not implicated by a canine sniff performed to ascertain whether a motel room contains unlawful drugs; accordingly, a canine sniff of the exterior door to a motel room satisfies state constitutional requirements only if it follows the issuance of a warrant founded on probable cause.

3. The information available to the police unrelated to the canine sniff was sufficient to establish probable cause for the search of the defendant's motel room, but a remand to the trial court was necessary to afford the state an opportunity to demonstrate that the evidence seized from that room was admissible under the independent source doctrine by establishing that the police would have sought the warrant regardless of the results of the canine sniff: the facts, untainted by the results of the canine sniff, were sufficient, standing alone, to support the issuance of the warrant, as T previously had been staying in the motel room, T was involved with and likely selling drugs, T was likely engaged in a drug transaction when he entered and immediately exited the room in the middle of the night, and there were likely drugs or drug related items in the room in light of what the police found on the defendant's person and the defendant's denial that anything in the motel room belonged to him; nevertheless, because the defendant did not raise the issue of the constitutionality of the canine sniff in the trial court and, thus, the state had no reason to adduce evidence demonstrating that the police were prepared to seek a warrant prior to the canine sniff or that they otherwise would have done so if the canine sniff had not occurred, the record was not clear with respect to that issue, and it would have been unfair to the state if this court had resolved the state's independent source claim on the basis of an undeveloped record; moreover, the inadequacy of the record with respect to the state's independent source claim did not require this court to reject the defendant's constitutional challenge to the canine sniff under the first prong of *State* v. *Golding* (213 Conn. 233), which ordinarily would bar appellate review of the defendant's unpreserved constitutional challenge on the basis that remands to supplement the record are generally not permitted, as a remand to allow the state to present additional evidence was appropriate, under the unusual circumstances of this case, insofar as allowing the Appellate Court's decision to stand would be contrary to the unanimous determination of this court that the canine sniff was unlawful, and vacating the Appellate Court's judgment would result in confusion with respect to the legality of a warrantless canine sniff of a motel room.

4. This court could not resolve, as a matter of law, the state's claim that the evidence seized from the motel room was admissible under the inevitable discovery doctrine on the ground that such evidence would have been discovered by lawful means in the absence of the canine search: although it was apparent that the investigating officers were seeking to develop enough evidence to obtain a warrant for the motel room even before the canine sniff was conducted and that their investigation could have resulted in their obtaining a warrant even if the canine sniff never occurred, the evidence adduced at the defendant's suppression hearing did not establish, as a matter of law, that the police would have sought a warrant irrespective of the canine sniff; moreover, because this court lacked the authority to find facts, it could not resolve the factual issue presented by the state's inevitable discovery claim, as the undisputed evidence did not lead to only one possible conclusion; nevertheless, as the state had no reason to adduce evidence in support of its inevitable discovery claim before the trial court insofar as the defendant did not challenge the propriety of the canine sniff in that court, this court concluded that, on remand, the state must be afforded the opportunity to present additional evidence in support of that claim.

5. The Appellate Court and the trial court incorrectly determined that the visual sweep of the defendant's motel room was justified by exigent circumstances, as the possibility that evidence would be destroyed was too speculative: the belief held by the police that an immediate visual sweep of the room was necessary to avert the destruction of evidence was not objectively reasonable, as the police knew that neither of the two individuals actually linked to the motel room was in a position to destroy evidence located inside the room because, at the time of the visual sweep, T was under arrest and the defendant was with the police, there was nothing in the record to suggest that the police had reason to believe that anyone else had a similarly direct connection to the room or its contents, the generalized possibility that an unknown person might be lurking inside was not sufficient to justify a visual sweep, and, except for the unremarkable fact that a light was on inside the room, the record was devoid of any evidence from which a police officer reasonably could have concluded that someone was inside the room; moreover, the determination of whether the state could prevail on its claim that any impropriety stemming from the visual sweep was obviated by the independent source doctrine required additional fact-finding, and, accordingly, this court directed that, on remand, the state must be afforded the opportunity to present additional evidence related to whether the police would have sought a warrant irrespective of the visual sweep, and the trial court's determination of that issue must be made in light of the fact that the canine sniff was also unlawful.

Argued February 27, 2020—officially released September 15, 2021**

** September 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Information charging the defendant with the crimes of possession of four or more ounces of marijuana, conspiracy to possess four or more ounces of marijuana, possession of a controlled substance with intent to sell, conspiracy to possess a controlled substance with intent to sell, possession of narcotics, conspiracy to possess narcotics, possession of narcotics with intent to sell by a person who is not drug-dependent, conspiracy to possess narcotics with intent to sell by a person who is not drug-dependent, operation of a drug factory, and conspiracy to operate a drug factory, brought to the Superior Court in the judicial district of Stamford, geographical area number one, where the court, *Blawie*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere to the crimes of conspiracy to possess a controlled substance with intent to sell, conspiracy to possess narcotics with intent to sell by a person who is not drug-dependent, and conspiracy to operate a drug factory; judgment of guilty in accordance with the plea; subsequently, the state entered a nolle prosequi as to the remaining charges, and the defendant appealed to the Appellate Court, *Alvord*, *Prescott* and *Beach*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, chief state's attorney, and *Susan M. Campbell*, assistant state's attorney, for the appellee (state).

PALMER, J. The primary issue presented by this appeal is whether article first, § 7, of the Connecticut constitution[1] prohibits the police from conducting a warrantless canine sniff of the exterior door to a motel room for the purpose of detecting the presence of illegal drugs inside the room. We conclude that a warrantless canine sniff of the exterior door to a motel room by the police violates article first, § 7, because its use for that purpose constitutes a search subject to the warrant requirement of that state constitutional provision.

The defendant, Ricardo Correa, was charged with several drug related offenses and, thereafter, filed a motion to suppress the evidence, including heroin and marijuana, that had been seized from his motel room pursuant to a search warrant. In support of the motion, he claimed that the search violated his rights under article first, § 7, of the Connecticut constitution and the fourth amendment to the United States constitution because the search warrant affidavit contained information obtained from an allegedly unlawful, warrantless visual sweep of his motel room. The trial court denied the motion on the ground that the visual sweep was necessary to prevent the imminent destruction of evidence and, therefore, was justified by the exigent circumstances exception to the warrant requirement. The trial court further concluded that, even if the visual sweep was not justified under that exception, the evidence seized during the execution of the search warrant was admissible under the independent source doctrine. The defendant subsequently entered a conditional plea

[1] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

of nolo contendere; see General Statutes § 54-94a;[2] to the charges of conspiracy to possess a controlled substance with intent to sell in violation of General Statutes §§ 21a-277 (b) and 53a-48, conspiracy to possess a controlled substance with intent to sell by a person who is not drug-dependent in violation of General Statutes §§ 21a-278 (a) and 53a-48, and conspiracy to operate a drug factory in violation of General Statutes §§ 21a-277 (c) and 53a-48, reserving his right to appeal from the denial of his motion to suppress. The trial court imposed a total effective sentence of nine years' imprisonment.

The defendant appealed to the Appellate Court, claiming, contrary to the determination of the trial court, that he was entitled to suppression of the evidence found in the motel room because the search warrant pursuant to which that evidence was seized was derived from the unlawful visual sweep of the room. See *State* v. *Correa*, 185 Conn. App. 308, 311, 197 A.3d 393 (2018). In addition, he claimed for the first time that the evidence must be suppressed because the search warrant affidavit also included information obtained from a canine sniff conducted by the police outside the door of his motel room, which, the defendant maintained, violated his rights under article first, § 7, because it was performed without a warrant predicated on probable cause. Id., 321. The Appellate Court rejected both of these claims, concluding, with respect to the visual

[2] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

sweep, that it was constitutionally permissible under the exigent circumstances exception to avert the destruction of evidence; see id., 340; and, with respect to the canine sniff, that a warrant was unnecessary because the sniff was not a search for purposes of the state constitution. See id., 330–31. The Appellate Court therefore affirmed the judgment of the trial court; id., 340; and we granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court [correctly] 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?" And (2) "[d]id the Appellate Court [correctly] conclude that the visual sweep of the defendant's motel room was justified by exigent circumstances?" *State* v. *Correa*, 330 Conn. 959, 959–60, 199 A.3d 19 (2019). We agree with the defendant that the Appellate Court incorrectly determined that the canine sniff was lawful under article first, § 7. We also agree with the defendant that the visual sweep was not justified by the exigencies of the situation. For the reasons set forth more fully hereinafter, however, we further conclude that the case must be remanded to the trial court so that the state may have the opportunity to adduce testimony establishing, first, that the evidence seized pursuant to the search warrant was admissible, notwithstanding the impropriety of the canine sniff, under the independent source or inevitable discovery doctrine, and, second, that the evidence seized pursuant to the warrant was admissible, notwithstanding the impropriety of the visual sweep, under the independent source doctrine.

I

FACTS AND PROCEDURAL HISTORY

The opinion of the Appellate Court sets forth the following facts, as found by the trial court on the basis of

the evidence adduced at the hearing on the defendant's motion to suppress, and procedural history. "During the early morning hours of February 5, 2013, Sergeant Christopher Broems 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 [the city of] 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, [indicating] 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 [his] 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." *State* v. *Correa*, supra, 185 Conn. App. 311–13. In response to questioning by the police, Brickman stated that Taveras was "staying in the hotel" but that he "[did not] know what [Taveras] was getting" when he entered and then quickly exited the first floor room there. Brickman was issued a ticket for operating a motor vehicle without headlights but was allowed to leave in the Yukon. The officers detained Taveras, who, at that time, denied being in or having any connection to the motel room. Taveras also denied having any more marijuana.

"Taveras informed Sergeant O'Brien that he lived with his grandmother nearby 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. [According to his brother, Taveras was in the process of moving out of the house.] 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 rented room 118 for the week, until February 8, 2013, paying $430 in cash.[3] 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 . . . 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 [of four rooms located] along the first floor walkway [including] room 118 . . . . On each pass, Cooper consistently alerted to the presence of narcotics at the door to room 118.[4]

"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, [and after conferring by telephone with the shift commander, Lieutenant Philip Mazzucco, and another sergeant, Adrian Novia,[5]

[3] "As the result of a prior case, the Stamford police already knew the defendant by name." *State* v. *Correa*, supra, 185 Conn. App. 313 n.2.

[4] Cooper alerted only to the defendant's motel room.

[5] According to testimony adduced by the state at the suppression hearing, Sergeant Novia previously had been assigned to the narcotics division of the Stamford Police Department.

both of whom were at Stamford police headquarters], Sergeant Broems decided to apply for a warrant to search room 118. The officers decided that Sergeant Broems and Officer Sheperis would return to . . . 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 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 [seized the cash that the defendant had in his possession and informed him that Taveras, who at police headquarters later admitted to storing his supply of marijuana in the room, had been] taken into custody, and that 'the jig is up.' The defendant responded, 'nothing in the room

is mine.'[6] 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 [who] 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, '[p]olice,' and looked inside the room for approximately fifteen to thirty seconds.[7] 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.

[6] When, however, Sergeant O'Brien asked the defendant about the $3600 in cash that he was carrying, the defendant stated that he had "papers" to prove that he had "earned" the money. Queried further by Sergeant O'Brien about those papers, the defendant indicated that they were in the motel room, the location that, the defendant stated, was "where [he] live[d]."

[7] "Sergeant O'Brien characterized the sequence of events as follows: '[Sergeant Broems] cracked the door, stuck his head in, cleared it, you know, visually, and then he relayed that nobody else was in there, [and] he closed the door." *State* v. *Correa*, supra, 185 Conn. App. 315 n.3.

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. [The facts contained in their affidavit in support of the warrant application included the canine sniff indicating that there were illegal drugs in the room, the visual sweep of the room by the police and their observation during that sweep of the digital scale and plastic bag, and the acknowledgment by Taveras, following his arrest and booking at police headquarters, that he kept his supply of marijuana in the room.] 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 [United States] currency, a laptop computer, and paper documents pertaining to a street gang, the Latin Kings. The police also discovered [more than] 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 felony drug offenses. On October 28, 2015, the defendant filed a motion to suppress 'all items seized by [the] police on February 5, 2013, from America's Best Value Inn [r]oom . . . 118.' In his memorandum of law in support of the motion to suppress, the defendant argued that, because Sergeant Broems' visual sweep of the room was performed without obtaining a valid search warrant, it

was 'per se unreasonable.' The defendant further argued that, because the search did not fall within any recognized exceptions to the warrant requirement, as no exigent circumstances existed at the time and the conduct fell short of a protective sweep, 'any evidence found as a result of the prior police illegality must be suppressed.'

"The [trial] court held a hearing on the motion to suppress on February 29, 2016. The state presented the testimony of Sergeant Broems, Officer Sheperis, and Sergeant O'Brien. At the conclusion of the suppression hearing, the state did not contest that Sergeant Broems' visual sweep of the room constituted a warrantless search within the meaning of the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution. Rather, the state argued that, because [Sergeant] Broems' visual sweep of room 118 was undertaken 'solely for the purpose of [e]nsuring . . . that no evidence was being destroyed,' it was lawful pursuant to the exigent circumstances exception to the warrant requirement. The state specifically noted that the visual sweep did not constitute a 'protective sweep.'[8] The state alternatively argued that, even if the visual sweep was unlawful, the evidence seized from the room was still admissible pursuant to the independent source doctrine.

"On June 22, 2016, the court denied the defendant's motion to suppress in a written memorandum of decision. The court concluded that Sergeant Broems' warrantless visual sweep was proper, under the exigent

[8] We note that, under the protective sweep exception to the warrant requirement, which "is rooted in the investigative and crime control function of the police"; *State* v. *Kendrick*, 314 Conn. 212, 229, 100 A.3d 821 (2014); "a law enforcement officer present in a home under lawful process . . . may conduct a protective sweep when the officer possesses articulable facts [that], taken together with the rational inferences from those facts, would warrant a reasonably prudent officer [to believe] that the area to be swept harbors an individual posing a danger to those on the . . . scene." (Emphasis omitted; internal quotation marks omitted.) Id., 230.

circumstances doctrine, to prevent the destruction of evidence. The court reasoned that, 'when all the facts of this case as known by [the] police at the time of the warrantless entry by [Sergeant] Broems are viewed objectively, the case meets the criteria for a finding of exigent circumstances.' " (Footnotes altered.) *State* v. *Correa*, supra, 185 Conn. App. 313–18. The court also agreed with the state that, even if the visual sweep was not justified by the exigencies of the situation, the evidence discovered as a result of that sweep was admissible under the independent source doctrine. Id., 319.

"On October 19, 2016, the defendant entered a conditional plea of nolo contendere to [the charges of] conspiracy to possess a controlled substance with intent to sell . . . conspiracy to possess a controlled substance with intent to sell by a person who is not drug-dependent . . . and conspiracy to operate a drug factory . . . . The plea was entered conditionally on [the defendant's] right to take an appeal from the [trial] court's ruling on the motion to suppress. The [trial] court . . . rendered . . . judgment of conviction . . . [and] sentenced the defendant to a term of incarceration of nine years on each of the charges, followed by six years of special parole, to run concurrently with one another, for a total effective sentence of nine years to serve followed by six years of special parole. On March 31, 2017, the court made a finding that the motion to suppress was dispositive of the case." Id., 319–20.

The defendant then appealed to the Appellate Court, claiming that the trial court had incorrectly determined that the visual sweep of the motel room was lawful under the exigent circumstances doctrine or, alternatively, under the independent source doctrine. See id., 332. In addition, he claimed for the first time on appeal that the canine sniff of the door to the motel room constituted an unlawful search under article first, § 7,

of the state constitution.[9] Id., 321. With respect to his latter contention, the defendant maintained that he was entitled to prevail on his unpreserved claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015),[10] because the record was adequate for review and the resolution of the defendant's claim was governed by this court's then recent decision in *State* v. *Kono*, 324 Conn. 80, 122, 152 A.3d 1 (2016),[11] which held that article first, § 7, 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. See *State* v. *Correa*, supra, 185 Conn. App. 321, 324.

The state opposed the defendant's first claim on the ground that the visual sweep of the motel room was justified by exigent circumstances; id., 332; but that, even if the sweep was not so justified, the seized evidence was admissible under the independent source doctrine. Id., 317–18. The state disagreed with the defendant's claim concerning the canine sniff for several reasons. First, the state argued that the record was inadequate for review of the claim under the first prong of *Golding* because, in light of the defendant's failure to challenge the constitutional propriety of the canine sniff in the trial court, the state had no occasion to

[9] The defendant did not raise a federal constitutional challenge to the canine sniff.

[10] Under *Golding*, a defendant who raises a constitutional claim for the first time on appeal may prevail on that unpreserved claim only if (1) the record is adequate for review, (2) the claim is of constitutional magnitude, (3) the alleged constitutional violation deprived the defendant of a fair trial, and (4) subject to harmless error analysis, the state cannot demonstrate the harmlessness of the constitutional violation beyond a reasonable doubt. *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, supra, 317 Conn. 781.

[11] We note that our decision in *Kono* was not issued until after the conclusion of the trial court proceedings in the present case.

prove what it maintained was an alternative rationale for the admissibility of the seized evidence, namely, the independent source doctrine.[12] See id., 322 n.9. The state also contended that, in the event the Appellate Court elected to consider the merits of the claim, the defendant could not establish a constitutional violation because the canine sniff was not a search subject to the requirements of article first, § 7. See id. In addition, the state maintained that, even if the canine sniff was a search, it need only have been supported by a reasonable and articulable suspicion, a standard that, the state further asserted, was satisfied in the present case. Id., 331 n.21. Finally, the state argued that, if the Appellate Court agreed with the defendant that the canine sniff constituted a full-blown search requiring a warrant predicated on probable cause, the seizure of the evidence from the motel room was lawful nonetheless under the independent source or inevitable discovery doctrine. See id., 322 n.9, 331 n.20.[13]

The Appellate Court rejected the defendant's claim regarding the visual sweep of the motel room, agreeing with the trial court that it was permissible due to exigent circumstances.[14] Id., 340. The Appellate Court also considered and rejected the defendant's contention con-

[12] The state has made no claim on appeal, however, that the alleged inadequacy of the record stems from the performance of the canine sniff *itself*. Rather, the state's contention concerning the inadequacy of the record is predicated solely on its inability to present evidence in the trial court to support its claim of an independent source. See *State* v. *Correa*, supra, 185 Conn. App. 322 n.9.

[13] We note that the opinion of the Appellate Court contains no reference to the state's claim under the inevitable discovery doctrine, the applicability of which, the state further asserted, was definitively established by the testimony presented at the suppression hearing.

[14] Accordingly, the Appellate Court did not reach the state's alternative claim that, as the trial court found, the evidence obtained from the motel room was admissible under the independent source doctrine, even if the visual sweep was not justified by exigent circumstances. See *State* v. *Correa*, supra, 185 Conn. App. 340 n.23.

cerning the constitutionality of the canine sniff, concluding that the sniff was not a search subject to the protection of the state constitution. See id., 330. In light of this determination, it was unnecessary for the Appellate Court to address the state's arguments that the claim was unreviewable and, even if reviewable, that the evidence seized was admissible under the independent source or inevitable discovery doctrine. See id., 331 n.20.

In rejecting the defendant's argument under *Kono*, the Appellate Court explained that the present case is distinguishable from *Kono* because, in that case, the hallway in which the canine sniff occurred "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." (Emphasis in original.) Id., 329–30. In contrast, in the present case, "[t]he open, shared walkway . . . 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." Id., 330. This distinction, the Appellate Court concluded, was fatal to the defendant's claim of a constitutional violation, primarily because he was unable to establish "a reasonable expectation of privacy [in] the outside of the door to his motel room." Id.

On appeal to this court, the defendant contends that the Appellate Court incorrectly determined that the canine sniff of the door to the motel room was not a search in violation of article first, § 7. The defendant further contends that the Appellate Court incorrectly concluded that the visual sweep of the motel room was lawful under the exigent circumstances doctrine

to prevent the destruction of evidence. In response, the state renews the arguments that it made in the Appellate Court to support its contention that the judgment of that court should be affirmed.

We conclude, first, that the canine sniff of the motel room was unlawful under article first, § 7, because it was a search requiring a warrant supported by probable cause. We also conclude, however, that the case must be remanded to the trial court so that the state may present additional testimony in connection with its claim that the evidence seized pursuant to the search warrant was admissible under the independent source or inevitable discovery doctrine despite the impropriety of the canine sniff. With respect to the visual search, we conclude that it was not justified by exigent circumstances. We further conclude, however, that the trial court, after affording the state the opportunity to supplement the record, shall reconsider the state's claim that the illegality of the visual search was obviated by the independent source doctrine.

II

THE CANINE SNIFF: WAS IT A SEARCH?

We begin with the defendant's unpreserved claim that the canine sniff of the door to his hotel room was a search for purposes of article first, § 7, of the Connecticut constitution.[15] "It is well established that this court, in determining whether the police conducted a search under article first, § 7, employ[s] the same analytical framework that would be used under the federal consti-

[15] Ordinarily, under *Golding*, we address the adequacy of the record before considering the merits of the unpreserved constitutional claim. See, e.g., *State* v. *Brunetti*, 279 Conn. 39, 54, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). For purposes of the defendant's constitutional challenge to the canine sniff, however, we address the merits of the claim first and the adequacy of the record hereafter, in parts IV and V of this opinion.

tution. . . . Specifically, we ask whether the defendant has established that he had a reasonable expectation of privacy in the area or thing searched.[16] . . . In the absence of such an expectation, the subsequent police action has no constitutional ramifications. . . . The determination of whether such an expectation exists is to be made on a [case-by-case] basis . . . and requires a [two part] inquiry: first, whether the individual has exhibited an actual subjective expectation of privacy, and, second, whether that expectation is one society recognizes as reasonable. . . . Whether a defendant's actual expectation of privacy in a particular place is one that society is prepared to recognize as reasonable involves a fact-specific inquiry into all the relevant circumstances." (Citation omitted; footnote altered; internal quotation marks omitted.) *State* v. *Kono*, supra, 324 Conn. 89–90. Thus, "[t]his determination is made on a case-by-case basis. . . . The burden of proving the existence of a reasonable expectation of privacy rests [with] the defendant." (Internal quotation marks omitted.) *State* v. *Jacques*, 332 Conn. 271, 279, 210 A.3d 533 (2019).

[16] It bears emphasis, however, that "[o]ur adoption of an analytical framework or methodology used under the federal constitution does not compel this court to reach the same outcome that a federal court might reach when the methodology is applied to a particular set of factual circumstances. Even when the state and [f]ederal [c]onstitutions contain the same [or similar] language and employ the same methodology to govern the interpretation and application of that language [as they do in the present case], the ultimate constitutional decision often will turn [on] a factual assessment of how society feels about certain matters or how society functions under various conditions. . . . In each instance it could matter greatly which society you are talking about: a privacy claim lacking the national consensus necessary to trigger federal constitutional protection might still enjoy local support strong enough to dictate state constitutional protection . . . ." (Internal quotation marks omitted.) *State* v. *Kono*, supra, 324 Conn. 89 n.6; see also *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 406, 119 A.3d 462 (2015) ("It is beyond dispute that we are not bound by federal precedents in interpreting our own state constitutional provisions. [F]ederal decisional law is not a lid on the protections guaranteed under our state constitution." (Internal quotation marks omitted.)).

"The determination that a particular place is protected under [article first, § 7] requires that it be one in which society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy. . . . It must be one that society is prepared to recognize as reasonable. . . . Legitimate expectations of privacy derive from concepts of real or personal property law or [from] understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. . . . Of course, one need not have an untrammeled power to admit and exclude in order to claim the protection of [article first, § 7, as] long as the place involved is one affording an expectation of privacy that society regards as reasonable. . . .

"Additional principles guide our analysis of the [defendant's] claim, chief among them 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. . . . It is also axiomatic that a search or seizure conducted without a warrant issued upon probable cause is presumptively unreasonable." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Kono*, supra, 324 Conn. 90–91. Because "[o]ur constitutional preference for warrants reflects a goal of protecting citizens from unjustified police intrusions by interposing a neutral [decision maker] between the police and the object of the proposed search"; *State* v. *Miller*, 227 Conn. 363, 382, 630 A.2d 1315 (1993); that preference "is overcome only in specific and limited circumstances." (Internal quotation marks omitted.) *State* v. *Kono*, supra, 91.

"Finally, [i]n determining the contours of the protections provided by our state constitution, we employ a multifactor approach . . . . The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]. . . . We have noted, however, that these factors may be inextricably interwoven, and not every [such] factor is relevant in all cases."[17] (Citation omitted; internal quotation marks omitted.) Id., 92. Because this court, in *State* v. *Kono*, supra, 324 Conn. 80, recently considered the state constitutional implications of a canine sniff conducted in the related context of a multiunit condominium complex, our resolution of the present claim is informed primarily by our reasoning and analysis in *Kono*. We also take into account, of course, relevant case law pertaining to the nature of one's right of privacy in a motel room, as distinguished from a home or permanent residence.

In support of his contention of a constitutional violation, the defendant relies principally on *Kono*, in which

[17] We consider these factors "mindful that state [c]onstitutional provisions must be interpreted within the context of the times. . . . We must interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning. . . . [A] constitution is, in [former United States Supreme Court] Chief Justice John Marshall's words, intended to endure for ages to come . . . and, consequently, to be adapted to the various crises of human affairs. . . . In short, the [state] constitution was not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness. . . . The Connecticut constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 406 n.38, 119 A.3d 462 (2015).

we were required to decide whether the defendant, Dennis Kono, was entitled to the suppression of certain evidence seized from his condominium following a warrantless canine sniff conducted by the police just outside of the door to the condominium. See id., 82. In that case, the police decided to conduct the search after receiving an anonymous tip that Kono was growing marijuana in his condominium, which was one of thirty-four such units situated on the first two floors of the complex in which Kono resided. Id., 83. The outside doors of the complex were normally locked, with access to the complex gained through a keypad. Id., 83–84. The police, however, were allowed entry to the complex by the property manager, who, at the request of the police, had signed a consent form permitting them to conduct a canine examination of the complex's common areas. Id., 83. A police canine handler, accompanied by a trained drug detection dog, walked through the common hallway located on each of the first two floors of the complex, and the handler directed the dog to sniff at the bottom of the front door of the units on both floors. See id., 84. The dog alerted following his sniff at the door to Kono's unit and, after knocking on Kono's door with no response, the police sought and obtained a search warrant for the unit on the basis of the results of the canine sniff. Id. Upon executing the warrant, the police discovered an indoor greenhouse containing marijuana plants, lighting equipment and several firearms, and Kono, thereafter, was charged with various drugs offenses and illegal possession of an assault weapon. Id.

Kono subsequently filed a motion to suppress the evidence seized from his unit, claiming that the canine sniff of the threshold of his home was a search under both the fourth amendment and article first, § 7, of the state constitution and, therefore, that a warrant based on probable cause was required. Id., 84–85. The trial

court agreed with the defendant that the warrantless canine sniff was a search that violated his reasonable expectation of privacy protected by the fourth amendment and granted the motion to suppress.[18] Id., 85. Because none of the state's evidence would have been admissible against the defendant at trial in light of the court's ruling on the defendant's motion, the court granted the defendant's motion to dismiss the charges. Id., 89.

The state appealed, and we reached the same conclusion as the trial court, albeit under article first, § 7.[19] Id., 82, 122. After observing 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"; (internal quotation marks omitted) id., 91; we disagreed with the state that the canine sniff was constitutionally innocuous merely because the police had received permission to enter the complex. See id., 109. In reaching that conclusion, we explained that the critical consideration was not where the canine sniff took place but, rather, the fact that Kono's condominium was the object of the canine sniff. See id., 112–14. In this regard, we agreed with the trial court, which, as we explained, had "rejected the state's contention that a [search] warrant was not required because [t]he police were lawfully present in the common hallway outside [Kono's] front door, an area where, in the state's view, [Kono] had no reasonable expectation of privacy or any property interest sufficient to protect against the officers' warrantless

[18] The trial court did not reach Kono's state constitutional claim in light of its determination that the canine sniff violated Kono's rights under the fourth amendment. *State* v. *Kono*, supra, 324 Conn. 85.

[19] We did not address Kono's fourth amendment claim because we concluded, first, that it was appropriate to begin by considering his claim under the state constitution; see *State* v. *Kono*, supra, 324 Conn. 82–83 n.3; and, second, that he was entitled to relief under article first, § 7, thereby making it unnecessary to consider his federal constitutional claim. See id., 104, 122.

intrusion. . . . [I]t was immaterial that the police were lawfully present in the hallway, or that [Kono] had a diminished expectation of privacy in the common areas of his condominium complex, because the privacy interest at stake did not relate to those areas but, rather, to the inside of [Kono's] home." (Internal quotation marks omitted.) Id., 88. In this regard, we also relied on the fact that, in *Florida* v. *Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013), the United States Supreme Court concluded that a canine sniff conducted by the police at the front door of a home was a search protected by the fourth amendment, even though the police, no less than any other visitor, generally were free to enter the homeowner's property and to approach the front door.[20] See id., 8–10; see also *State* v. *Kono*, supra, 324 Conn. 112.

We also were unpersuaded by the state's argument that the canine sniff was not a search because the sniff reveals only the existence of contraband, and Kono had no reasonable expectation of privacy in any such contraband inside his condominium. *State* v. *Kono*, supra, 324 Conn. 111–12. Although acknowledging that the United States Supreme Court had considered the fact that a canine sniff reveals nothing but contraband in concluding that that investigative technique is not a search within the meaning of the fourth amendment when directed at a motor vehicle subject to a lawful traffic stop; *Illinois* v. *Caballes*, 543 U.S. 405, 408–10, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005); or luggage at a public airport; *United States* v. *Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); we explained that the privacy interest in one's home is considerably

[20] As we discuss more fully in this opinion, the court's holding in *Jardines* was predicated on the fact that the canine sniff at issue in that case was performed by the police canine within the curtilage of the home of the defendant without his explicit or implicit permission. *Florida* v. *Jardines*, supra, 569 U.S. 5–6.

greater than the privacy interest in one's automobile or luggage at an airport. *State* v. *Kono*, supra, 109–13. Explaining that "this distinction between searches of the home and searches of locations outside [of] the home is consistent with the established priorities of article first, § 7, of the Connecticut constitution"; id., 113; and underscoring this state's long-standing constitutional preference for warrants; id.; we agreed with Kono that, for purposes of the state constitution, the canine sniff of his condominium was a search requiring a warrant founded on probable cause.[21] Id., 122.

In addition to *Kono*, the defendant also relies on this court's recognition in *State* v. *Benton*, 206 Conn. 90, 536 A.2d 572, cert. denied, 486 U.S. 1056, 108 S. Ct. 2823, 100 L. Ed. 2d 924 (1988), that "[p]ersons . . . residing in an apartment, or persons staying in a hotel 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." (Emphases in original.) Id., 95; see also *Stoner* v. *California*, 376 U.S. 483, 490, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964) ("[n]o less than a tenant of a house, or the occupant of a room in a boarding house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures" (citation omitted)); *United States* v. *Stokes*, 733 F.3d 438, 443 (2d Cir. 2013) ("[a] person staying in a motel room has the same constitutional protection against unreasonable searches of that room as someone in his or her own home" (internal quotation marks omitted)); *United States* v. *Stokes*, supra, 443 n.7 ("[h]otel guests retain a legitimate expectation of

[21] As we explain in part III of this opinion, in *Kono*, the state did not claim that a lesser standard than probable cause, such as a reasonable and articulable suspicion, would suffice for state constitutional purposes in the event we concluded, contrary to the state's contention, that the canine sniff at issue in that case was a search protected by article first, § 7. See *State* v. *Kono*, supra, 324 Conn. 86 n.4, 122 n.21.

privacy in the hotel room and in any articles located in their hotel room for the duration of their rental period"); *State* v. *Jackson*, 304 Conn. 383, 397, 40 A.3d 290 (2012) ("[a] person who has rented a hotel room generally has a reasonable expectation of privacy in that location"). In *Benton*, the police suspected that the defendant, Leonard R. Benton, was engaged in illegal narcotics activity, and, as part of their investigation into that activity, a police detective who was present in the apartment immediately adjacent to Benton's apartment overheard certain incriminating conversations. *State* v. *Benton*, supra, 94. It was undisputed that the detective had gained entry into that adjacent apartment with the permission of the tenant and, further, that the detective heard the conversations without the aid of any sensory enhancing devices. Id. Citing to the general rule that "what a government agent perceives with his or her unaided senses, when lawfully present in a place where he or she has a right to be, is not an illegal search under the fourth amendment"; id.; we rejected Benton's claim that the eavesdropping violated his federal constitutional rights. Id., 94–96. As we explained, "[c]onversations carried on in any type of residence, or anywhere for that matter, in a tone audible to the unaided ear of a person located in a place where that person has a right to be, and where a person can be expected to be, are conversations knowingly exposed to the public. . . . [Such] [c]onversations . . . are not within the penumbra of fourth amendment protection." (Citations omitted.) Id., 96. We also expressly acknowledged, however, that the right of an apartment dweller or motel guest to be free from unreasonable searches and seizures "honors the justifiable expectation that if their conversations are conducted in a manner undetectable outside their room or residence by the electronically unaided ear they will not be intercepted." Id., 95–96. Accordingly, the defendant contends that our holding

in *State* v. *Kono*, supra, 324 Conn. 122, that a canine sniff targeted at a condominium located in a multiunit condominium complex is a search for which a warrant is required, also applies to a motel room.

Applying the principles that we found to be determinative in *Kono*, we agree with the defendant that the protection against a canine sniff afforded under the state constitution to a resident of a multiunit condominium complex also extends to the occupant of a motel room. As we explain more fully in this opinion in addressing the state's contrary arguments, we are not persuaded that the differences between the motel room at issue in the present case and the condominium unit at issue in *Kono* are weighty enough to justify a different result.

In support of its contention that a canine sniff conducted immediately outside a motel room door is not a search, the state cites to a number of cases holding that the occupant of a motel room has a diminished expectation of privacy as compared to the resident of a home. In particular, the state, like the defendant, relies on *State* v. *Benton*, supra, 206 Conn. 90, in which we observed that "[t]he shared atmosphere and the nearness of one's neighbors in a hotel or motel or apartment in a multiple family dwelling . . . diminish the degree of privacy that one can reasonably expect or that society is prepared to recognize as reasonable." Id., 96. We supported this assertion in *Benton* with citations to several cases, including *United States* v. *Mankani*, 738 F.2d 538 (2d Cir. 1984), in which the United States Court of Appeals for the Second Circuit observed that, "[u]nlike 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 occu-

pants may even have retained a key to a hotel room. . . . In short, it is the transitory nature of such places, commonly understood as such, that diminishes a person's justifiable expectation of privacy in them. Since a hotel room is exposed to others, it is unlike a house, [that is], a place where one lives." (Internal quotation marks omitted.) Id., 544; see also *State* v. *Benton*, supra, 95–96.

Similarly, in *United States* v. *Agapito*, 620 F.2d 324 (2d Cir.), cert. denied, 449 U.S. 834, 101 S. Ct. 107, 66 L. Ed. 2d 40 (1980), the court explained that, "[d]espite the fact that an individual's [f]ourth [a]mendment rights do not evaporate when he rents a motel room, the extent of the privacy he is entitled to reasonably expect may very well diminish. For although a motel room shares many of the attributes of privacy of a home, it also possesses many features [that] distinguish it from a private residence . . . . A private home is quite different from a place of business or a motel cabin. A home owner or tenant has the exclusive enjoyment of his home, his garage, his barn or other buildings, and also the area under his home. But a transient occupant of a motel must share corridors, sidewalks, yards, and trees with the other occupants. Granted that a tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is entirely lacking in the enjoyment of one's home." (Internal quotation marks omitted.) Id., 331.

The state also notes that, in light of this reduced expectation of privacy in a motel room as distinguished from a private home, a significant number of courts have held that a canine sniff of a door in a motel hallway does not constitute a search. See *United States* v. *Legall*, 585 Fed. Appx. 4, 5–6 (4th Cir. 2014) (concluding that canine sniff of hotel room did not violate fourth amendment because police did not enter curtilage of room

and did not infringe on defendant's reasonable expectation of privacy insofar as canine sniff disclosed only presence of illegal narcotics in which defendant had no legitimate expectation of privacy), cert. denied, 574 U.S. 1183, 135 S. Ct. 1471, 191 L. Ed. 2d 415 (2015); *United States* v. *Roby*, 122 F.3d 1120, 1124–25 (8th Cir. 1997) (because canine sniff "could reveal nothing about noncontraband items" and odor of marijuana was in "plain smell" of dog, and because defendant had no reasonable expectation of privacy in hallway outside his hotel room, canine sniff conducted in hotel hallway was not search for fourth amendment purposes (internal quotation marks omitted)); *United States* v. *Lewis*, Docket No. 1:15-CR-10 (TLS), 2017 WL 2928199, *8 (N.D. Ind. July 10, 2017) (because officers conducting canine sniff in open-air walkway of motel were entitled to be in that location and sniff could not reveal any information other than presence of illegal narcotics, sniff did not violate defendant's legitimate privacy expectations, and, therefore, defendant's fourth amendment rights were not implicated); *United States* v. *Marlar*, 828 F. Supp. 415, 419 (N.D. Miss. 1993) (because canine sniff revealed odors that were outside of motel room and officer had right to be on public sidewalk adjacent to defendant's motel room, canine sniff did not violate defendant's reasonable expectation of privacy protected by fourth amendment), appeal dismissed, 68 F.3d 464 (5th. Cir. 1995); *State* v. *Foncette*, 238 Ariz. 42, 45–46, 356 P.3d 328 (2015) (because officers were legally present in hotel hallway and canine sniff discloses only presence of contraband, sniff was not search for fourth amendment purposes); *Nelson* v. *State*, 867 So. 2d 534, 536–37 (Fla. App. 2004) (because officers conducting canine sniff of hotel hallway were entitled to be in hallway and "evidence in the plain smell may be detected without a warrant," sniff did not violate defendant's reasonable expectation of privacy under fourth

amendment), review denied, 115 So. 3d 1001 (Fla. 2013); *People* v. *Lindsey*, Docket No. 124289, 2020 WL 1880802, *1 (Ill. April 16, 2020) (canine sniff in alcove outside of motel room was not search under fourth amendment because sniff revealed odors in alcove only, not inside of motel room), cert. denied, U.S. , 141 S. Ct. 2476, 209 L. Ed. 2d 534 (2021); *Wilson* v. *State*, 98 S.W.3d 265, 272–73 (Tex. App. 2002, pet. ref'd) (because exterior door of hotel room was open to public and canine sniff revealed nothing about room but presence of cocaine, sniff was not search for fourth amendment purposes); *Sanders* v. *Commonwealth*, 64 Va. App. 734, 755, 772 S.E.2d 15 (2015) (because police officers conducting canine sniff in motel walkway had right to be in that location and sniff did not reveal any information other than presence of contraband, there was no violation of defendant's reasonable expectation of privacy under fourth amendment).

As the state acknowledges, however, these cases have focused primarily on two principles: first, that, because a canine sniff detects only the presence of illegal narcotics, it does not infringe on any legitimate expectation of privacy; see, e.g., *Illinois* v. *Caballes*, supra, 543 U.S. 408–10 (canine sniff of motor vehicle does not implicate fourth amendment because there can be no expectation of privacy in contraband that society deems reasonable); *United States* v. *Place*, supra, 462 U.S. 707 (because canine sniff of luggage in airport "does not expose noncontraband items that otherwise would remain hidden from public view," it is not search); and, second, customarily, the walkway or hallway of a motel is a location where the police, no less than the general public, are entitled to be, and that undisputedly was the case here. But cf. *Florida* v. *Jardines*, supra, 569 U.S. 11 ("[t]hat the officers learned what they learned only by physically intruding on [the defendant's] property to gather evidence is enough to

establish that a search occurred"). As we previously explained in *Kono*, however, at least for purposes of the state constitution, the United States Supreme Court's decisions in *Caballes* and *Place* are distinguishable from cases involving a canine sniff of a door to an apartment "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." *State* v. *Kono*, supra, 324 Conn. 112; see also *Florida* v. *Jardines*, supra, 12–13 (Kagan, J., concurring) (canine sniff of front door of single-family residence violates reasonable expectation of privacy). We also emphasized that "the question of lawful physical presence is distinct from the question of whether a canine sniff of the exterior of a person's home impermissibly invades reasonable expectations of privacy *in* the home." (Emphasis added.) *State* v. *Kono*, supra, 109.

The state maintains that these principles, applicable to apartments and condominiums under *Kono*, are inapplicable to motel rooms for four primary reasons, none of which we find sufficiently convincing to persuade us that the canine sniff of the defendant's motel room was not a search subject to the protections of article first, § 7. First, the state asserts that, in contrast to an apartment, a motel room most often serves merely as transitory quarters rather than a private, permanent residence.[22] Although we agree generally with this

[22] It is important to note, however, that, for some, a motel room *is* home, either temporarily or, in some cases, indefinitely or even permanently. Indeed, there is some evidence in the record to suggest that the defendant or Taveras or both were living at the motel at the time of the canine sniff. See part I of this opinion. Asserting that he was, in fact, residing there at that time, the defendant contends that his "living situation was therefore like many others who must live in a motel when they have no [other] place to stay." "Distinguishing motel rooms from apartments is problematic because it affords less protection and privacy rights to people whose motel room is their only home." "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." To support this contention, the defendant cites to *Kono*, in which we recognized the

observation, it is well settled that motel guests, like home dwellers, have a reasonable expectation of privacy in their rooms. See, e.g., *Stoner* v. *California*, supra, 376 U.S. 490; *State* v. *Benton*, supra, 206 Conn. 95. The fact that a motel is not a home when, as is ordinarily the case, a stay there is temporary, does not, ipso facto, establish the scope of the privacy that transient motel guests reasonably may expect. We believe, rather, that, in order to establish a reduced expectation of privacy in a particular motel room, the state must point to some specific attribute of the room that makes the type of intrusion at issue reasonable, even though that same intrusion would be unlawful if directed at a private home. Indeed, this court previously has recognized that those aspects of a hotel or motel that reduce a guest's expectations of privacy but do not increase the vulnerability of guests *to the particular type of intrusion at issue* are irrelevant in assessing the legality of that intrusion. See *State* v. *Benton*, supra, 96 ("[t]he type of dwelling is inconsequential except insofar as its physical attributes increase the vulnerability of its occupants to eavesdropping by the unaided ear"). If it were otherwise, the only guidance that courts would have in determining whether certain conduct by the police constituted an unlawful search of a motel room would be the vague and conclusory statement that motel guests have a diminished expectation of privacy as compared to residents of private homes. In the present case, although the transitory nature of motel stays

manifest injustice of allowing warrantless canine sniffs of the doors of apartments or other multiunit dwellings but not freestanding homes because doing so would effectively result in the allocation of constitutional protections on the basis of income, race, and ethnicity. See *State* v. *Kono*, 324 Conn. 121–22. Although we acknowledge the persuasive force of the defendant's argument, we need not determine the extent to which it might otherwise bear on our resolution of the present case in light of our determination, for the other reasons set forth in this opinion, that a canine sniff of the door to a motel room is a search within the meaning of article first, § 7, of the state constitution.

may render guests more vulnerable to warrantless intrusions in some instances or respects; see, e.g., *State* v. *Jackson*, supra, 304 Conn. 398 (hotel guest has no reasonable expectation of privacy in her room when she has left room with no intent to return); we do not agree with the state that it inevitably does so irrespective of the circumstances.

This court's observation in *Benton* also belies the state's second argument that, unlike an apartment, motel guests generally do not keep their personal effects in a motel room. Again, such guests ordinarily do not keep *all* of their personal effects in their rooms because a motel room frequently is a temporary accommodation or lodging and not the guest's permanent residence. That fact, however, does not mandate the conclusion that the personal effects that guests often *do* keep there—no matter how private or personal they may be—should be subject to appreciably less protection under the law. On the contrary, we see no reason why a motel guest reasonably cannot expect a degree of privacy in his or her room sufficient to preclude random or arbitrary intrusions by the police.

The state next maintains that, as we observed in *State* v. *Benton*, supra, 206 Conn. 96, "[t]he shared atmosphere and the nearness of one's neighbors" in a motel setting reduce the extent to which a motel guest reasonably may expect to retain his or her complete privacy. We acknowledge that this attribute of a motel and its rooms may diminish a guest's expectations of privacy in some respects. For example, we observed in *Benton* that mere unaided eavesdropping on audible conversations from an adjacent motel room is not a search. See id., 96–97. Similarly, if a guest does not make any effort to ensure that motel staff do not enter his room for cleaning or maintenance when he is not there, and the staff discovers evidence of illegal activity in the course of performing those tasks, the guest has no legitimate

reason to complain. We do not agree, however, that a room occupied by a motel guest is more vulnerable to a warrantless canine sniff than an apartment, condominium or house simply because other guests occupy nearby rooms or because the rooms may be entered by motel staff to perform certain functions unless guests place a "Do Not Disturb" sign on the door.[23]

We also disagree with the state's final contention, namely, that the canine sniff was not a search under *Kono* because it occurred in an open-air walkway that was fully accessible to the public, whereas the sniff in *Kono* occurred in an interior corridor of a locked apartment building. See *State* v. *Kono*, supra, 324 Conn. 83–84. It is true that, in certain circumstances, an open-air walkway may make the activities in or the contents of a motel room more readily subject to detection, such as by simple visual surveillance or unaided eavesdropping, than those of an apartment that is accessible only by way of a locked or enclosed corridor. As we explained, however, this court rejected the state's claim in *Kono* that a warrantless canine sniff of the hallway adjacent to an apartment is undeserving of constitutional protection because a tenant reasonably can expect police officers, no less than members of the public generally, to gain access there, stating that, for purposes of the state constitution, a tenant's "lack of a reasonable expectation of complete privacy in the hallway does 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." (Internal quotation marks omitted.) *State* v. *Kono*, supra, 324 Conn. 114;

[23] No doubt there are other attributes of a motel that may, depending on the circumstances, serve to diminish the legitimate privacy expectations of its guests. The state has not identified any, however, and we are aware of none, that cause us to conclude that a motel guest's reasonable privacy interest in his or her room is so relatively inconsequential as to exempt a canine sniff of the exterior of that room from constitutional scrutiny.

see also id., 109 (lawful presence of police located immediately outside door of home is not determinative of whether canine sniff conducted at that location violates homeowner's reasonable expectation of privacy). We see no reason why the fact that the police in the present case were lawfully present in an open-air walkway abutting the defendant's motel room makes any appreciable difference with respect to this analysis. The relevant question is not how easy it may be to gain lawful access to the door of a particular dwelling or lodging, but what conduct those occupying that space reasonably may expect from persons who actually have such access. Thus, as we stated in *Kono*, an apartment dweller's "lack of a right to exclude [others from access to common areas does] not mean [that] he [has] no right to expect certain norms of behavior in his apartment hallway. [To be sure], other [apartment] residents and their guests (and even their dogs) can pass through the hallway. They are not entitled, though, to set up chairs and have a party in the hallway right outside the door. Similarly, 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." (Internal quotation marks omitted.) Id., 113–14.

Significantly, in *Florida* v. *Jardines*, supra, 569 U.S. 1, the United States Supreme Court employed similar reasoning in concluding that the fourth amendment prohibits the police from conducting a warrantless canine sniff at the front door of a private home. See id., 8–9, 11–12. Although the court decided the case on the basis of common-law property principles and therefore had no need to apply the reasonable expectation of privacy test; see id., 5–6, 11; its analysis nevertheless bears on the claim at issue in the present case. After first observing that "the knocker on the front door [of a home] is treated as an invitation or license to attempt an entry,

justifying ingress to the home by solicitors, hawkers and peddlers of all kinds"; (internal quotation marks omitted) id., 8; the court continued: "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the [n]ation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." (Footnote omitted; internal quotation marks omitted.) Id. As the court further explained, however, that license does not extend to a canine sniff: "But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. . . . To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. . . . [T]he background social norms that invite a visitor to the front door do not invite him there to conduct a search." (Emphasis in original; footnote omitted.) Id., 9. Despite the differences between a motel room and a home, similar norms apply to the conduct of visitors lawfully on motel property: motel guests reasonably do not expect that the foot traffic generally associated with an open-air walkway abutting the motel's guestrooms includes law enforcement officers trolling the walkway with a trained police dog in search of contraband in those rooms.

We note, in addition, that, if the state were correct that a canine sniff of the exterior door of a motel room is an event altogether lacking in constitutional significance, the police would be entitled to roam through the corridors of a motel conducting canine sniffs of some or all of the doors to those rooms despite having no particularized cause to believe that any of them contained drugs. In tacit acknowledgment that our citizenry would find this conduct unacceptable, the state asserts that there is no reason to believe that the police in Connecticut would engage in such a trawling exercise, even though they could do so lawfully. Even if we shared the state's confidence in that regard, however, the fact that it would be legally permissible for the police to go from door to door conducting suspicionless canine sniffs throughout the motel is itself reason to doubt the soundness of the state's constitutional argument. Cf. *State* v. *Kono*, supra, 324 Conn. 115 (expressing concern, in context of canine sniff conducted at front door of condominium located in multiunit condominium complex, "that, if police officers are permitted to conduct warrantless canine [sniffs] of people's homes, there is nothing to prevent [them] from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen, and that [s]uch an open-ended policy invites overbearing and harassing conduct" (internal quotation marks omitted)).

The state's reliance on *United States* v. *Hayes*, 551 F.3d 138 (2d Cir. 2008), to support its claim to the contrary is misplaced. In *Hayes*, the police conducted a canine sniff of the property surrounding the outside perimeter of the home of the defendant, Derrick Hayes, and the dog alerted to a bag of illegal drugs located in scrub brush, about ten to fifteen feet thick, approximately sixty-five feet from the back door of the house and on the border of the neighboring property. Id., 141–

42, 145. Hayes sought to suppress the drugs on the ground that the canine sniff constituted an unlawful warrantless search. Id., 142. The court concluded that Hayes "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," primarily because the "front yard where the dog sniff occurred was clearly within plain view of the public road and adjoining properties" and the "canine's sense of smell was directed [toward] an area [sixty-five] feet behind the back door of the home." Id. 145. The court also explained that the decision of the United Statutes Supreme Court in *Kyllo* v. *United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001), holding that the use of a thermal imaging device to detect temperature variations inside a home was an unreasonable search in violation of the fourth amendment, and the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Thomas*, 757 F.2d 1359, 1367 (2d Cir.), cert. denied sub nom. *Fisher* v. *United States*, 474 U.S. 819, 106 S. Ct. 66, 88 L. Ed. 2d 54 (1985), and cert. denied sub nom. *Wheelings* v. *United States*, 474 U.S. 819, 106 S. Ct. 67, 88 L. Ed. 2d 54 (1985), and cert. denied sub nom. *Rice* v. *United States*, 479 U.S. 818, 107 S. Ct. 78, 93 L. Ed. 2d 34 (1986), holding that a canine sniff of the door to an apartment was an unlawful search, were distinguishable because, in those cases, the police were trying to detect information *inside* of the defendant's home. *United States* v. *Hayes*, supra, 145. Thus, the court left open the possibility that initiating a canine sniff to detect odors emanating from inside of a home would violate the homeowner's reasonable expectations of privacy, even if the sniff occurred at a location that was in plain view of the public and in which the subject of the search had no legitimate expectation of privacy. In any event, it clearly is not the case that every war-

rantless canine sniff of a dwelling that occurs within plain view of adjacent roads or parking lots is lawful; see, e.g., *Florida* v. *Jardines*, supra, 569 U.S. 4, 11–12 (warrantless canine sniff on front porch of private dwelling is search for fourth amendment purposes); and *Hayes* provides no guidance on the issue of whether the common walkway area immediately adjacent to a motel room door is more analogous to the open yard of a private home, which was the situation in *Hayes*, or to the home's front porch, as was the case in *Jardines*.[24]

For all the foregoing reasons, we conclude that the canine sniff of the exterior door to the defendant's motel room was a search for purposes of article first, § 7. The state nevertheless contends that, insofar as the canine sniff was a search, it was reasonable and, therefore, lawful under that state constitutional provision. We therefore turn to that issue.

III

WARRANT REQUIREMENT

The state claims that, even if the canine sniff of the door to the defendant's motel room was a search, it passes muster under article first, § 7, because it was supported by a reasonable and articulable suspicion that there were illicit drugs in the room. In the state's

[24] In *Kono*, this court did not address the issue of whether the area immediately in front of the door to an apartment is analogous to curtilage for purposes of article first, § 7, of the state constitution, resolving the case instead on the basis of the defendant's reasonable expectation of privacy. See *State* v. *Kono*, supra, 324 Conn. 94 n.10. But see id., 104 (federal precedent supports conclusion that warrantless canine sniff of door to apartment inside multiunit building is unlawful search "whether the defendant's claim is reviewed under the . . . line of privacy based decisions [originating with *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)] or under the principles of curtilage on which the court in *Jardines* relied"). We also need not express an opinion as to whether the area immediately adjacent to an apartment or a motel room is analogous to curtilage. We conclude only that *Hayes* is inapposite because it sheds no light on that issue.

view, a warrant predicated on probable cause is not required for a canine sniff of the exterior door to a motel room; rather, the state maintains, the requirements of article first, § 7, are satisfied if such a search is founded on a reasonable and articulable suspicion. We disagree with the state that a warrant is not required in such circumstances.[25]

As the state observes, and as we recognized in *State* v. *Kono*, supra, 324 Conn. 116–17, a number of courts have concluded that a canine sniff of the door of an apartment or condominium in a multiunit building is a lawful search if it is based on a reasonable and articulable suspicion rather than on probable cause. See *Fitzgerald* v. *State*, 384 Md. 484, 512, 864 A.2d 1006 (2004) (declining to decide whether canine sniff of door to apartment was search under Maryland constitution because, even if it was, police had reasonable and articulable suspicion to conduct canine sniff, which is all that is required); *State* v. *Davis*, 732 N.W.2d 173, 181–82 (Minn. 2007) (reasonable and articulable suspicion is needed under Minnesota constitution to conduct canine sniff immediately outside apartment door); *State* v. *Ortiz*, 257 Neb. 784, 796, 600 N.W.2d 805 (1999) (only reasonable and articulable suspicion is needed under Nebraska constitution); *People* v. *Dunn*, 77 N.Y.2d 19, 25–26, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990) (only reasonable and articulable suspicion is needed under New York constitution), cert. denied, 501 U.S. 1219, 111 S. Ct. 2830, 115 L. Ed. 2d 1000 (1991); see also *Hoop* v. *State*, 909 N.E.2d 463, 469–70 (Ind. App. 2009) (reasonable suspicion is required under Indiana constitution before conducting canine sniff of private residence in

[25] The defendant contends that, prior to the canine sniff, the police did not have a reasonable and articulable suspicion that the motel room contained illegal drugs. For present purposes, we may assume, as the state maintains, that the police did have a reasonable and articulable suspicion that there were such drugs in the room.

order to restrict arbitrary police action). Like the courts that have held that a canine sniff outside the door to a motel or hotel room is not a search, the courts that have held that a sniff outside the door to an apartment is lawful if supported by a reasonable and articulable suspicion have reasoned that a canine sniff is minimally intrusive because it detects only illegal drugs, that it occurs in a place where the police are lawfully entitled to be, and that it is an investigative technique of significant utility to the police. See *Fitzgerald* v. *State*, supra, 510 (noting nonintrusive nature of search and its significant value to police); *State* v. *Davis*, supra, 179–82 (noting that police were in location where they were entitled to be, that canine sniff is minimally intrusive, and that sniff has significant utility to police); *State* v. *Ortiz*, supra, 794–96 (canine sniff of threshold to apartment that is supported by reasonable and articulable suspicion is lawful if police are entitled to be where sniff occurred because of nonintrusive nature of sniff); *People* v. *Dunn*, supra, 26 (noting nonintrusive nature of canine sniff and its significant value to police).

The state also notes that, in *State* v. *Waz*, 240 Conn. 365, 692 A.2d 1217 (1997), this court, assuming that subjecting a mail parcel in the possession of the United States Postal Service to a canine sniff was a search, held that the search was lawful under article first, § 7, because it was based on a reasonable and articulable suspicion. Id., 383–84. Similarly, in *State* v. *Torres*, 230 Conn. 372, 645 A.2d 529 (1994), this court, without deciding whether a canine sniff of the exterior of a car following a traffic stop is a search, held that it was lawful for the same reason, that is, because it was supported by a reasonable and articulable suspicion. Id., 381–82.

As we noted previously; see footnote 21 of this opinion; in *Kono*, the state's sole claim was that the canine sniff of the front door of the condominium unit at issue

was not a search and, therefore, the police were free to conduct the sniff without a warrant and without any reason to believe that there were drugs inside the condominium. See *State* v. *Kono*, supra, 324 Conn. 89. The state made no claim in *Kono* that, in the event we were to conclude that the canine sniff *was* a search, the use of that technique by the police nevertheless satisfied constitutional requirements because it was supported by a reasonable and articulable suspicion. See id., 86 n.4, 122 n.21. Having had no occasion to address that issue, we also had no reason to deviate from the general rule that, under article first, § 7, a search is lawful only if it has been authorized by a warrant founded on probable cause. E.g., id., 91 (search conducted without warrant issued upon probable cause is presumptively unreasonable). We gave no indication in *Kono*, however, that we believed that condominiums and apartments are meaningfully distinguishable from private homes in regard to the cause necessary to justify a canine sniff of those dwellings. On the contrary, our analysis in *Kono* belies any such suggestion. First, as we already explained, in *Kono*, this court rejected the state's arguments that a canine sniff of an apartment is not a search because it reveals only the presence of illegal drugs; see id., 109–12; and that it is not unlawful if performed in a place where the police were entitled to be; see id., 109; because an apartment, like a private residence, is a home. We also explained that distinguishing between single-family dwellings and dwellings in a multiunit building in this context "would be deeply troubling because it would apportion [constitutional] protections on grounds that correlate with income, race, and ethnicity." (Internal quotation marks omitted.) Id., 121. We further stated, with respect to those state courts that have concluded that a canine sniff of the front door of a single-family home requires a warrant supported by probable cause, that, "[b]ecause these

courts based their rulings on the reasonable expectation of privacy test recognized in *Katz* [v. *United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)], their holdings logically would extend to *all residences* within their states." (Emphasis added.) *State* v. *Kono*, supra, 117. Moreover, in citing Justice Kagan's concurring opinion in *Jardines* with approval, we, like Justice Kagan, placed our imprimatur on the principle that any action taken by the police vis-à-vis a home that is sufficiently invasive to constitute a search, including a canine sniff of the door to the home, implicates the reasonable expectations of privacy of those residing in the home and, in the absence of exigent circumstances, requires a warrant that must be supported by probable cause.[26] Id., 99 (indicating that, as Justice Kagan suggested in her concurrence in *Jardines*, warrantless search of home is never constitutional in absence of exigent circumstances because such search invades heightened privacy expectations in home), citing *Florida* v. *Jardines*, supra, 569 U.S. 12–14 (Kagan, J., concurring); cf. *State* v. *Jacques*, supra, 332 Conn. 278 ("The capacity to claim the protection of the fourth amendment does not depend [on] a property interest, permanency of residence, or payment of rent but [on] whether the person who claims fourth amendment protection has a reasonable expectation of privacy in the invaded area. . . . [A] person is entitled to fourth amendment protection anywhere he resides where he has a reasonable expectation of privacy." (Citations omitted; internal quotation marks omitted)). We also underscored this state's strong preference for warrants under article first, § 7. See, e.g., *State* v. *Kono*, supra, 113. Although there are a few limited, narrowly tailored exceptions to this preference, which, as a rule, "arise out of

[26] "Both the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution prohibit the issuance of a search warrant in the absence of probable cause." *State* v. *Sawyer*, 335 Conn. 29, 37, 225 A.3d 668 (2020).

acknowledged interests in protecting the safety of the police and the public and in preserving evidence," we explained that "the use of a canine sniff for drugs in response to an anonymous tip will rarely, if ever, rise to the level of urgency required by these precedents." (Internal quotation marks omitted.) Id. In light of the foregoing, it is not surprising that, in *Kono*, we stated our holding as follows: "[W]e conclude 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." Id., 122. For all these reasons, cases from other jurisdictions holding that a canine sniff of the door to an apartment is lawful if supported by a reasonable and articulable suspicion are incompatible with our reasoning and holding in *Kono*. We conclude, therefore, that a canine sniff of the door to an apartment is a search requiring a warrant supported by probable cause.

Of course, it does not necessarily follow from this determination that a canine sniff of the door to a motel room is also a search for which a warrant based on probable cause is required. We repeatedly emphasized in *Kono* that our decision in that case rested in no small measure on the fact that an apartment is a home; see id., 112 ("[b]oth this court and the United States Supreme Court have drawn a bright line around the home"); id. ("respect for the sanctity of the home is at the very core of the fourth amendment" (internal quotation marks omitted)); and we acknowledge that, most often, guests staying at a motel do not live there. Although, as in *Kono*, we recognize that one's privacy interests are greatest in his or her home; id. 120–21; our determination in the present case that a canine sniff of the exterior door to a motel room is a search for purposes of article first, § 7, is predicated on the similarities in the nature of the privacy interests implicated

by a canine sniff of the outside of a motel room and a canine sniff of the outside of an apartment or condominium. We believe that these similarities also militate in favor of the conclusion that, under article first, § 7, a canine sniff of the exterior door to a motel room is subject to the same warrant requirement as a canine sniff of the door to a residence. Furthermore, as we previously noted, the few recognized exemptions from the warrant requirement invariably involve searches conducted under circumstances requiring immediate action by the police, generally, in the interest of police or public safety; see, e.g., *State* v. *Miller*, supra, 227 Conn. 383; a consideration that is not implicated by a canine sniff performed to ascertain whether a motel room contains unlawful drugs.

Finally, our conclusion finds significant support in the fact that "Connecticut has long had a strong policy in favor of warrants under article first, § 7, a policy that has been held to [provide] broader protection than the fourth amendment in certain contexts." (Internal quotation marks omitted.) *State* v. *Kono*, supra, 324 Conn. 113. "Indeed, [u]nder the state constitution, *all* warrantless searches, [regardless of] whether . . . the police have probable cause to believe that a crime was committed, are per se unreasonable, unless they fall within one of a few specifically established and well delineated exceptions to the warrant requirement." (Emphasis added; internal quotation marks omitted.) Id. In other words, a search or seizure conducted without a warrant issued upon probable cause is presumed to be unreasonable; *State* v. *Waz*, supra, 240 Conn. 374 n.16; and the state's heavy burden of overcoming that presumption is met only in certain exceptional or compelling circumstances. See id., 374–75 n.16 (identifying limited exceptions to warrant requirement). Due to the substantial privacy interests an individual has in his or her motel room, because canine sniffs for drugs

generally are not conducted to address urgent concerns related to police and public safety, and "[i]n light of our demonstrated constitutional preference for warrants and our concomitant obligation narrowly to circumscribe exceptions to the state constitutional warrant requirement"; *State* v. *Miller*, supra, 227 Conn. 386; we are not persuaded that an exemption from the warrant requirement should be extended to a canine sniff of the exterior door to a motel room, as the state advocates. We believe, rather, that, in the present context, the "balance between law enforcement interests and [an individual's] privacy interests . . . tips in favor" of the latter, given that "our state constitutional preference for warrants [occupies the] dominant place in that balance . . . ." Id., 385. Accordingly, we reject the state's claim that a canine sniff of the exterior door to a motel room is lawful if supported by a reasonable and articulable suspicion and conclude, instead, that such a search satisfies state constitutional requirements only if it follows the issuance of a warrant founded on probable cause.

IV

THE CANINE SNIFF AND THE INDEPENDENT SOURCE DOCTRINE

We next address the state's contention that, even if the canine sniff of the exterior door to the defendant's motel room violated the state constitution, the evidence seized from the room was admissible under the independent source doctrine. Before considering the applicability of the doctrine to the facts of the present case, however, we set forth the principles underlying it. "It is well recognized that the exclusionary rule has no application [when] the [g]overnment learned of the evidence from an independent source. . . . Independent source, in the exclusionary rule context, means that the tainted evidence was obtained, in fact, by a search

untainted by illegal police activity. . . . The doctrine is based on the premise that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Cobb*, 251 Conn. 285, 333, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

"To determine whether [a] warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred . . . . That is to say, what counts is whether the actual illegal search had any effect in producing the warrant . . . ." *Murray* v. *United States*, 487 U.S. 533, 542 n.3, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988); see also *State* v. *Cobb*, supra, 251 Conn. 335 (explaining that "the decision to seek the warrant [for the search of the defendant's car] was not prompted by the information gleaned from the [prior] illegal conduct" because evidence established "that the decision to seek the warrant would have been the same irrespective of the pre-warrant discovery of the small amount of tainted information"). In other words, a prior illegal entry by the police does "not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the [unlawful] entry." *Murray* v. *United States*, supra, 535. Consequently, a source of information is not "genuinely independent" of the unlawful intrusion if the information gleaned from that intrusion is necessary to establish probable cause. Id., 542. Thus, to prevail under the independent source doctrine, the state must establish *both* that the warrant was supported by probable cause derived from

sources entirely separate and distinct from the prior illegal entry *and* that the police would have applied for the warrant, even if they had not acquired the tainted information.[27] See id., 541–42 and n.3; *State* v. *Vivo*, 241 Conn. 665, 672–73, 677–78, 697 A.2d 1130 (1997). When those two requirements are met, the otherwise suppressible evidence will be admissible because the prior unlawful entry "did not contribute in any way to [the] discovery of the evidence seized under the warrant"; *Segura* v. *United States*, 468 U.S. 796, 815, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); thereby ensuring that the discovery was the product of a source truly independent of any illegality. See id.

With these principles in mind, we turn to the state's contention under the independent source exception to the warrant requirement. As a threshold matter, the state maintains that, because the defendant did not contest the propriety of the canine sniff in the trial court, the state never had the opportunity to demonstrate that the police would have sought the warrant irrespective of the canine sniff and that, as a consequence, the record is inadequate for our review of the defendant's unpreserved constitutional claim. According to the state, we should decline to consider the defendant's claim because of the unfairness that would result due to the state's inability to present evidence supporting its contention that any constitutional impropriety in its reliance on the canine sniff was obviated by the

[27] We note that, with respect to the second requirement of the independent source doctrine, which requires a fact based inquiry; see, e.g., *Murray* v. *United States*, supra, 487 U.S. 543; the United States Supreme Court has observed: "To say that a [trial] court must be satisfied that a warrant would have been sought without the illegal entry is not to give dispositive effect to [the] police officers' assurances on the point. [When] the facts render those assurances implausible, the independent source doctrine will not apply." Id., 540 n.2.

independent source doctrine.[28] The state further contends that, if we conclude to the contrary that the record is adequate for review, the lawfully obtained information set forth in the search warrant affidavit—that is, information that the police obtained wholly unrelated to the canine sniff—constituted probable cause to search the defendant's motel room. With respect to the requirement that the police would have sought a search warrant irrespective of the canine sniff, the state contends that the record, even if deemed adequate for review, is nevertheless ambiguous as to that requirement, an ambiguity that, the state further asserts, "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."

In response, the defendant argues that the record is adequate for review because, although the state concededly had no occasion to adduce facts at the suppression hearing relating specifically to its independent source claim relative to the canine sniff, the state did present testimony to support its independent source claim relative to the visual sweep, which, according to the defendant, is the same testimony that the state would have adduced for purposes of demonstrating a source independent of the canine sniff. The defendant also contends that, in light of that testimony, the state cannot

[28] Typically, of course, a defendant who raises a constitutional claim for the first time on appeal is required to demonstrate the adequacy of the trial record for purposes of establishing his or her claim under *Golding*. See footnote 10 of this opinion. In the present case, however, there is no dispute that the record is adequate for review of the *defendant's* claim concerning the invalidity of the canine sniff. See footnote 12 of this opinion. The issue, rather, is whether the record is adequate for review of the *state's* claim that the evidence seized as a result of that canine sniff is admissible under the independent source doctrine. As we explain more fully hereinafter, if the record is inadequate for review of the state's independent source claim, it would be unfair to address the defendant's claim on that record because to do so would effectively foreclose the state from establishing its claim of an independent source.

meet its burden of establishing an independent source, first, because the evidence discovered by the police that was untainted by the canine sniff did not rise to the level of probable cause to search the room and, second, because the testimony did not establish that the police would have sought the warrant even if the canine sniff had never occurred. We conclude that the information available to the police unrelated to the canine sniff was sufficient to establish probable cause for the search, but we further conclude, for the reasons that follow, that a remand is necessary to afford the state the opportunity to demonstrate that the police would have sought the warrant regardless of the canine sniff.[29]

We turn first to the issue of whether, as the defendant claims, the record is adequate for review of the state's independent source claim with respect to the canine sniff. The state does not appear to dispute, and we agree, that the record is adequate for review of the first part of the two part test, that is, whether the warrant affidavit contained information establishing probable cause derived from sources entirely unconnected to the canine sniff. Accordingly, with respect to that component of the test, we must determine whether the facts untainted by the canine sniff were sufficient, standing alone, to support the issuance of the warrant. We agree with the state that they were.[30]

[29] In light of our determination that the current record is inadequate for our resolution of the state's independent source claim, the state cannot prevail on its alternative contention that the record, if deemed adequate, is ambiguous as to whether the police would have sought a warrant irrespective of the canine sniff, an ambiguity that, the state further contends, defeats the defendant's contention that the seized evidence was tainted by the canine sniff.

[30] Whether facts are "enough to support a finding of probable cause is a question of law . . . subject to plenary review on appeal." (Internal quotation marks omitted.) *State* v. *Holley*, 324 Conn. 344, 351, 152 A.3d 532 (2016). The test for determining probable cause in the context of a search is well settled. "Probable cause to search exists if . . . (1) there is probable cause to believe that the particular items sought to be seized are connected with

The following facts bear on the issue of whether the police had probable cause to search the motel room independent of the canine sniff. Sergeant Broems observed the Yukon in which Taveras was a passenger pull up to the motel around 1:20 a.m., at which time Taveras exited the vehicle, entered room 118 for about one minute, exited the room, and reentered the Yukon, which then drove off. The area was known for drug activity, and, on the basis of his training and experience, Sergeant Broems believed that Taveras' conduct likely involved a drug transaction. After promptly stopping the vehicle, the police detected a strong smell of marijuana, and, upon searching Taveras, they discovered five glass jars, two of which contained marijuana, and a knotted corner of a plastic sandwich bag containing heroin. The operator of the vehicle, Brickman, told the police that Taveras was staying at the motel but that he did "[not]

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 to be searched. . . . Although [p]roof of probable cause requires less than proof by a preponderance of the evidence . . . [f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . . Consequently, [i]n determining the existence of probable cause to search, the issuing magistrate assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *Shields*, 308 Conn. 678, 689–90, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014). Thus, probable cause is determined by applying a "totality of the circumstances" test. (Internal quotation marks omitted.) *State* v. *Holley*, supra, 352; see also *Florida* v. *Harris*, 568 U.S. 237, 244, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013) ("In evaluating whether the [s]tate has met [the probable cause] standard, [the court has] consistently looked to the totality of the circumstances . . . [and has] rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." (Citations omitted.)).

know what [Taveras] was getting" when he entered and then quickly exited the motel room. After Taveras told the police that he was living with his grandmother, the police went to her home and, with his grandmother's consent, searched Taveras' room, where they found numerous plastic bags with the corners cut off, consistent with narcotics packaging, along with other bags containing an off-white powder residue. According to his brother, Taveras was in the process of moving out of that house.

When the police returned to the motel, they learned that it had been rented by an individual named "Victor Taveras," who the police believed was probably Eudy Taveras, and the defendant. Shortly thereafter, Sergeant O'Brien observed the defendant walking toward him on Home Court. Upon seeing Sergeant O'Brien, the defendant immediately changed direction and began walking east on East Main Street. Sergeant O'Brien approached the defendant, who was found to have a large amount of cash and a key to room 118 on his person. Sergeant O'Brien then informed the defendant that the police had arrested Taveras and that "the jig is up," to which the defendant responded, "nothing in the room is mine," implying that there was something in the room with which the defendant did not want to be associated.[31]

[31] We note that our summary of the evidence pertaining to the probable cause issue includes certain facts developed by the police after the canine sniff was performed, in particular, the information garnered by the police as a result of their encounter with the defendant. As the state asserts, however, it is perfectly clear that the encounter and the information that the police obtained therefrom had nothing to do with the canine sniff; it is apparent, rather, that Sergeant O'Brien was prompted to stop and question the defendant because the police knew that the defendant had rented the motel room that was the focus of their investigation. There is nothing in the record to suggest either that Sergeant O'Brien would not have confronted the defendant when he saw him on the street or that his interaction with the defendant would have been different in any way if the canine sniff had not occurred.

These facts established probable cause to search the room for evidence of narcotics offenses. The information developed by the police that was unrelated to the canine sniff demonstrated that Taveras was staying in the room, that he was involved with drugs, and that he likely also was selling drugs. Moreover, the room was linked to drugs by virtue of Sergeant Broems' belief, based on his training and experience, that Taveras was engaged in a drug transaction when he entered and immediately exited the room in the middle of the night. Finally, the probability that there were drugs or drug related items in the room was enhanced by the defendant's self-serving statement to the police, who discovered a large quantity of cash and a key to the room in his possession, denying that anything in the room belonged to him. On the basis of these facts, we agree with the Appellate Court that the evidence was sufficient to "persuade a reasonable person to believe that criminal activity had occurred [and that it] would also lead a reasonable person to conclude that there was a fair probability that contraband or evidence of that crime would be found in room 118."[32] *State* v. *Correa*, supra, 185 Conn. App. 336.

With respect to the requirement that the police would have sought a search warrant based on this information irrespective of the canine sniff, the following additional facts and procedural history are relevant. As we discussed previously, the defendant filed a motion to suppress the evidence seized from his motel room on the ground that Sergeant Broems' visual sweep of the room,

[32] The Appellate Court did not reach the state's claim concerning the applicability of the independent source doctrine to the canine sniff or the visual sweep. *State* v. *Correa*, supra, 185 Conn. App. 331 n.20, 340 n. 23. In concluding that the police had probable cause to search the motel room prior to the visual sweep, the Appellate Court relied on the same facts that provide the basis for our determination that probable cause existed for purposes of the state's claim of an independent source relative to the canine sniff. See id., 336.

which occurred after the canine sniff, required a search warrant supported by probable cause. In response to the defendant's motion to suppress, the state argued that the visual sweep was permitted under the exigent circumstances exception to the warrant requirement to prevent the destruction of evidence but that, even if the sweep could not be justified on that basis, the seized evidence was admissible under the independent source doctrine. To establish the applicability of that doctrine—which was dependent on proof that the decision to seek a search warrant was made before the officers conducted the visual sweep of the defendant's motel room, thereby demonstrating that the fruits of the sweep played no role in the warrant application decision—the state adduced the suppression hearing testimony of Sergeants Broems and O'Brien regarding the timing of the decision to seek a warrant.

In that testimony, Sergeants Broems and O'Brien explained that the decision to apply for a warrant was made before the visual sweep of the defendant's motel room occurred, and the trial court's memorandum of decision reflects its finding confirming that sequence of events. In the course of their testimony, however, Sergeants Broems and O'Brien also explained that the decision to seek the search warrant was made after Cooper, the canine officer, alerted to the presence of drugs inside the defendant's motel room. More particularly, following testimony by Sergeant O'Brien concerning his decision to conduct the canine sniff of exterior door to the room and the manner in which he conducted it, the prosecutor asked him: "Now, while you're running Cooper up and down the hallway past the [m]otel rooms . . . what else is . . . going on?" Sergeant O'Brien responded that Sergeant Broems was speaking by phone to the shift commander, Lieutenant Mazzucco, and to Sergeant Novia, who were at police headquarters, and that Officer Sheperis remained in his patrol car

with Taveras, who was being detained. The prosecutor then inquired of Sergeant O'Brien: "So now, armed with all of this information that you currently have, do you, Sergeant Broems, and Officer Sheperis make a decision at this point in time?" Sergeant O'Brien responded: "Yeah, at that point, it was determined that . . . we were going to head back to headquarters and start typing the search warrant application for that [m]otel room."

Subsequently, on redirect examination, the prosecutor posed the following question to Sergeant O'Brien: "There was a line of questioning during [cross-examination], which seemed to suggest that, possibly, you and your fellow investigating officers only decided to . . . get a search warrant . . . after [the visual sweep of] the room. But it's your testimony that that's not, in fact, the case, correct? "Sergeant O'Brien responded: "Correct." The prosecutor then asked him: "And when did you determine . . . to get a search warrant for the room, initially?" Sergeant O'Brien answered: "When Sergeant Broems and Officer Sheperis began to transport Taveras into headquarters initially, and that was after . . . the canine search."[33]

The prosecutor elicited similar testimony from Sergeant Broems. Specifically, she asked Sergeant Broems whether he could "enumerate" for the court "what information [he] . . . believed [rose] to the level of probable cause for a search warrant" for the defendant's motel room at the time he headed to police headquarters to seek the warrant. Sergeant Broems responded that

[33] As we previously noted, the police detained Taveras after they discovered marijuana and suspected that he had heroin in his possession following the traffic stop of the vehicle, operated by Brickman, in which Taveras was a passenger. The police did not transport Taveras to headquarters for processing, however, until more than one hour later and after they had received his grandmother's consent to search his bedroom, where they found additional incriminating evidence.

the decision to seek a search warrant was based on all of the evidence that had been obtained that evening, which included the canine sniff of the room. After summarizing the evidence gathered prior to the canine sniff, Sergeant Broems completed his answer to the prosecutor's question as follows: "[A]t that point, [Sergeant O'Brien] does a narcotics sniff of the four rooms which . . . was new to me; I've never done something like that, which . . . was more building upon probable cause.

"And then we're speaking with people [namely, the shift supervisor, Lieutenant Mazzucco, and Sergeant Novia], making sure we have enough [evidence], because I'd have to wake up Your Honor or a judge at that time [to obtain a warrant for the defendant's room]. So, that's really what my concerns were, or was [the] decision making at that time.

"So, I believed I had enough to get a search warrant after discussing it with the shift lieutenant. And we were basing all of that probable cause on the fact of getting a search warrant for that room."

For purposes of the suppression hearing, it is apparent that the state was on notice of the significance of the sequence of the events leading up to the officers' decision to obtain the warrant. The state, however, was *not* on notice of the import of what the officers *would have done* if the canine sniff had not occurred. It is *that* issue—whether the officers would have sought a warrant even if Sergeant O'Brien had not conducted the canine sniff—that is critical to the determination of whether the independent source doctrine renders the seized evidence admissible despite the canine sniff. See, e.g., *United States* v. *Johnson*, 994 F.2d 980, 987 (2d Cir.) (to determine applicability of independent source doctrine, court "must consider whether the agents would have applied for a warrant had they not [engaged

in the unlawful search] beforehand"), cert. denied, 510 U.S. 959, 114 S. Ct. 418, 126 L. Ed. 2d 364 (1993). Because, however, the defendant did not raise the issue of the constitutionality of the canine sniff in the trial court, the state had no reason to adduce evidence demonstrating that the police were, in fact, prepared to seek a search warrant prior to the sniff or that they otherwise would have done so if the sniff had not occurred. Under such circumstances, in which the defendant's belated constitutional challenge to the canine sniff effectively foreclosed the state from seeking to prove that the unlawful intrusion did not contribute to the seizure of the evidence pursuant to the search warrant, it would be unfair to the state to resolve the defendant's constitutional claim on the basis of the current, undeveloped record.

In light of the foregoing, we also agree with the state that, contrary to the claim of the defendant, the record is not clear as to whether the police would have sought a search warrant if the canine sniff had not occurred. Certain testimony of Sergeants O'Brien and Broems, however, suggests that the state may be able to establish that the police would have applied for the warrant irrespective of the canine sniff. For example, Sergeant O'Brien testified in response to the prosecutor's question regarding what evidence he believed constituted probable cause for a warrant: "From the very beginning, just the totality of the whole thing; the fact that Sergeant Broems had said he saw Taveras go into . . . that [m]otel room, to that specific [m]otel room. He made the motor vehicle stop, they located the marijuana on Taveras, as well as that bag of heroin or suspected heroin. You know, the fact that we then searched his room and saw the additional baggie corners. And then going back and, I mean, just everything—and leading up to, you know, to seeing the registration card with . . . Taveras on it. I mean, *up until that point*, *even*

. . . prior to seeing [*the defendant's*] *name, and we were getting ready to, obviously, go that route as far as the search warrant is concerned. And then the canine, obviously, the canine alert helped confirm things . . . with that specific room.*" (Emphasis added.)

The testimony of Sergeant Broems similarly provides some support for the state's reliance on the independent source doctrine. For example, when testifying about the information on which he had relied in deciding to seek the warrant, he characterized the results of the canine sniff as "more building [on] probable cause," suggesting that the canine sniff might not have been integral to the decision to apply for the warrant.

The testimony of Sergeants O'Brien and Broems indicates that, even before the canine sniff, the police investigation was focused on room 118 and that the goal of that investigation was to obtain a search warrant for that room. Their testimony, however, is not definitive with respect to whether the police would have sought a search warrant for the room, even if the canine sniff had not revealed the likelihood that there were illegal narcotics inside. Acknowledging as much, the state contends that the inadequacy of the record with respect to its independent source claim dictates that we reject the defendant's constitutional challenge to the canine sniff under *Golding*'s first prong because it would be manifestly unfair to the state to deprive it of the opportunity to supplement the record with respect to that claim, an option that, the state further asserts, would be inappropriate under that prong of *Golding*. In support of this contention, the state relies primarily on *State* v. *Brunetti*, 279 Conn. 39, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

In *Brunetti*, the father of the defendant, Nicholas A. Brunetti, had signed a consent to search form permitting the police to search his family home, where Bru-

netti, a suspect in a recent murder, resided with his parents. See id., 48. Following his arrest on that charge, Brunetti filed a motion to suppress certain evidence seized by the police as a result of the consent search, claiming that his father's consent was not knowing and voluntary and, therefore, was constitutionally infirm. Id. Through counsel, Brunetti had informed the court that, although his mother had declined to sign the consent to search form, he was not claiming that her refusal to do so rendered the search unlawful. Id. The trial court denied Brunetti's motion to suppress on the ground that his father's consent was knowing and voluntary. Id., 50. Following his conviction, Brunetti appealed, claiming, inter alia, that the consent to search violated his rights under the federal and state constitutions because the state had failed to establish that *both* of his parents had consented to the search of their home. Id., 46–47. We concluded that the record was inadequate for review of Brunetti's unpreserved claim because the state was not on notice that it was required to establish the consent to search of his mother as well as his father, and, as a result, the record was inconclusive in regard to the alleged consent of his mother.[34] Id., 58–59 and n.31. We further explained that, in light of the inadequacy of the record, we would not remand the case to the trial court for further proceedings because "that is what the first prong of *Golding* was designed to avoid." Id., 55 n.27; see also id. (explaining that "[a] contrary rule [permitting such remands] would promote ceaseless litigation by discouraging parties from raising claims in a timely manner, thereby seriously undermin-

[34] As we explained in *Brunetti*, "[i]t is beyond dispute that the act of declining to *sign* a consent to search form is not tantamount to a refusal to *consent* to the search; rather, it is simply one of several relevant factors that a court considers in determining the validity of a consent to search." (Emphasis in original.) *State* v. *Brunetti*, supra, 279 Conn. 56. Thus, the refusal of Brunetti's mother to sign the consent form was not dispositive of the issue of whether she had consented to the search. See id., 56–62.

ing the efficient administration of justice"); *State* v. *Golding*, supra, 213 Conn. 240 ("The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim.").

Thus, *Brunetti* provides support for the state's position that, because the record is inadequate for resolution of the state's independent source claim due to the fact that the defendant failed to challenge the propriety of the canine sniff in the trial court, the defendant is not entitled to review of his constitutional claim on appeal. Although we agree that the first prong of *Golding* ordinarily would bar appellate review of the defendant's unpreserved constitutional claim because remands to supplement the record are generally not permitted, we are persuaded, for the reasons that follow, that such a remand is appropriate under the unusual circumstances of the present case. In the present case—and in contrast to the manner in which we resolved the unpreserved constitutional claim in *Brunetti*—the Appellate Court opted to consider and decide the merits of the defendant's claim concerning the constitutionality of the canine sniff without first addressing the adequacy of the record in regard to the state's independent source claim. In doing so, the Appellate Court acted within its discretion because an "appellate tribunal is free . . . to respond to the defendant's [unpreserved constitutional] claim by focusing on whichever [of the four *Golding* requirements it deems] most relevant in the particular circumstances." *State* v. *Golding*, supra, 213 Conn. 240. For the reasons set forth in parts II and III of this opinion, however, we disagree with the Appellate Court's resolution of the merits of the defen-

dant's claim that the canine sniff violated article first, § 7. Consequently, if we were to reject the defendant's claim due to an inadequate record and not reach the merits of that claim, the decision of the Appellate Court with respect to that claim ordinarily would stand, thereby remaining the law of this state. That outcome, however, would be contrary to the unanimous determination of this court that the canine sniff was unlawful. Alternatively, we could vacate the Appellate Court judgment. Vacatur, however, is an extraordinary remedy; see, e.g., *Fay* v. *Merrill*, 338 Conn. 1, 29 n.24, 256 A.3d 622 (2021); most "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." (Internal quotation marks omitted.) *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 303, 898 A.2d 768 (2006). More important, the exercise of our authority to vacate the Appellate Court judgment would result in confusion with respect to the legality of a warrantless canine sniff of a motel room, an important constitutional issue squarely presented by this appeal in light of the Appellate Court's decision to address and resolve that issue. We do not find either of these options satisfactory.

Furthermore, as we have discussed, in *Brunetti*, we did not reach the unpreserved constitutional claim concerning the propriety of the consent search of Brunetti's home because the record was inadequate for appellate review of that claim. See *State* v. *Brunetti*, supra, 279 Conn. 58–59 and n.31. This was so because "the facts relevant to the issue of [Brunetti's] mother's consent never were adduced in the trial court." Id., 64. Due to the incomplete record concerning that critical issue, we further explained that "the facts revealed by the record [were] inadequate to establish *whether the alleged constitutional violation did, in fact, occur*." (Emphasis added.) Id. In the present case, by contrast, although the current record is not adequate for our

determination of the state's independent source claim, the facts revealed by the record *are* adequate for the resolution of the issue of the constitutionality of the canine sniff, which the Appellate Court did undertake. For this reason, as well, the present case is distinguishable from *Brunetti*.

We conclude, therefore, that it is appropriate to remand the case to the trial court so that the state may present additional evidence in connection with its independent source claim. It bears emphasis, however, that, in reaching this conclusion, we do not signal a retreat from the general rule, long adhered to by this court, that a defendant's failure to provide an adequate record is fatal to an unpreserved constitutional claim raised for the first time on appeal. Rather, we will deviate from that rule only when exceptional circumstances mandate it, a standard that has been satisfied in the present case.[35]

V

THE CANINE SNIFF AND THE INEVITABLE DISCOVERY DOCTRINE

The state also contends that the evidence seized from the motel room was admissible under the inevitable

[35] This court previously has ordered a remand for further proceedings in similar circumstances, albeit in a case decided prior to *Golding*. In *State* v. *Badgett*, 200 Conn. 412, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986), the defendant, Earl Badgett, entered a conditional plea of nolo contendere to the illegal possession of heroin with intent to sell. Id., 413. Badgett then appealed, claiming, inter alia, that the trial court had improperly denied his motion to suppress evidence seized in connection with the warrantless search of the automobile he was driving at the time of his arrest. Id., 414. We agreed with Badgett that the warrantless entry into his vehicle by the police violated his rights under the fourth amendment. Id., 421. Instead of ordering the suppression of the evidence seized as a result of that search, however, we remanded the case to the trial court to give the state the opportunity to present evidence in support of a claim under the inevitable discovery doctrine, a claim that the state had not made in the trial court or on appeal. See id., 432–34. In doing so, we explained that, in light of the nature and importance of the issues involved, our remand for further proceedings was in the public interest and,

discovery doctrine because, prior to the canine sniff, the police were actively investigating Taveras, they had probable cause to obtain a search warrant for the room and planned to do so, and they would have sought and obtained a warrant even if Sergeant O'Brien had not conducted the canine sniff. The state further contends that Taveras' statement confirming the presence of drugs inside the motel room—which he gave to the police at headquarters prior to their seeking a search warrant—was untainted by the illegal search and provides additional evidence to support the claim that the police inevitably would have secured a warrant irrespective of the canine sniff. Although acknowledging that, "whether the [inevitable discovery] doctrine applies ordinarily is, at least in the first instance, a question of fact for the trial court"; *State* v. *Cobb*, supra, 251 Conn. 339; see also *United States* v. *Durand*, 767 Fed. Appx. 83, 88 n.5 (2d Cir. 2019) (applicability of inevitable discovery doctrine requires fact intensive inquiry to be conducted by trial court); the state maintains that, in the present case, we can decide this fact specific issue for the first time on appeal—that is, as a matter of law—because "the undisputed historical facts established by the record reveal that [the only] rational conclusion [that can] be drawn" is that the evidence seized from the motel room inevitably would have been discovered by lawful means in the absence of the canine sniff. We disagree with the state that we may decide the issue as a matter of law, but we also conclude that the state must be given the opportunity, on remand, to present additional evidence in support of its inevitable discovery claim.

"Under the inevitable discovery rule, evidence illegally secured in violation of the defendant's constitutional rights need not be suppressed if the state

under the circumstances, necessary to do justice between the parties. See id., 432 n.10. We reach the same conclusion in the present case.

demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means. . . . To qualify for admissibility the state must demonstrate that the lawful means [that] made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the constitutional violation." (Citation omitted; emphasis in original.) *State* v. *Badgett*, 200 Conn. 412, 433, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). Accordingly, "[c]ourts resolve claims of [inevitable discovery] under a [two step] process. First, the court must evaluate the progress of the investigation at the time of the government misconduct to determine whether an active and ongoing investigation was in progress at [that time]. At this step, the government must establish that the investigation was not triggered or catalyzed by the information unlawfully gained by the illegal search but, rather, that the alternate means of obtaining the challenged evidence was, at least to some degree, imminent, if yet unrealized at the time of the unlawful search. Second, the court must, *for each particular piece of evidence*, specifically analyze and explain how, if at all, discovery of that piece of evidence would have been more likely than not inevitable absent the unlawful search."[36] (Emphasis in origi-

[36] As we previously have observed, the independent source and inevitable discovery doctrines are "closely related"; (internal quotation marks omitted) *State* v. *Vivo*, supra, 241 Conn. 672; because "[b]oth . . . rest on assumptions that if the law enforcement agencies involved had eschewed the illegal activity, they nevertheless would have procured the evidence at issue"; (internal quotation marks omitted) id., 673 n.5; thus obviating the illegality and rendering suppression of the evidence unnecessary. See id., 672–73. They "have distinct applications in relation to the exclusionary rule," however; id., 672; inasmuch as "the independent source rule applies only upon proof that *in actual fact* the officers did not obtain the challenged evidence as a result of the primary illegality"; (emphasis in original; internal quotation marks omitted) id., 673 n.5; whereas the inevitable discovery exception, which has been characterized as an "extrapolation from the independent source doctrine"; *Murray* v. *United States*, supra, 487 U.S. 539; "assumes that the evidence was in fact obtained as a consequence of the primary illegality but is invoked by proof that—hypothetically—if the officers had not engaged in the primary illegality, they would nevertheless, although

nal; internal quotation marks omitted.) *In re 650 Fifth Avenue & Related Properties*, 934 F.3d 147, 165 (2d Cir. 2019); see also *United States* v. *Cabassa*, 62 F.3d 470, 473 and n.2 (2d Cir. 1995) (explaining that government's burden of establishing that challenged evidence inevitably would have been discovered required detailed showing of each of contingencies involved, including analysis of strength of government's showing of probable cause, "the extent to which the warrant process [had] been completed at the time those seeking the warrant learn of the search," whether agents obtained warrant after illegal search, and whether there was "evidence that law enforcement agents 'jumped the gun' because they lacked confidence in their showing of probable cause").

In *State* v. *Brown*, 331 Conn. 258, 286–87, 202 A.3d 1003 (2019), we adopted the approach utilized by the Second Circuit Court of Appeals with respect to the

in a different manner, have obtained the challenged evidence." (Internal quotation marks omitted.) *State* v. *Vivo*, supra, 673 n.5.

When, as in the present case, the police seize evidence pursuant to a search warrant but the application for that warrant was predicated in part on a prior, illegal entry, the independent source exception generally is the doctrine invoked for the purpose of establishing that suppression of the evidence is not required notwithstanding the unlawfulness of the prewarrant intrusion. See, e.g., *United States* v. *Johnson*, supra, 994 F.2d 987 (observing that courts apply independent source doctrine in cases in which police discover evidence "while engaging in an unlawful search or entry, but where there was an independent basis apart from the illegal entry to allow a warrant to issue"); see also *United States* v. *Mulholland*, 628 Fed. Appx. 40, 43 n.3 (2d Cir. 2015) (observing that, in government's view, independent source doctrine rather than inevitable discovery doctrine applied because challenged evidence actually was seized pursuant to search warrant obtained following unlawful entry). Nevertheless, in the present case, the state relies on the inevitable discovery doctrine as well as the independent source doctrine. In light of our determination affording the state the opportunity to adduce additional evidence in connection with its claims under both doctrines, and because the distinction between the two doctrines is not always a "sharp" one; *United States* v. *Baez*, 983 F.3d 1029, 1037 (8th Cir. 2020), cert. denied, U.S. , 141 S. Ct. 2744, 210 L. Ed. 2d 896 (2021); see also *United States* v. *Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004); for present purposes, we need not express a view as to the applicability of the inevitable discovery doctrine separate and apart from the independent source doctrine.

nature of the proof necessary for the state to prevail on a claim that the otherwise inadmissible fruits of an illegal search inevitably would have been discovered notwithstanding that unlawful search, thereby eliminating the need for suppression of that evidence. As we explained in *Brown*, "proof of inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . . . The focus on demonstrated historical facts keeps speculation to a minimum, by requiring the [court] to determine, viewing affairs as they existed at the instant before the unlawful search occurred, what would have happened had the unlawful search never occurred. . . . Evidence should not be admitted, therefore, unless a court can 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."[37] (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 287, quoting *United States* v. *Stokes*, supra, 733 F.3d 444.

[37] With respect to the requirement that the state must prove by a preponderance of the evidence that the tainted evidence inevitably would have been discovered irrespective of the unlawful search, the Second Circuit has "acknowledged that using the [preponderance of the evidence] standard to prove inevitability creates a problem of probabilities, [observing] that even if each event in a series is individually more likely than not to happen, it still may be less than probable that the final event will occur." *United States* v. *Vilar*, 729 F.3d 62, 84 (2d Cir. 2013), cert. denied, 572 U.S. 1146, 134 S. Ct. 2684, 189 L. Ed. 2d 230 (2014). Recognizing the need to avoid any confusion that might result from this "semantic puzzle"; *United States* v. *Cabassa*, supra, 62 F.3d 474; the Second Circuit Court of Appeals has aptly underscored the significance of the "difference between proving by a preponderance that something *would have happened* and proving by a preponderance that something *would inevitably have happened*"; (emphasis in original; internal quotation marks omitted) *United States* v. *Heath*, 455 F.3d 52, 59 n.6 (2d Cir. 2006); and further explained that "the government must prove that each event leading to the discovery of the evidence would have occurred with a sufficiently high degree of confidence for the [trial court] to conclude, by a preponderance of the evidence, that the evidence would inevitably have been discovered." *United States* v. *Vilar*, supra, 84.

It is apparent that the investigating officers on the scene were seeking to develop enough evidence to obtain a search warrant for the motel room, even before the canine sniff was conducted, and, to that end, they were engaged in ongoing conversations concerning that evidence with supervisory personnel, stationed at headquarters, during the course of the investigation. Consequently, it cannot reasonably be disputed that, both prior to and after the canine sniff, the police were involved in investigative activities, pertaining both to Taveras and to the defendant, for the purpose of obtaining a search warrant. As the state maintains, therefore, the evidence reveals that the police were actively involved in an investigation that, at least potentially, could have resulted in their obtaining a warrant, even if the canine sniff had never occurred.

The state further posits, however, that the record also establishes, first, that the police had sufficient probable cause to obtain a warrant immediately prior to the canine sniff and, second, that they would have sought and obtained a warrant irrespective of the canine sniff. The state contends that, because it has demonstrated these two contingencies, the evidence seized from the motel room was admissible against the defendant because it inevitably would have been discovered in the absence of the canine sniff. On the basis of the record before us, we are not persuaded, contrary to the state's claim, that the evidence adduced at the suppression hearing proves as a matter of law that the police would have sought a search warrant irrespective of the canine sniff.

With respect to the question of whether the police had probable cause to search the motel room prior to the canine sniff,[38] we agree with the state that the informa-

[38] The facts relevant to this issue are set forth in detail in parts I and IV of this opinion.

tion known to the police at that time constituted probable cause to believe that Taveras, who was staying in the room, was involved in the drug trade and that he was using the room to facilitate that trade. Although sufficient to support the issuance of a search warrant, this evidence cannot be characterized as constituting a particularly strong showing of probable cause. Because "[r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause"; (internal quotation marks omitted) *State* v. *Sawyer*, 335 Conn. 29, 38, 225 A.3d 668 (2020); and because the state "cannot prevail under the inevitable discovery doctrine merely by establishing that it is more probable than not that the disputed evidence would have been obtained without the constitutional violation . . . proving that a judge *could* validly have issued a warrant supported by probable cause [is] not necessarily enough to establish that a judge *would* have issued the warrant in question." (Citations omitted; emphasis in original; footnote omitted.) *United States* v. *Heath*, 455 F.3d 52, 58–59 (2d Cir. 2006). In other words, "probable cause on its own is not enough; inevitable discovery requires that the [trial] court have a high level of confidence that the warrant would have—not could have—been issued . . . and the government bears the burden of proof . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Christy*, 739 F.3d 534, 543 n.5 (10th Cir.), cert. denied, 574 U.S. 844, 135 S. Ct. 104, 190 L. Ed. 2d 84 (2014); see also *United States* v. *Cabassa*, supra, 62 F.3d 473–74 (in circumstances in which "there is some room for disagreement" as to whether facts known to police prior to illegal search would have been sufficient for issuance of warrant, there is "a residual possibility that a . . . judge would have required a stronger showing of probable cause," thereby defeating state's inevitable discovery claim). For present purposes, however, we need not decide

whether the state has met its burden in this regard in light of our determination, discussed more fully in this opinion, that, on remand, the state must be afforded the opportunity to present additional evidence in support of its claim under the inevitable discovery doctrine. Instead, we leave it to the trial court to decide, in the first instance, whether the state has established that the facts known to the police prior to the canine sniff give rise to a sufficiently high likelihood that a judge would have issued a search warrant on the basis of those facts.[39]

With respect to the question of whether the police would have sought a warrant even if the canine sniff had not occurred, the testimony indicated that the decision to apply for a warrant was a collective one—made by the police who were at the scene in consultation with and with the approval of the supervisory officials who remained at headquarters—and that that joint decision was arrived at after the canine sniff. The state nonetheless contends that certain excerpts from the testimony of Sergeants O'Brien and Broems demonstrate that they believed they had probable cause to search the room before the canine sniff was conducted *and* that they would have sought a warrant based on that evidence if the canine sniff had not occurred. More specifically, the state relies on Sergeant O'Brien's testimony that they were "getting ready" to "go [the search warrant] route" prior to the canine sniff and that the "alert helped confirm things . . . with that specific

[39] It is true, of course, that the police did eventually seek and obtain a search warrant for the motel room. It bears noting, however, that the affidavit submitted to the issuing judge in support of the warrant application contained far more evidence of drugs in the motel room than the police possessed prior to the canine sniff. Indeed, that affidavit contained truly overwhelming evidence of probable cause, including the results of the canine sniff, the observation by the police of drug related paraphernalia during their visual sweep of the room, and the statement by Taveras after he had been transported to police headquarters that he kept marijuana in the room.

room," and on Sergeant Broems' testimony characterizing the canine sniff as "more building upon probable cause." This testimony and other testimony confirm that, prior to the sniff, Sergeants O'Brien and Broems believed that they were closing in on their goal of developing the evidence necessary to obtain a search warrant, but it does not clearly or necessarily establish that the police would have sought a warrant even in the absence of the canine sniff.[40] Because this court lacks the authority to find facts; see, e.g., *Ashmore* v. *Hartford Hospital*, 331 Conn. 777, 785, 208 A.3d 256 (2019); we cannot resolve the factual issue presented by the state's inevitable discovery claim unless the undisputed evidence leads to only one possible conclusion. See *State* v. *Cobb*, supra, 251 Conn. 339. Although arguably supporting such a finding, the testimony certainly does not dictate it. Without evidence that would render this factual issue free from all doubt, we cannot purport to resolve it.

The state further maintains that the police also would have sought and obtained a search warrant for the motel room on the basis of the statement that Taveras gave to the police, after he had been taken to headquarters, acknowledging that he kept marijuana in the room. As we stated in *Brown*, "in order to bear its burden [of] prov[ing] that the inevitable discovery exception to the exclusionary rule applie[s] [to the statement of a witness], the state [is] required to prove by a preponderance of the evidence . . . that . . . [the witness] *would have cooperated and provided the same infor-*

[40] Indeed, certain testimony adduced by the state indicates that the police would not have sought a warrant unless they were able to make what they believed was a strong showing of probable cause. In particular, as we noted previously; see part IV of this opinion; Sergeant Broems explained that, because the investigation was being conducted in the middle of the night, he wanted to make sure that the police had ample evidence of probable cause, sufficient to justify waking a judge to review the warrant application and affidavit.

mation," even if the illegal search had not occurred. (Emphasis added.) *State* v. *Brown*, supra, 331 Conn. 285–86.

This is no easy task, especially when, as in the present case, the statement at issue was obtained by the police from a suspect during the course of an active, fast moving investigation. Indeed, as the Third Circuit Court of Appeals has observed, cases in which the doctrine has been applied to admit statements, as distinguished from physical evidence, are few and far between. See *United States* v. *Vasquez De Reyes*, 149 F.3d 192, 195 (3d Cir. 1998). "While we know of no articulation of the inevitable discovery doctrine that restricts its application to physical evidence . . . it is patent why cases have generally, if not always, been so limited. A tangible object is hard evidence, and absent its removal will remain where left until discovered. In contrast, 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." Id., 195–96; see also, e.g., *United States* v. *Rodriguez*, Docket No. 3:06-cr-57 (JCH), 2006 WL 2860633, *11 (D. Conn. October 4, 2006) (holding that "the government . . . failed to satisfy its burden of proving that [the defendant inevitably] would have made the same statements," especially because "the statement at issue [was] made by a non-law enforcement person, for it is harder to determine what such an individual might have said or done during a police investigation"), rev'd on other grounds sub nom. *United States* v. *Delossantos*, 536 F.3d 155 (2d Cir.), cert. denied sub nom. *Rodriguez* v. *United States*, 555 U.S. 1056, 129 S. Ct. 649, 172 L. Ed. 2d 628 (2008).

On the basis of the current record, we cannot conclude with the required high level of confidence that Taveras would have provided the same incriminating

statement to the police if the canine sniff had not occurred. As we previously discussed, after the police stopped the Yukon in which Taveras was a passenger, they found drugs in Taveras' possession and arrested him. He was then placed in Officer Sheperis' cruiser, where he remained until he was transported to police headquarters more than one hour later. Upon his arrest, Taveras denied that he had been in the motel or had any connection to it, and he also denied having any additional marijuana. Because Taveras was detained in Officer Sheperis' cruiser, which was parked at the motel when the canine sniff was performed, there is a likelihood that Taveras witnessed Sergeant O'Brien conduct the canine sniff—the walkway in front of room 118 was open, illuminated and readily visible from at least fifty yards away—and that he therefore was aware that Cooper had alerted on the room. Only thereafter, following his transportation to headquarters, did Taveras acknowledge that he kept marijuana in the room. In light of these events, there is also a real possibility that Taveras, who previously had refused to make any such admissions to the police, decided to confess to having marijuana in the motel room in the interest of limiting his criminal exposure, for, by then, Taveras had every reason to believe that the police, armed with the results of the canine sniff, would obtain a search warrant for the room and, upon executing it, find a large cache of heroin therein. Moreover, even if Taveras had not witnessed the canine sniff, it would have been consistent with common police practice for the officers questioning Taveras to inform him of the canine sniff in order to induce him to confess to his drug involvement, and to otherwise cooperate with the police, before they obtained a search warrant for the room.

Under these circumstances, the state bears the burden of establishing that the canine sniff was not used by the police, directly or indirectly, to procure Taveras'

statement and, further, that Taveras' willingness to provide the particular statement that he did—with its incriminating reference to the marijuana he kept in the motel room—was not influenced by any knowledge of the canine sniff. See, e.g., *Murray* v. *United States*, supra, 487 U.S. 542 n.3 (inevitable discovery is rule inapplicable if illegal search had "any effect" in producing warrant); *State* v. *Brown*, supra, 331 Conn. 288 ("The requirement that the state prove that each contingency would have been resolved in its favor demands that, at the least, the state [must] prove . . . that it would have . . . secured the same level of cooperation from [the witness] in the absence of the illegally obtained [evidence]. . . . [The witness'] cooperation was a contingency [on] which the procurement of a statement incriminating himself and the defendant depended. The state [bears] the burden, therefore, to prove that this contingency would have resolved in its favor."); see also 6 W. LaFave, Search and Seizure (5th Ed. 2012) § 11.4 (c), pp. 399–400 ("[when] the defendant was present when incriminating evidence was found in an illegal search or was confronted by the police with incriminating evidence they had illegally seized earlier, it is apparent that there has been an exploitation of that illegality when the police subsequently question the defendant about that evidence or the crime to which it relates" (footnotes omitted; internal quotation marks omitted)). This is particularly true in view of the fact that Taveras had refused to provide the police with any such information prior to the canine sniff. Although the testimony adduced at the suppression hearing does not foreclose the possibility that Taveras would have given the same incriminating statement, even in the absence of the canine sniff, on the strength of the record before us, we are unable to conclude without resort to speculation that he would have done so.

The fact that the current record does not support the conclusion that the evidence seized pursuant to the

warrant inevitably would have been discovered irrespective of the canine sniff, however, does not mean that the state cannot prove its claim. As with the state's contention under the independent source doctrine, the state had no reason to adduce proof of the elements of its inevitable discovery claim because the defendant did not challenge the propriety of the canine sniff in the trial court. Accordingly, on remand, the state must be given the opportunity to present additional evidence in support of that claim, as well.

VI

THE VISUAL SWEEP

The defendant next claims that the Appellate Court incorrectly concluded that the trial court correctly had determined that the visual sweep of the defendant's motel room was justified by exigent circumstances, in particular, the need to forestall the destruction of evidence. We agree with the defendant that, under the circumstances, the possibility that evidence would be destroyed was too speculative to justify the visual sweep.[41]

The following legal principles guide our review of the defendant's claim with respect to the exigent circumstances doctrine, an exception to the warrant requirement that is triggered when "the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable . . . ." (Internal quotation marks omitted.) *Kentucky* v. *King*, 563 U.S. 452, 460, 131 S. Ct 1849, 179 L. Ed. 2d 865 (2011). "The exception enables law enforcement officers to handle emergenc[ies]—situations presenting a compelling need for official action

[41] As we previously noted, the state also argues that, even if the visual sweep was not supported by exigent circumstances, the trial court correctly concluded that any such illegality is obviated by the independent source doctrine. We discuss this contention in part VII of this opinion.

and no time to secure a warrant." (Internal quotation marks omitted.) *Lange* v. *California*, U.S. , 141 S. Ct. 2011, 2017, 210 L. Ed. 2d 486 (2021). "The term, exigent circumstances, does not lend itself to a precise definition but generally 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." (Internal quotation marks omitted.) *State* v. *Gant*, 231 Conn. 43, 63–64, 646 A.2d 835 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1404, 131 L. Ed. 2d 291 (1995). Thus, "[t]he core question is whether the facts, as they appeared at the moment of entry, would lead a reasonable, experienced officer to believe there was an urgent need to render aid or take action." (Internal quotation marks omitted.) *United States* v. *Moreno*, 701 F.3d 64, 73 (2d Cir. 2012), cert. denied, 569 U.S. 1032, 133 S. Ct. 2797, 186 L. Ed. 2d 864 (2013). As this court has observed; see, e.g., *State* v. *Aviles*, 277 Conn. 281, 294, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006); courts have recognized three general categories as justifying the application of the exigent circumstances doctrine, namely, danger to human life, the flight of a suspect, and, most relevant here, "the imminent destruction of evidence . . . ." *Brigham City* v. *Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). In each such category, "the delay required to obtain a warrant would bring about some real immediate and serious consequences—and so the absence of a warrant is excused." (Internal quotation marks omitted.) *Lange* v. *California*, supra, 141 S. Ct. 2017.

The test for determining whether a warrantless entry was justified to prevent the imminent destruction of evidence is well established and seeks to ascertain whether, under the totality of the circumstances, the

police had both probable cause to search and reasonable grounds to believe that evidence would be destroyed if immediate action were not taken. See, e.g., *State* v. *Guertin*, 190 Conn. 440, 447, 454, 461 A.2d 963 (1983). "This is an objective test; its preeminent criterion is what a *reasonable*, [well trained] police officer would believe, not what the . . . officer actually did believe." (Emphasis in original; internal quotation marks omitted.) Id., 453. "Rather than evaluating the significance of any single factor in isolation, courts must consider all of the relevant circumstances in evaluating the reasonableness of the officer's belief that immediate action was necessary"; *State* v. *Kendrick*, 314 Conn. 212, 229, 100 A.3d 821 (2014); and "[t]he reasonableness of a police officer's determination that [such] an emergency exists is evaluated on the basis of facts known at the time of entry." (Internal quotation marks omitted.) *State* v. *Aviles*, supra, 277 Conn. 293–94. Consequently, the applicability of the exigent circumstances doctrine must be determined on a "case-by-case basis"; *Birchfield* v. *North Dakota*, U.S. , 136 S. Ct. 2160, 2174, 195 L. Ed. 2d 560 (2016); see also *Riley* v. *California*, 573 U.S. 373, 402, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (exigent circumstances exception "requires a court to examine whether an emergency justified a warrantless search in each particular case"); an "approach [that] reflects the nature of emergencies. Whether a 'now or never situation' actually exists—whether an officer has 'no time to secure a warrant'—depends [on] facts on the ground." *Lange* v. *California*, supra, 141 S. Ct. 2018. Furthermore, because warrantless searches are disfavored, "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify [a search without a warrant]." *Welsh* v. *Wisconsin*, 466 U.S. 740, 749–50, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). Finally, because determining whether the circumstances of any particular case were sufficiently

exigent to justify a warrantless search is a question of law, we review de novo the conclusions of the trial court and the Appellate Court regarding the doctrine's applicability to the facts of the present case. *State* v. *Kendrick*, supra, 222.

As we previously discussed, following the canine sniff, the officers decided that Sergeant Broems and Officer Sheperis would return to police headquarters to prepare an application for a search warrant while Sergeant O'Brien remained at the motel to continue the surveillance of room 118. Minutes after Sergeant Broems and Officer Sheperis departed, Sergeant O'Brien observed the defendant walking nearby and radioed Sergeant Broems to return to the motel, which he did. At that time, the defendant was searched, and a large quantity of cash and a key to room 118 were found in his pocket. The defendant was initially cooperative and agreed to let the officers into the room, but, when they got to the door, he changed his mind and refused to do so. Sergeant Broems then took the room key from the defendant, opened the door and looked inside the room for approximately fifteen to thirty seconds, at which time he observed a large black digital scale on a table and a plastic sandwich bag lying near it on the floor. The visual sweep and the resulting police observation of the scale and sandwich bag, both of which constituted evidence of drug trafficking, were referenced in the affidavit in support of the search warrant application.

Following his arrest, the defendant moved to suppress the evidence seized from the room on the ground that Sergeant Broems' visual sweep was a search requiring a warrant supported by probable cause. The state did not dispute that the visual sweep was a search for constitutional purposes but maintained that the sweep was justified under the exigent circumstances exception to the warrant requirement to prevent someone

who might be inside the room from destroying evidence. To establish the applicability of the doctrine, the prosecutor questioned Sergeants Broems and O'Brien about their reasons for believing that the sweep was necessary to prevent the destruction of evidence pending the application for and issuance of a search warrant.

Specifically, the prosecutor asked Sergeant O'Brien if he or Sergeant Broems had inquired of the defendant, after the defendant refused to open the door to the motel room, whether anyone was inside the room. Sergeant O'Brien responded that he did not recall asking that question but "it definitely would have been a concern of ours . . . ." When asked to "elaborate" on that and "why would that be a concern," Sergeant O'Brien responded: "Well, I mean, at this point, I mean, if anybody was, and we were already thinking we had—before we had even—just to back track—before I ran . . . Cooper on the breezeway, on that first floor [hallway], we knocked on the door, and we didn't get a response. So, it was at that point, after not getting a response, that . . . I decided to use . . . Cooper to . . . do the sweep of the doors.

"So, plus, you know, between the male that we had stopped initially in the SUV and then [Taveras'] brother, I mean, at any point, any one of these people could have, you know, called. And, if there was somebody in there and said, hey, look, you know, the cops are all over this place, it's typical. . . . I mean, people drive by all the time and say they see their friends . . . being stopped or spoken to . . . . And calls are made . . . ."

On cross-examination, Sergeant O'Brien was asked whether there was "[a]nything specific" that caused him to think that someone might be in the room. Sergeant O'Brien responded that, although there were "[n]o audio indications whatsoever," "[w]e had no reason not to believe [it]. Just because somebody doesn't answer

the door when there's a narcotics investigation going, doesn't mean that there isn't potentially somebody [in] there." On redirect examination, the prosecutor asked Sergeant O'Brien whether it was "possible that a concern of yours could have been that . . . Taveras' brother could have tipped off [the defendant] or one of his associates to destroy evidence inside the room?" Sergeant O'Brien responded: "Yeah, I believe I indicated that earlier as far as, you know, on the motor vehicle stop that, you know, often, people drive by and see their friends, you know, being stopped or detained, and phone calls are . . . quickly made . . . ." Sergeant O'Brien further testified that "[t]he light off could have meant that as well, in my opinion. I mean, there was nothing to indicate that there was nobody else . . . in that room . . . . You're asking me for indicators that . . . somebody was in there? I had none . . . ."

Defense counsel engaged Sergeant Broems in a similar line of questioning. Specifically, he asked him whether he could offer "any fact, any articulation, as to why you believed there was someone in . . . room 118?" Sergeant Broems stated: "I can't give you fact[s] because there was nobody in there. But I can tell you, through my twenty years of experience, why there's a possibility. I made a motor vehicle stop, there was two people in a car, I had Taveras . . . with me; [but] the driver was able to leave. I then went over to Charles Street; there was his brother there at that location; we then left that location.

"We then went to the [m]otel clerk . . . . So I don't know who made any calls, I don't know anything. So, based on my training and experience, I—that's what I based it on, that there was more than one person that knew about that room and . . . had access to that room."

In its memorandum of decision denying the defendant's motion to suppress, the trial court rejected the

defendant's claim that the visual sweep was not justified by the exigent circumstances exception to the warrant requirement. The court concluded that the sweep was permissible because, as both Sergeants O'Brien and Broems testified, it was possible that someone had alerted "potential confederates" of the defendant about the "Stamford police's investigation into the activity in room 118," thus "prompting" these unknown associates to destroy evidence located in the room. The trial court also relied on Sergeant O'Brien's testimony that, "when it comes to prostitution or narcotics trafficking out of hotel rooms . . . it is quite common for additional people to be present" in the room, "regardless of the actual number of registered parties."

The Appellate Court agreed with the trial court that the visual sweep was permissible to prevent the destruction of evidence. *State* v. *Correa*, supra, 185 Conn. App. 340. The Appellate Court reasoned that the police had interacted "with at least four people who were not taken into police custody" on the night in question, in particular, Brickman, Taveras' brother and grandmother, and the motel manager, and that "phone calls may have occurred" between these people "and possible confederates [of the defendant], prompting the destruction of evidence inside of the room." Id., 337. The Appellate Court further explained that "it was reasonable for the police to fear that even unknown passersby might become aware of the police investigation into room 118" and alert someone who, in turn, could have destroyed evidence inside the room. Id., 337. Finally, the Appellate Court stated: "Sergeant Broems . . . noted that, from the time Taveras entered the room [earlier in the evening] until the . . . police returned to the room with the defendant after 3 a.m., there was 'nobody with eyes on' the room, which might have allowed an unknown person to enter [the room] and [to] destroy evidence contained therein. Although no

one answered when the police knocked on the door . . . and there was no evidence confirming the presence of an additional person in [the room], these facts, coupled with the observation of a light on in the room, provided ample reason to believe that, [in the absence of] swift action in opening the door to room 118 and performing a visual sweep, there was a significant risk of the destruction of evidence." Id., 339–40.

On appeal, the defendant challenges the Appellate Court's determination that the trial court correctly concluded that exigent circumstances justified the visual sweep. The defendant argues, first, that the police lacked probable cause to believe that evidence of an offense would be found in the room when they conducted the visual sweep and, second, that neither Sergeant O'Brien nor Sergeant Broems was able to identify any fact or combination of facts sufficient to lead a police officer reasonably to believe that someone was in the room who had been alerted to the need to destroy incriminating evidence located inside. In that regard, the defendant asserts that the fact that the light was on in the room was the only concrete piece of evidence that supported the officers' belief that someone might be in the room, evidence that, the defendant further maintains, was patently inadequate to justify a warrantless entry on grounds of exigent circumstances.

With respect to the probable cause requirement, we agree with the state that the police had probable cause to search the room following their encounter with the defendant. In part IV of this opinion, we explained why the facts known to the police at that time constituted probable cause to search the room, and we need not repeat that discussion here.[42]

[42] It bears emphasis, however, that our probable cause determination does not include the canine sniff or, for that matter, any information gathered by the police following the canine sniff that reasonably might have been obtained as a result of the canine sniff.

As for the exigency requirement, we agree with the defendant that, contrary to the determination of the trial court and the Appellate Court, the belief held by the police that an immediate visual sweep of the room was necessary to avert the destruction of evidence was not objectively reasonable. Of course, the police knew that neither one of the two individuals actually linked to the motel room, Taveras and the defendant, was in a position to destroy evidence located inside the room because Taveras was under arrest and the defendant was with the police when the visual sweep was conducted. Moreover, there is nothing in the record to suggest that the police had reason to believe that anyone else had a similarly direct connection to the room or its contents. Consequently, the only concern that the police reasonably could have had with respect to the destruction of evidence located inside the room was based solely on the possibility—unsupported by any facts—that there was someone in the room who could be notified of the police investigation and destroy any such evidence. The state has not identified a single case, however, and our independent research has not revealed one, in which a warrantless entry was found to be justified on similar facts, that is, facts establishing merely that someone who had become aware of a police investigation involving the suspect might possibly alert that suspect of the investigation and, in turn, the suspect might possibly enlist some unknown confederate—one with immediate access to incriminating evidence—to destroy that evidence.

In fact, in *State* v. *Spencer*, 268 Conn. 575, 580, 596–97, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004), we rejected a nearly identical claim in the context of a warrantless protective sweep of the apartment of the defendant, Michael Spencer, following Spencer's arrest outside of the apartment, and our reasons for doing so are fully applicable in

the present case. As we explained in *Spencer*: "[T]he officers' testimony reveals that [the police] had no information that any person who posed a threat to the officers or to others might have been in the apartment at [the] time [of the search]." Id., 595–96. "The generalized possibility that an unknown, armed person may be lurking [inside] is not . . . an articulable fact sufficient to justify a protective sweep. Indeed, nearly every arrest involving a large quantity of drugs, in or just outside of a home, carries the same possibility. To allow the police to justify a warrantless search based solely [on] that possibility would threaten to swallow the general rule requiring search warrants. Furthermore, allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether anyone else is inside a house in order to conduct a protective sweep. . . . The officers' lack of information cannot be an articulable basis for a sweep that requires information to justify it in the first place." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) Id., 596–97; see also, e.g., *United States* v. *Burleigh*, 414 Fed. Appx. 77, 78 (9th Cir. 2011) ("the police [officers'] speculations that there were individuals inside the warehouse who might destroy evidence and that these individuals knew or might be alerted that the warehouse was under surveillance [was] insufficient to meet the government's burden of proving exigent circumstances"); *United States* v. *Menchaca-Castruita*, 587 F.3d 283, 295–96 (5th Cir. 2009) ("There will always be some possibility that an unknown person might be hiding somewhere inside a residence, waiting for an opportunity to . . . destroy evidence. A finding of exigent circumstances, however, must be based on more than a mere possibility; it must be based on an officer's reasonable belief that the delay necessary to obtain a warrant will facilitate the destruc-

tion or removal of evidence . . . . [T]he totality of the circumstances [fell] well short of any reasonable foundation for such speculation." (Emphasis omitted.)); *United States* v. *Carter*, 360 F.3d 1235, 1241 (10th Cir. 2004) ("There was simply no evidence that destruction of evidence was likely. Indeed, the government point[ed] to no reason to believe that other people were in the garage, or even the house."); *United States* v. *Driver*, 776 F.2d 807, 810 (9th Cir. 1985) (government's "burden is not satisfied by leading a court to speculate about what may or might have been the circumstances" requiring warrantless entry); *United States* v. *Agapito*, supra, 620 F.2d 336 n.18 ("[The court does] not suggest that law enforcement officers who arrest an individual outside the premises never may conduct a security check inside the premises. . . . [I]n such a case, the arresting officers must have (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons are aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public." (Citations omitted.)).

Thus, at a minimum, the state was required to point to specific and articulable facts that, taken together with rational inferences from those facts, gave rise to a reasonable belief that someone was, in fact, inside the defendant's motel room when the police conducted the visual sweep. Cf. *United States* v. *Almonte-Báez*, 857 F.3d 27, 33 (1st Cir. 2017) (exigency due to imminent destruction of evidence existed when "agents knocked on the front door of the apartment and identified themselves," "heard someone inside the apartment running away from the door," and "noticed that the door was sealed shut"); *United States* v. *Andino*, 768 F.3d 94, 99 (2d Cir. 2014) (officers reasonably believed that destruction of evidence was likely when woman, upon learning of their investigation, slammed apartment door shut,

began opening and closing drawers, and turned on faucet); *United States* v. *Ramirez*, 676 F.3d 755, 758, 763, 765 (8th Cir. 2012) (government had "fail[ed] to establish that it was reasonable for the officers to conclude that [the] destruction of evidence was imminent, thereby establishing exigent circumstances warranting the forced entry" into defendant's hotel room, when "the only sound [the officer] heard from the room . . . after he ultimately knocked on the door" was "the sound of an individual approaching the door," and officers subsequently heard no sounds of "dead bolt lock being engaged, no toilet flushing or a shower or faucet running, and no shuffling noises or verbal threats emanating from the room"); *United States* v. *Etchin*, 614 F.3d 726, 733–34 (7th Cir. 2010) ("[A]n emergency justifying entry and a search arises only if the officer knocking at the door observes objective evidence that there is an ongoing crime within that must be stopped before it is completed. The sound of someone walking around, for example, or a voice that announces, '[t]he cops are here,' is not enough by itself. But other sights and sounds—toilets flushing, a door slammed, people running, an obvious lie by the person answering the door, or efforts to remove contraband from the house—may be evidence that there is an emergency that calls for an immediate, warrantless intrusion."), cert. denied sub nom. *Cole* v. *United States*, 562 U.S. 1156, 131 S. Ct. 953, 178 L. Ed. 2d 786 (2011); *United States* v. *Leveringston*, 397 F.3d 1112, 1116 (8th Cir.) ("The occupant of the suite reacted to [the] police knocking by looking through curtains, expressing surprise, and then immediately shutting the curtains. This response was followed by sounds of pots and pans slamming, dishes breaking, water flowing, and a garbage disposal running. The officers reasonably could infer that these sounds indicated the destruction of evidence of drug trafficking in response to the presence of the police."), cert. denied,

546 U.S. 862, 126 S. Ct. 159, 163 L. Ed. 2d 145 (2005); *United States v. Bonner*, 874 F.2d 822, 825 (D.C. Cir. 1989) (exigency exists when, inter alia, "officers heard sounds consistent with . . . destruction of the object of the search"); *United States* v. *Alfonso*, 759 F.2d 728, 742–43 (9th Cir. 1985) (when hotel room door was opened in response to knock on door by police, who observed suspect and several others in room and heard " 'hurried scuffling noise' coming from the bathroom," police reasonably believed that "concealed presences might pose danger, or that an unidentified person might be able to destroy evidence").

Except for the wholly unremarkable fact that a light was on inside the motel room, the record is devoid of any evidence from which a police officer reasonably could have concluded that someone was inside the room. Lights are routinely left on in empty homes and hotel rooms, especially at night. If this were enough to create the kind of emergency justifying warrantless entry, the exigent circumstances exception would immediately cease to be an exception and, instead, would become the rule. In other words, if the warrantless search by the police in the present case is deemed to be supported by exigent circumstances, then such a search will be permissible whenever there is any possibility that the defendant or someone else might attempt to contact a third party for the purpose of having that third party destroy evidence. Indeed, that is the thrust of the state's argument: the police should be permitted to conduct a warrantless search in such circumstances. A warrantless entry, however, cannot be deemed necessary on emergency grounds on the basis of such generalized speculation, even if, on occasion, evidence may be destroyed because the police simply did not have enough information available to them to form a reasonable belief, based on the particular facts of the case at hand, that a warrantless search was justified to prevent the destruction of such evidence.

In reaching a contrary conclusion, the Appellate Court relied primarily on *State* v. *Reagan*, 18 Conn. App. 32, 556 A.2d 183, cert. denied, 211 Conn. 805, 559 A.2d 1139 (1989), which it cited for the proposition that the search of the defendant's motel room was justified, so long as "there was a distinct possibility that someone who observed either the police stop of the Yukon, Taveras' arrest, or the police and canine presence at the motel, might inform someone involved with the criminal activity." *State* v. *Correa*, supra, 185 Conn. App. 339. We disagree that *Reagan* stands for that proposition.

In that case, the police were conducting a surveillance of the home of the defendant, Edward L. Reagan, a suspected drug dealer. *State* v. *Reagan*, supra, 18 Conn. App. 34. After witnessing what they believed to be a drug transaction between Reagan and another man, David Earl Jones, at Reagan's home, the police detained Jones a short distance from the home. Id. A number of people witnessed Jones' detention, including a woman whom the police had seen enter and exit Reagan's home earlier in the day. Id., 34–35. In concluding that immediate entry into Reagan's home was permissible to prevent the imminent destruction of evidence while the police sought a search warrant for the home, the Appellate Court, citing a number of federal cases, observed that "[i]t has been recognized that the possibility that a suspect knows or may learn that he is under surveillance or at risk of immediate apprehension may constitute exigent circumstances, on the theory that the suspect is more likely to destroy evidence, to attempt to escape or to engage in armed resistance." Id., 38. The Appellate Court further stated that "[f]ederal courts have held that exigent circumstances may exist [when the] police reasonably believe that a defendant may be alerted to the imminence of [his] arrest by the detention or arrest of a confederate and destroy incriminating evidence." Id. In all of the cited cases, however, as in *Reagan* itself,

the police knew that the suspect was inside the place to be searched, in a position and with an obvious motive to destroy evidence of his or her crime. In the present case, by contrast, the police had no reason, beyond rank speculation, to believe that anyone was inside the defendant's motel room. Indeed, as we previously discussed, they knew for certain that the two targets of the investigation, the defendant and Taveras, were not in the room. We therefore conclude that the Appellate Court and the trial court incorrectly determined that the visual sweep of the defendant's motel room was justified by exigent circumstances.

VII

THE VISUAL SWEEP AND THE INDEPENDENT SOURCE DOCTRINE

Finally, the state claims that the trial court properly determined that any impropriety in the visual sweep was obviated by the independent source doctrine.[43] In support of this contention, the state asserts that, prior to the visual sweep, the facts known to the police constituted probable cause to search the room and, in addition, that the police would have sought a search warrant even if Sergeant Broems had not conducted the visual sweep.

In parts IV and VI of this opinion, we explained why the information available to the police before the canine sniff, which preceded the visual sweep, constituted probable cause.[44] Consequently, the state has satisfied

[43] Having set forth the principles underlying the independent source doctrine in part IV of this opinion, we do not repeat them here.

[44] We note that, in reaching the same conclusion, the trial court excised only that information contained in the warrant affidavit that was derived from the visual sweep. Because the defendant challenged the propriety of the canine sniff for the first time on appeal, the trial court had no occasion to consider whether to excise the information obtained as a result of the canine sniff.

the first requirement of the independent source doctrine.

The next question, therefore, is whether the police would have applied for a search warrant irrespective of the visual sweep. The evidence established, and the trial court found, that the police decided to seek a warrant prior to the visual sweep. According to the testimony, however, the collective decision to apply for the warrant was made after Sergeant O'Brien conducted the canine sniff, a fact that the trial court did not consider because the propriety of the canine sniff was not an issue in the trial court.

We, of course, have concluded that the canine sniff violated article first, § 7, of the state constitution. Consequently, for purposes of the state's claim that the independent source doctrine obviates the illegality of the visual sweep, the determination as to whether the police would have sought a warrant irrespective of the visual sweep must be made in light of the fact that the canine sniff also was unlawful. That determination requires the same fact-finding that will be necessary to resolve the state's claim of an independent source relative to the canine sniff. Accordingly, on remand, the trial court also must consider the state's claim of an independent source relative to the visual sweep with due regard for the impropriety of the canine sniff, as well. Of course, the state must have the opportunity to present any additional evidence that may be relevant to that issue.

VIII

CONCLUSION

We conclude that the canine sniff was a search subject to the warrant requirement of article first, § 7, of the state constitution and that the failure of the police to obtain a warrant before conducting the canine sniff

violated that requirement. We also conclude that the case must be remanded to the trial court so that the state may be afforded the opportunity to adduce additional evidence concerning its claims relative to the canine sniff under the independent source and inevitable discovery doctrines, claims that, if proven, would obviate the illegality of the canine sniff and thereby eliminate the need for suppression of the evidence ultimately seized pursuant to the search warrant. We finally conclude that, although the visual sweep was not justified by exigent circumstances, the state also must be afforded the opportunity to present additional evidence to establish, in light of our determination regarding the impropriety of the canine sniff, that the constitutional infirmity of the visual sweep is obviated by the independent source doctrine.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

MERIBEAR PRODUCTIONS, INC. *v.* JOAN E. FRANK ET AL.
(SC 20473)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiff, M Co., which had obtained a judgment in California against the defendants, J and G, sought to enforce that judgment in Connecticut and to recover damages in connection with a home staging services and lease agreement between the parties. Pursuant to the agreement, M Co., a California corporation, was to provide design and decorating services, including the delivery and installation of rental furniture and décor, for the purpose of making the defendants' Connecticut residence more attractive to potential buyers. J was the sole signatory to the agreement,

but M Co. negotiated the agreement exclusively with G. The lease required an initial payment and had an initial term of four months. If the residence was not sold within that term, the lease would continue on a month-to-month basis at a monthly rate. One provision of the agreement contained both a choice of law clause, providing that California law governed the agreement, and a forum selection clause, which vested courts in Los Angeles, California, with jurisdiction over disputes arising under the agreement and provided that the parties consented to the jurisdiction of that court. Beneath that provision, G amended the choice of law clause, writing in that, "[s]ince this is a contract for an agreement taking place in the state of Connecticut, Connecticut laws will [supersede] those of California." Additionally, although G did not sign the agreement, he signed an addendum to the agreement authorizing M Co. to charge his credit card for the initial payment. G made the initial payment to M Co., which then delivered and installed the rental furniture and décor. Thereafter, the defendants defaulted on their payment obligations. The defendants denied M Co. access to the premises when it attempted to repossess its furniture and décor, which ultimately remained in the residence for approximately three years. M Co. filed an action in California Superior Court, which rendered a default judgment against the defendants after they failed to appear. When the default judgment remained unsatisfied, M Co. filed the present action, seeking enforcement of the California judgment and alleging breach of contract and quantum meruit. As to the claim seeking enforcement of the California judgment, the trial court concluded that the California court lacked personal jurisdiction over J, but not over G, and that the California court's judgment was entitled to full faith and credit as to G. As to the breach of contract claim, the court found that J had breached the home staging services agreement. In doing so, it rejected J's special defense that the agreement was unenforceable because it failed to comply with certain provisions of the Home Solicitation Sales Act (§ 42-134a et seq.) (HSSA). The court specifically determined that a home staging agreement, which involves the use of goods and services to facilitate the sale or rental or real property, was excluded from the purview of the HSSA, which exempts transactions "pertaining to the sale or rental of real property" from its requirements. Accordingly, the trial court rendered judgment for M Co. and against G in connection with the enforcement of the California judgment and awarded M Co. the full amount of that judgment. In connection with the breach of contract claim, the court rendered judgment for M Co. and against J, and awarded M Co. damages for the conversion of M Co.'s furniture and décor, as well as for the associated rental loss of that inventory. Having done so, the court declined to address M Co.'s quantum meruit claim as to J. Thereafter, M Co. withdrew the breach of contract and quantum meruit claims as to G, and the defendants appealed. *Held*:

1. The trial court correctly concluded that the California court had personal jurisdiction over G, G having consented to jurisdiction in California by virtue of the agreement's forum selection clause, and, accordingly, the trial court properly found that the California judgment was enforceable against G: although a nonsignatory to a contract generally is not bound by a forum selection clause contained therein, under the "closely related" doctrine, a nonsignatory may be bound by that clause if he was so intimately involved in the negotiation, formation, execution, or ratification of the contract that it was reasonably foreseeable that he would be bound by it, considering factors such as the nonsignatory's relationship to the signatory and whether the nonsignatory received a direct benefit from the agreement; in the present case, the defendants did not dispute that the forum selection clause in the agreement was valid and enforceable, and G was so closely related to the agreement that he was bound by its forum selection clause, especially when G was married to J and lived in the residence she owned, in which they wrongfully used M Co.'s inventory for three years; moreover, in addition to receiving a direct benefit under the agreement, only G, and not J, participated in the negotiations, he made a substantive change to the agreement prior to its execution, notably amending the choice of law clause while leaving the forum selection clause in that same provision untouched, and he executed an addendum to the agreement, pursuant to which he authorized the sole payment made to M Co. that prompted M Co.'s full performance of its contractual obligations.

2. The defendants could not prevail on their claim that the home staging services agreement was unenforceable due to M Co.'s noncompliance with certain provisions of the HSSA, as the trial court correctly concluded that the transaction between the parties was not a "home solicitation sale," as defined therein, and, therefore, was outside the purview of the HSSA: the provisions of the HSSA apply only to "home solicitation sale[s]," the statutory (§ 42-134a (a) (5)) definition of which excludes any transaction "pertaining to the sale or rental of real property"; moreover, although a narrow construction of that language that applied only to contracts for the sale or rental of real property was inconsistent with the dictionary definitions of the phrase "pertaining to," this court nonetheless concluded that it would yield absurd results to construe the real property exception as applying to all transactions for goods and services that relate to, or are an adjunct or accessory to, the sale or rental of real property; accordingly, this court turned to extratextual sources, including legislative history, the federal regulations on which the real property exception was based, and sister state precedent, and, consistent with the liberal construction afforded to remedial statutes such as the HSSA, concluded that a "home solicitation sale" is not strictly limited to the sale or rental of real property but, instead, includes a limited category of consumer goods and services that may be excluded under the real property exception; in the present case, the sale of the residence

was the stated purpose of the agreement, the duration of the agreement was defined by how long it took for the property to sell, and the sale of the property delimited the agreement's various terms by, for example, allowing M Co. to remove the furniture and décor if the defendants' residence was not listed for sale within a prescribed period of time, such that the terms of the agreement were so intertwined with the sale of the defendants' property that the agreement was inextricably related to, or an integral adjunct or accessory to, the sale of the home.

3. There was no merit to the defendants' claim that the award of damages was improper insofar as the trial court awarded M Co. double damages by rendering judgment against both G and J for the same loss and included the conversion value of the furniture and décor in the amount of damages for which J was liable in connection with the breach of contract claim; although a party may recover just damages for the same loss only once, it was undisputed that M Co.'s loss was wholly unsatisfied when the trial court rendered judgment in its favor on the claim against G concerning the enforceability of the California judgment and on the breach of contract claim against J, and the trial court was not foreclosed from rendering judgment in favor of M Co. against both defendants, jointly or separately, for injuries for which each is liable; moreover, the trial court's award of damages for the conversion value of the furniture and décor was not clearly erroneous in light of the fact that J caused M Co.'s total loss of that inventory by keeping and using it in her personal residence for three years, as M Co.'s loss of the furniture and décor was a reasonably foreseeable consequence of J's breach of the home staging services agreement.

(*Two justices concurring in part and dissenting in part in one opinion*)

Argued September 8, 2020—officially released September 22, 2021*

Procedural History

Action to enforce a foreign default judgment rendered against the defendants in California, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Tyma*, *J.*; judgment for the plaintiff, from which the defendants appealed to the Appellate Court, *Gruendel*, *Alvord* and *Pellegrino*, *Js.*, which affirmed the trial court's judgment, and the defendants, on the granting of certification, appealed to this court, which reversed the judgment of the Appellate Court and remanded the case to that court with direc-

* September 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tion to dismiss the defendants' appeal; thereafter, the plaintiff withdrew the remaining counts of the complaint, and the defendants appealed. *Affirmed.*

Michael S. Taylor, with whom was *Brendon P. Levesque*, *for the appellants (defendants).*

Anthony J. LaBella, with whom, on the brief, was *Deborah M. Garskof*, for the appellee (plaintiff).

Opinion

ECKER, J. This appeal arises out of a dispute between the plaintiff, Meribear Productions, Inc., doing business as Meridith Baer and Associates, and the defendants, Joan E. Frank and George A. Frank, in connection with a contract for the design, decoration, and staging for sale of the defendants' residence at 3 Cooper Lane in Westport. After the plaintiff staged the defendants' home by installing rental furniture, antiques, art, and home décor for the purpose of enhancing its appearance and, thereby, its prospects for sale, the defendants defaulted on their contractual payment obligations to the plaintiff. The plaintiff, a California company, obtained a default judgment against the defendants in its home state and thereafter filed an action in the Superior Court in Connecticut seeking to enforce the California judgment or, alternatively, to recover under the theories of breach of contract or quantum meruit. The trial court rendered judgment in favor of the plaintiff against George Frank on the count seeking to enforce the California judgment and in favor of the plaintiff against Joan Frank on the breach of contract count.[1] On appeal, the defendants claim that (1) the California judgment is unenforceable for lack of personal jurisdiction, (2) the contract is unenforceable

[1] The trial court determined that there was no need to adjudicate the quantum meruit claim against Joan Frank after finding her liable for breach of contract. The plaintiff subsequently withdrew the breach of contract and quantum meruit claims against George Frank.

under the Home Solicitation Sales Act (HSSA), General Statutes § 42-134a et seq., and (3) the amount of damages awarded by the trial court was improper. We affirm the judgment of the trial court.

The relevant facts either are undisputed or were found by the trial court following a bench trial. The plaintiff is a California corporation that provides residential design and decoration services, including the delivery, staging and leasing of home furnishings and décor. The defendants are a married couple who resided in a home owned by Joan Frank at 3 Cooper Lane in Westport. In an effort to sell their home and make it more attractive to potential purchasers, Joan Frank, as the homeowner, entered into a "[s]taging [s]ervices and []l]ease [a]greement" (agreement) with the plaintiff on March 13, 2011. Under the terms of the agreement, Joan Frank agreed to pay the plaintiff a " '[s]taging [f]ee' " in the amount of $19,000, which represented a nonrefundable " '[i]nitial [p]ayment' " due "prior to [the] delivery and installation" of the furnishings. After the delivery and installation of the furnishings, the agreement provided that Joan Frank would make monthly rental payments in the amount of $1900 beginning on July 23, 2011. The initial term of the agreement was for four months "or until the buyer's contingencies are either satisfied or waived with respect to the purchase of the [p]roperty, whichever comes first." If the property did not sell after four months, then the agreement would continue on a monthly basis, subject to the right of either party to terminate the agreement by providing written notice.

Joan Frank was the sole signatory to the agreement. Although George Frank did not sign the agreement and was not a party to it, he participated in its negotiation. Indeed, in negotiating the agreement, the plaintiff dealt exclusively with George Frank, his office assistant, and the defendants' realtor. The plaintiff had no meaningful

dealings with Joan Frank other than her execution of the agreement.

In addition to negotiating the agreement, George Frank signed an addendum to the agreement, addendum B, which is a credit card authorization expressly made "a part of [the] [a]greement . . . ." Pursuant to the credit card authorization, George Frank "authorized the plaintiff to charge his Visa credit card a 'total amount' of $19,000." George Frank crossed out language in the addendum providing that he agreed to personally guarantee "any obligations that may become due."[2]

Although George Frank was not a party to the agreement, he made substantive modifications to its terms. Paragraph 19 of the agreement contains a choice of law provision, which provides that "[t]his [a]greement and the rights of the parties hereunder shall be determined, governed by and construed in accordance with the internal laws of the [s]tate of California without regard to conflicts of laws principles." Paragraph 19 also contains a forum selection clause, which provides that "[a]ny dispute under that [a]greement shall only be litigated in any court having its situs within the [c]ity of Los Angeles, California, and the parties consent and submit

[2] Addendum B is a preprinted form that, in its original format, provided in relevant part: "I authorize [the plaintiff] to charge my credit card for any due amount resulting from this staging/design agreement. I agree by signing below to personally guarantee to [the plaintiff], any obligations that may become due.

"Upon acceptance of this application, the client agrees to the payment terms stated by the creditor, [the plaintiff]. A 10 [percent] finance charge will apply on any open balances beyond terms. I understand that I am fully responsible for all balances on my account, and I am liable for additional charges that may be incurred by [the plaintiff] as a result of collection and/or legal proceedings. . . ."

George Frank crossed out the term "any" in the first sentence and inserted the sum of "19,000" in its place. George Frank also crossed out the phrase, "any obligations that may become due," in the second sentence. Finally, the last sentence of the second paragraph is crossed out entirely.

to the jurisdiction of any court located within such venue." Despite the choice of law provision, George Frank unilaterally added the following language at the end of paragraph 19: "Since this is a contract for an agreement taking place in the state of Connecticut, Connecticut laws will [supersede] those of California." (Emphasis omitted.)

After George Frank made the initial payment of $19,000, the plaintiff delivered and installed the rental furnishings and décor pursuant to the terms of the agreement. Thereafter, the defendants defaulted on their rental obligation. The plaintiff hired a crew of movers to remove the rental furnishings and décor from the defendants' residence, but the defendants denied the movers access to the premises. The defendants demanded that the plaintiff provide a written release of all claims, but the plaintiff refused. The inventory remained in the home.[3]

The litigation began in California. On February 15, 2012, the plaintiff filed suit against the defendants in the Superior Court of California, county of Los Angeles, claiming, inter alia, breach of contract and conversion. That action resulted in a default judgment against the defendants in the amount of $259,746.10. When the default judgment remained unsatisfied, the plaintiff brought an action against the defendants in the Superior Court for the judicial district of Fairfield, seeking to enforce the foreign judgment. Alternatively, the plaintiff sought recovery against the defendants for breach of contract and quantum meruit under counts two and three of the complaint, respectively. The defendants

[3] Sometime during the pendency of the present appeal, the defendants sold their residence at 3 Cooper Lane. See *Meribear Productions, Inc.* v. *Frank*, 165 Conn. App. 305, 309, 140 A.3d 993 (2016), rev'd, 328 Conn. 709, 183 A.3d 1164 (2018). The plaintiff's counsel stated at oral argument before the Appellate Court that the current whereabouts of the home furnishings and décor are unknown. See id.

raised various special defenses. In particular, the defendants claimed that (1) the California judgment was unenforceable for lack of personal jurisdiction, (2) the agreement was unenforceable under the HSSA because the plaintiff failed to advise the defendants of their cancellation rights, and (3) the plaintiff failed to mitigate its damages and breached the covenant of good faith and fair dealing.

On count one of the plaintiff's complaint, seeking enforcement of the California judgment, the trial court found that the California court lacked personal jurisdiction over Joan Frank due to insufficient service of process but that "the substituted service of process on George Frank [was] valid."[4] "To the extent that George Frank claim[ed] that the California court lacked sufficient minimum contacts over him" to satisfy the due process clause of the federal constitution, the trial court "disagree[d]." The trial court reasoned that "George Frank admit[ted] that he signed a guarantee of the staging agreement with a company that has a principal place of business in California and that [the agreement] provides that [the city of] Los Angeles is the appropriate forum. He disputes only the extent of the guarantee. The California court possessed personal jurisdiction

[4] The plaintiff "attempted constructive service on the defendants" at the office of LCP Homes, Inc., "located at 1175 Post Road East in Westport." LCP Homes, Inc., "is a corporation owned by George Frank, and in which he and Joan Frank are corporate officers." The trial court determined that service of process on Joan Frank was insufficient under § 415.20 (b) of the California Code of Civil Procedure because "Joan Frank is not an owner or operator of the company, and, moreover, there is no evidence that she was ever present at the office." See Cal. Civ. Proc. Code § 415.20 (b) (Deering Supp. 2020) (providing that, in lieu of personal service, "a summons may be served by leaving a copy of the summons and complaint at the person's . . . usual place of business"). With respect to George Frank, the trial court found that substituted service of process was sufficient on the ground that "he is an owner of LCP Homes [Inc.] and Andy Frank Builders, which shared the [office at] 1175 Post Road East," and "he had a presence at the office at the time of service . . . ."

over George Frank, and its judgment is entitled to full faith and credit as to him." Therefore, the trial court rendered judgment "in favor of the plaintiff and against George Frank on the first count of the complaint for common-law enforcement of a foreign judgment."

The trial court proceeded to address counts two and three of the plaintiff's complaint against Joan Frank for breach of contract and quantum meruit, respectively. In connection with count two, the trial court found that "the plaintiff's evidence relevant to the claimed breach [was] credible," that "[t]he furnishings were delivered to, and installed in, the residence in March, 2011," and that "Joan Frank failed to make the July rent payment, and the rent payments and other charges due thereafter." Moreover, the trial court found that, following Joan Frank's default on the rental payments, the plaintiff attempted to remove the inventory from the defendants' residence, but the defendants wrongfully "denied the movers access to their home unless the plaintiff provided them with a full release of all claims," which the plaintiff "reasonably refused . . . ." The trial court therefore concluded that Joan Frank had breached the agreement.

The trial court rejected Joan Frank's claim that the agreement was unenforceable under the HSSA because the plaintiff had not provided her with notice of her cancellation rights, concluding that the "plain and unambiguous" language of the statute exempts from the definition of a " 'home solicitation sale' " transactions " 'pertaining to the sale or rental of real property.' " Accord General Statutes § 42-134a (a) (5) ("[t]he term 'home solicitation sale' does not include a transaction . . . pertaining to the sale or rental of real property"). The trial court determined that "[a]n agreement concerning the staging of a residential home for sale in the real estate marketplace" pertains to the sale of real property and, therefore, is excluded from the purview

of the HSSA. The trial court also rejected Joan Frank's claim that the plaintiff had failed to mitigate its damages, finding that it was Joan Frank who had "wrongfully prevented" the removal of the home furnishings and décor. Furthermore, because "Joan Frank . . . wrongfully withheld payments under the agreement, and wrongfully refused the plaintiff's attempts to reclaim the inventory," the trial court found that she had breached the covenant of good faith and fair dealing by "injur[ing] the rights of the plaintiff to receive the benefits of the staging agreement." The trial court therefore rendered judgment in favor of the plaintiff and against Joan Frank on the plaintiff's breach of contract claim. Having determined that "[t]he plaintiff [proved] that Joan Frank breached the contract," the trial court stated that it "need not consider the alternative claim for quantum meruit."

Finally, the trial court addressed the issue of damages. On the first count of the complaint, enforcement of the California judgment against George Frank, the trial court awarded the plaintiff the full amount of the California judgment: $259,746.10. On the second count of the complaint, breach of contract against Joan Frank, the trial court awarded the plaintiff damages for the loss of the home furnishings and décor in the amount of $235,598 and an additional $47,508.45 for "the rental loss and related late fees," for a total of $283,106.45.

The defendants jointly appealed from the trial court's judgment to the Appellate Court, claiming that (1) the California judgment was unenforceable against George Frank for lack of personal jurisdiction, (2) the agreement was unenforceable because it did not provide the defendants with notice of their cancellation rights under the HSSA, and (3) the damages award was improper because (a) the trial court awarded double damages against George Frank and Joan Frank for the same loss, and (b) the trial court incorrectly included damages for

conversion of the home furnishings in the breach of contract award against Joan Frank. See *Meribear Productions, Inc.* v. *Frank*, 165 Conn. App. 305, 311, 316, 321–22, 140 A.3d 993 (2016), rev'd, 328 Conn. 709, 183 A.3d 1164 (2018). The Appellate Court affirmed the trial court's judgment, holding that (1) the California judgment was enforceable as to George Frank because he consented to personal jurisdiction in California by signing addendum B, which was incorporated into the agreement; see id., 315; (2) the agreement was not subject to the provisions of the HSSA because it fell within the statutory exemption for transactions pertaining to the sale or rental of real property under § 42-134a (a) (5); see id., 316, 321; and (3) the measure of damages was proper because (a) the plaintiff may recover the full amount of damages under either count one or count two of the complaint but may not recover twice for the same loss; see id., 322; and (b) the amount of damages on the breach of contract claim was not clearly erroneous in light of the trial court's factual findings "that Joan Frank had breached the staging services agreement by failing to pay the rent due, by wrongfully using the furniture in the defendants' personal residence for approximately three years, and by thwarting the plaintiff's efforts to retrieve its inventory, thereby resulting in the total loss of that inventory to the plaintiff." Id., 323.

This court granted the defendants' joint petition for certification to appeal.[5] See *Meribear Productions, Inc.* v. *Frank*, 322 Conn. 903, 138 A.3d 288 (2016). During the

[5] We granted the defendants' petition for certification to appeal, limited to the following issues: "Did the Appellate Court correctly determine that the trial court properly determined that: (1) the foreign judgment against [George Frank] was enforceable after concluding that he had minimum contacts with California that warranted the exercise of its jurisdiction; (2) the contract signed by [Joan Frank] was enforceable notwithstanding the provisions of the [HSSA]; and (3) an award of double damages to the plaintiff was appropriate." *Meribear Productions, Inc.* v. *Frank*, 322 Conn. 903, 138 A.3d 288 (2016).

adjudication of that appeal, a question arose "whether George Frank's appeal had been taken from a final judgment when the trial court's ruling had not disposed of all counts against him," namely, the plaintiff's alternative theories of recovery in counts two and three of the complaint, breach of contract and quantum meruit. *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 715, 183 A.3d 1164 (2018). Following oral argument and supplemental briefing from the parties, we determined that the trial court's judgment was not final given that counts two and three "remain[ed] unadjudicated" as to George Frank and "present[ed] the possibility that [he] could be found liable for additional damages." Id., 726. Accordingly, we reversed the judgment of the Appellate Court and remanded to that court with direction to dismiss the defendants' joint appeal. See id.

On remand to the trial court, the plaintiff withdrew counts two and three as to George Frank.[6] The defendants thereafter filed a joint appeal with the Appellate Court, which we transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

I

The defendants first claim that the foreign judgment against George Frank is unenforceable for lack of personal jurisdiction because George Frank's sole contact with California was "sign[ing] a single credit authorization in Connecticut, and every relevant action the plaintiff took with regard to George Frank was taken in Connecticut. "The defendants contend that, under these circumstances, George Frank lacked sufficient mini-

[6] On remand, the plaintiff moved for an award of postjudgment interest pursuant to General Statutes § 37-3a (a) on the breach of contract claim against Joan Frank. The trial court concluded that the plaintiff was entitled to postjudgment interest in the amount of "5 percent per annum from the date of the final judgment until the date the judgment is paid" because Joan Frank had "deprived [the plaintiff] of the use of its money and furniture" since 2011.

mum contacts with California and that the assertion of personal jurisdiction over him in that state offended traditional notions of fair play and substantial justice in violation of the due process clause of the United States constitution. See, e.g., *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) ("an individual's contract with an out-of-state party *alone* [cannot] automatically establish sufficient minimum contacts in the other party's home forum" (emphasis in original)). The defendants further argue that George Frank did not consent to jurisdiction in California because he was not a party to the agreement, and, therefore, the forum selection clause in the agreement "cannot form a proper basis for jurisdiction."

The full faith and credit clause of the United States constitution governs an action to enforce a foreign judgment.[7] "[T]he full faith and credit clause requires a state court to accord to the judgment of another state the same credit, validity and effect as the state that rendered the judgment would give it. . . . This rule includes the proposition that lack of jurisdiction renders a foreign judgment void. . . . A party can therefore defend against the enforcement of a foreign judgment on the ground that the court that rendered the judgment lacked personal jurisdiction, unless the jurisdictional issue was fully litigated before the rendering court or the defending party waived the right to litigate the issue." (Citations omitted.) *Packer Plastics, Inc.* v. *Laundon*, 214 Conn. 52, 56, 570 A.2d 687 (1990). The party raising a jurisdictional claim as a defense against the enforcement of a foreign judgment bears the burden of proving, "by a preponderance of the evidence, facts that demonstrate that the foreign court lacked jurisdiction." *Maltas* v. *Maltas*, 298 Conn. 354, 364 n.11, 2 A.3d 902 (2010).

[7] The full faith and credit clause of the United States constitution provides in relevant part that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State. . . ." U.S. Const., art. IV, § 1.

On appeal, we defer to the trial court's factual findings but exercise plenary review over the ultimate question of personal jurisdiction. See *Ryan* v. *Cerullo*, 282 Conn. 109, 118, 918 A.2d 867 (2007). "The question of whether another state's court properly exercised personal jurisdiction is determined with reference to the law of that state." *Maltas* v. *Maltas*, supra, 298 Conn. 367; see, e.g., *Smith* v. *Smith*, 174 Conn. 434, 438–39, 389 A.2d 756 (1978); *J. Corda Construction, Inc.* v. *Zaleski Corp.*, 98 Conn. App. 518, 524, 911 A.2d 309 (2006).[8]

In California, "a civil court gains jurisdiction over a person through one of four methods. There is the old-fashioned method—residence or presence within the state's territorial boundaries. . . . There is minimum contacts—activities conducted or effects generated within the state's boundaries sufficient to establish a 'presence' in the state so that exercising jurisdiction is consistent with ' "traditional notions of fair play and substantial justice.' " . . . A court also acquires jurisdiction when a person participates in a lawsuit in the courthouse where it sits, either as the plaintiff initiating the suit . . . or as the defendant making a general appearance . . . . Finally, a party can consent to per-

[8] Of course, the due process clause sets the outer limits of a state court's exercise of personal jurisdiction. See, e.g., *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 923, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) ("[t]he [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment sets the outer boundaries of a state tribunal's authority" to exercise personal jurisdiction over defendant); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) ("[a] judgment rendered in violation of due process is void in the rendering [s]tate and is not entitled to full faith and credit elsewhere"). Consistent with the requirements of the full faith and credit clause, however, we first must determine whether the exercise of jurisdiction comports with the applicable law of the foreign state. Under some circumstances—including the present case, as we shall see—we need go no further than an examination of state law because, if jurisdiction is established under state law, then the due process clause is satisfied.

sonal jurisdiction, when it would not otherwise be available." (Citations omitted; footnote omitted.) *Global Packaging, Inc.* v. *Superior Court*, 196 Cal. App. 4th 1623, 1629, 127 Cal. Rptr. 3d 813 (2011).

We need not address the defendants' minimum contacts argument because we conclude that George Frank consented to personal jurisdiction in California.[9] "[D]ue process permits the exercise of personal jurisdiction over a nonresident defendant . . . when the defendant consents to jurisdiction. . . . A party, even one who has no minimum contacts with [a] state, may consent to jurisdiction in a particular case. . . . Agreeing to resolve a particular dispute in a specific jurisdiction, for example, is one means of expressing consent to [the] personal jurisdiction of courts in the forum state for purposes of that dispute. . . . [Although] subject matter jurisdiction cannot be conferred by consent, personal jurisdiction can be so conferred, and consent may be given by a contract provision." (Citation omitted; internal quotation marks omitted.) *Rockefeller Technology Investments (Asia) VII* v. *Changzhou SinoType Techonology Co., Ltd.*, 9 Cal. 5th 125, 140, 460 P.3d 764, 260 Cal. Rptr. 3d 442, cert. denied, U.S. , 141 S. Ct. 374, 208 L. Ed. 2d 98 (2020); see also *Burger King Corp.* v. *Rudzewicz*, supra, 471 U.S. 472 n.14 ("[B]ecause the personal jurisdiction requirement is a waivable

[9] The concurring and dissenting opinion presumes that, by resting our jurisdictional holding on the closely related doctrine, we implicitly have concluded that George Frank lacks minimum contacts with California. That presumption is incorrect. The plaintiff's primary argument throughout this litigation has been that George Frank consented to personal jurisdiction in California. The closely related doctrine on which we base our holding falls within "one of four traditional bases for the exercise of personal jurisdiction over a nonresident defendant" in California, namely, consent, which is "separate from the 'minimum contacts' analysis." *Nobel Farms, Inc.* v. *Pasero*, 106 Cal. App. 4th 654, 658, 130 Cal. Rptr. 2d 881 (2003). Because consent is an alternative basis for personal jurisdiction, we need not conduct a minimum contacts analysis, and we express no opinion on the merits of the parties' minimum contacts arguments.

right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court. . . . For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. . . . [When] such [forum selection] provisions have been obtained through freely negotiated agreements and are not unreasonable and unjust . . . their enforcement does not offend due process." (Citations omitted; internal quotation marks omitted.)).

In the present case, the agreement expressly provided in relevant part that "[a]ny dispute under [the] agreement shall *only* be litigated in any court having its situs within the [c]ity of Los Angeles, California, and *the parties consent and submit to the jurisdiction of any court located within such venue*." (Emphasis added.) The defendants do not dispute that the forum selection clause in the agreement is valid and enforceable[10] and, therefore, that its "enforcement does not offend due process." *Burger King Corp.* v. *Rudzewicz*, supra, 471 U.S. 472 n.14. Instead, they contend that George Frank is not bound by the forum selection clause because he did not sign the agreement. We disagree.

Generally, a nonsignatory to a contract is not bound by a forum selection clause contained therein. See, e.g., *Berclain America Latina S.A., de C.V.* v. *Baan Co. N.V.*, 74 Cal. App. 4th 401, 404–405, 409, 87 Cal. Rptr. 2d 745 (1999) (holding that nonsignatory to contract lacked standing to enforce forum selection clause). An exception to this general rule exists, however, for nonsignatories who are "so closely involved in the agreement or associated with a party to the transaction as

[10] To the extent the defendants contend that the forum selection clause is unenforceable under the HSSA because the plaintiff failed to provide them with notice of their cancellation rights as required by § 42-135a (2), we reject this claim for the reasons explained in part II of this opinion.

to be functionally equivalent to that party." Id., 403; see *Net2Phone, Inc.* v. *Superior Court*, 109 Cal. App. 4th 583, 589, 135 Cal. Rptr. 2d 149 (holding that forum selection clause was enforceable against nonsignatory on ground that it was " 'closely related' to the contractual relationship because it stands in the shoes of those whom it purports to represent"), review denied, Docket No. S117411 (Cal. August 27, 2003); *Bancomer, S. A.* v. *Superior Court*, 44 Cal. App. 4th 1450, 1461, 52 Cal. Rptr. 435 (1996) (to demonstrate that nonsignatory is " 'so closely related to the contractual relationship' that it is entitled to enforce the forum selection clause, it must show by specific conduct or express agreement that (1) it agreed to be bound by the terms of the . . . agreement, (2) the contracting parties intended the [nonsignatory] to benefit from the . . . agreement, or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party"); *Lu* v. *Dryclean-U.S.A. of California, Inc.*, 11 Cal. App. 4th 1490, 1494, 14 Cal. Rptr. 2d 906 (1992) (holding that nonsignatories were bound by forum selection clause because they were "closely related to the contractual relationship" in that they allegedly "participated in the fraudulent representations [that] induced [the] plaintiffs to enter into the [a]greement").

Under the "closely related" doctrine, a nonsignatory to a contract may be bound by a forum selection clause if the nonsignatory was so intimately involved in the negotiation, formation, execution, or ratification of the contract that it was reasonably foreseeable that he or she would be bound by the forum selection clause. See, e.g., *Carlyle Investment Management, LLC* v. *Moonmouth Co. SA*, 779 F.3d 214, 219 (3d Cir. 2015) ("even if [the] defendants are not parties to the agreement or third-party beneficiaries of it, they may be bound by the forum selection clause if they are closely related to the agreement in such a way that it would be foreseeable

that they would be bound"); *Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998) (nonsignatories who signed letters of credit to provide collateral for signatories were bound by forum selection clause because their "interests . . . in [the] dispute are completely derivative of those of [the signatories]—and thus 'directly related to, if not predicated upon' the interests of the [signatories]"), cert. denied, 525 U.S. 1093, 119 S. Ct. 851, 142 L. Ed. 2d 704 (1999); *Hugel* v. *Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993) ("[i]n order to bind a [nonparty] to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound"); *Manetti-Farrow, Inc.* v. *Gucci America, Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988) (nonsignatories were bound by forum selection clause because they were "so closely related to the contractual relationship"). In determining whether a nonsignatory may be bound by a forum selection clause, "courts consider the [nonsignatory's] . . . relationship [to the signatory] and whether the [nonsignatory] received a direct benefit from the agreement."[11] *Carlyle Investment Management, LLC* v. *Moonmouth Co. SA*, supra, 219.

Applying these factors, we conclude that George Frank was so closely related to the agreement that he is bound by the forum selection clause explicitly providing that the "the parties consent and submit to the jurisdiction of any court located within" the city of Los Angeles, California. First, the record reflects that George Frank participated in the negotiation of the agreement prior to its execution. Indeed, even though Joan Frank was "the sole signatory [to] the agreement," she had no "meaningful dealings concerning the matter" and "was not involved in the process other than signing

[11] In the context of parent-subsidiary corporate relationships, courts also consider "the [nonsignatory's] ownership of the signatory . . . ." *Carlyle Investment Management, LLC* v. *Moonmouth Co. SA*, supra, 779 F.3d 219.

the agreement." Instead, George Frank negotiated the agreement, "took charge of the project and dealt with the plaintiff." George Frank was a party to the agreement in all but name.

Second, George Frank made substantive changes to the agreement prior to its execution. Specifically, "George Frank unilaterally added the following language to the end of paragraph 19," which is the portion of the agreement that contains the forum selection clause and the choice of law provision: "Since this is a contract for an agreement taking place in the state of Connecticut, Connecticut laws will [supersede] those of California." Notably, George Frank made no amendments to the forum selection clause.

Third, in addition to negotiating and amending the agreement, George Frank executed addendum B, which is a credit card authorization that expressly was made "a part of [the] [a]greement . . . ." Pursuant to addendum B, George Frank authorized a onetime credit card payment in the amount of $19,000, which represented the "[i]nitial [p]ayment" or "[s]taging [f]ee" due under the agreement. By doing so, George Frank authorized the sole payment made to the plaintiff and prompted the plaintiff's full performance of its contractual obligations under the terms of the agreement.

Lastly, we consider George Frank's relationship with the parties and whether he benefited from the agreement. As we previously explained, George Frank is married to Joan Frank and resided with her at 3 Cooper Lane—where the home furnishings and décor were installed and remained for years. See footnote 3 of this opinion. Given that George Frank plainly enjoyed the use and benefit of the home furnishings and décor and shared his wife's desire to enter into the agreement for the purpose of selling their marital residence, we have

no trouble concluding that he received a direct benefit under the agreement.

For the foregoing reasons, we conclude that George Frank consented to personal jurisdiction in California. Accordingly, the trial court properly found that the California judgment is enforceable against George Frank under the full faith and credit clause.

The concurring and dissenting opinion objects to our reliance on the closely related doctrine to affirm the trial court's enforcement of the foreign judgment against George Frank, arguing that "the plaintiff did not advance [this theory], either in the trial court or before this court," and that the plaintiff did not raise it as an alternative ground for affirmance under Practice Book § 63-4 (a). It is true that the plaintiff did not frame its jurisdictional argument using the line of cases discussed in this opinion. In all but name, however, the gravamen of the plaintiff's argument throughout this litigation has been that George Frank was so closely related to the transaction that he should be bound by the forum selection clause in the agreement signed by his wife, Joan Frank. The record reveals that the plaintiff consistently has maintained that George Frank consented to personal jurisdiction in California via the forum selection clause, even though he was not a signatory to the agreement.[12] In support of this argument, the plaintiff always has emphasized George Frank's close involvement in the negotiation and execution of the agreement, pointing

[12] Indeed, the plaintiff's primary argument on appeal is that "George Frank expressly consented to the jurisdiction of the California courts by knowingly signing a contract that contained a forum selection clause, thereby making the California judgment fully enforceable against him in [Connecticut]." Although the concurring and dissenting opinion correctly observes that "George Frank has consistently argued that he lacked sufficient minimum contacts with California," the plaintiff also consistently has argued that George Frank consented to personal jurisdiction in California by virtue of his involvement in the negotiation and execution of the agreement and addendum B.

out that he signed addendum B and "made specific, handwritten changes to the [agreement] in certain places, including to the forum selection clause, which . . . expressly included the selection of California for litigation arising under the [agreement], yet did not alter or delete his consent to California jurisdiction."[13] (Emphasis omitted.)

The plaintiff's failure to cite the applicable, governing case law is not fatal to its claim because it is well established that "[w]e may . . . review legal arguments that differ from those raised" by the parties "if they are subsumed within or intertwined with arguments related to the legal claim before the court."[14] (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 644 n.2, 224 A.3d 147 (2020); see *State* v. *Santiago*, 318 Conn. 1, 124, 122 A.3d 1 (2015) ("[W]e generally do not consider *claims or issues* that the parties themselves have not raised

[13] Although the plaintiff did not file notice of its intention to raise George Frank's consent to jurisdiction in California as an alternative ground on which to affirm the judgment of the trial court pursuant to Practice Book § 63-4 (a) (1), this procedural irregularity does not preclude our review of the plaintiff's claim. See, e.g., *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010) (reviewing alternative ground for affirmance, even though defendants did not file notice under § 63-4 (a) (1), because there was no prejudice to the plaintiffs given that "the defendants . . . raised the claim in their briefs . . . and the plaintiffs had an adequate opportunity to respond, and did so, in their reply briefs").

[14] The concurring and dissenting opinion is concerned that "we might be going beyond the confines of our adversarial system in our discovery of an additional doctrine that supports the plaintiff . . . ." As a general admonition, the concern is valid. The issue arises because we will occasionally rest our decision on a legal doctrine or theory that is not identical to the one argued and briefed by the parties. We agree with the concurring and dissenting opinion that, ordinarily, we must desist from deciding cases on grounds that the parties have not raised. In our view, however, the distinction in our case law between *claims* and *arguments*, as outlined in the text accompanying this footnote, accurately and adequately delineates the "limits of th[e] latitude" that govern our appellate review. For the reasons set forth herein, we are confident that we have not exceeded those limits under the circumstances of this case.

. . . [but] in cases too numerous to mention, we have considered *arguments or factors* pertaining to those claims or issues that were not expressly identified by the parties." (Citation omitted; emphasis in original.)). This is because, "when [a case] is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law . . . ." (Internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 148, 84 A.3d 840 (2014); see *In re David B.*, 167 Conn. App. 428, 448 n.10, 142 A.3d 1277 (2016) ("[i]n resolving a claim raised by the parties, we are not required to constrain our analysis to the law relied on by the parties"). Our independent power to identify and apply the proper construction of the governing law is particularly important in a case such as the present one, given our constitutional obligation to afford full faith and credit to the California judgment. See, e.g., *State* v. *Santiago*, supra, 124 (emphasizing importance of our power to identify and apply proper construction of governing law "when plenary consideration is necessary to thoroughly address and accurately decide constitutional claims and other matters of substantial public importance"). In light of the clear applicability of the closely related doctrine to the facts marshaled by the parties and found by the trial court,[15] we affirm the trial court's judgment enforcing the California judgment against George Frank.

II

The defendants next claim that the agreement is unenforceable under the HSSA because it did not include a notice of their cancellation rights in accor-

[15] We do not share the concern of the concurring and dissenting opinion regarding the factual findings of the trial court. The trial court expressly found that both of the defendants resided at 3 Cooper Lane and "have been wrongfully using the furniture in their personal residence for . . . years."

dance with General Statutes § 42-135a (2).[16] The plaintiff

There is no question that George Frank received a direct benefit under the agreement.

[16] General Statutes § 42-135a provides: "No agreement in a home solicitation sale shall be effective against the buyer if it is not signed and dated by the buyer or if the seller shall:

"(1) Fail to furnish the buyer with a fully completed receipt or copy of all contracts and documents pertaining to such sale at the time of its execution, which contract shall be in the same language as that principally used in the oral sales presentation and which shall show the date of the transaction and shall contain the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer, or on the front page of the receipt if a contract is not used, and in boldface type of a minimum size of ten points, a statement in substantially the following form:

"YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

"(2) Fail to furnish each buyer, at the time such buyer signs the home solicitation sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned 'NOTICE OF CANCELLATION', which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point boldface type the following information and statements in the same language as that used in the contract:

"NOTICE OF CANCELLATION

". . . . (Date of Transaction)

"YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

"IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

"IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

"IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN TWENTY DAYS OF THE DATE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE

responds that it was not required to provide a notice of cancellation rights because the agreement falls outside the purview of the HSSA. Specifically, the plaintiff contends that the transaction at issue was not a "home solicitation sale," as defined by the HSSA, because it

THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

"TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO . . . . (Name of Seller) AT . . . . (Address of Seller's Place of Business) NOT LATER THAN MIDNIGHT OF . . . . (Date)

"I HEREBY CANCEL THIS TRANSACTION.

". . . . (Date)

". . . . (Buyer's Signature)

"(3) Fail, before furnishing copies of the 'Notice of Cancellation' to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

"(4) Include in any home solicitation sale contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this chapter, including specifically such buyer's right to cancel the sale in accordance with the provisions of this section.

"(5) Fail to inform each buyer, orally, at the time such buyer signs the contract or purchases the goods or services, of such buyer's right to cancel.

"(6) Misrepresent in any manner the buyer's right to cancel.

"(7) Fail or refuse to honor any valid notice of cancellation by a buyer and within ten business days after the receipt of such notice, to (A) refund all payments made under the contract or sale; (B) return any goods or property traded in, in substantially as good condition as when received by the seller; (C) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction; and (D) cancel and return any contract executed by the buyer in connection with the transaction.

"(8) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the date the contract was signed or the goods or services purchased.

"(9) Fail, within ten business days of receipt of the buyer's notice of cancellation, to notify such buyer whether the seller intends to repossess or to abandon any shipped or delivered goods."

"pertain[ed] to the sale or rental of real property" under § 42-134a (a) (5).[17]

The scope and meaning of the phrase "home solicitation sale" in the HSSA presents a question of statutory construction, over which we exercise plenary review. See, e.g., *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 422, 941 A.2d 868 (2008). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 379, 54 A.3d 532 (2012). General Statutes § 1-2z guides this analysis and "directs us first to consider the text of the statute itself and its relationship to other statutes." (Internal quotation marks omitted.) Id.

Section 42-135a provides in relevant part that "[n]o agreement in a home solicitation sale shall be effective against the buyer" if the seller "[f]ail[s] to furnish each buyer, at the time such buyer signs the home solicitation sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned 'NOTICE OF CANCELLATION', which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten-point boldface type" certain specified information regarding the buyer's right to cancel the transaction. General Statutes § 42-135a (2). A "home solicitation sale" is defined

[17] General Statutes § 42-134a (a) provides in relevant part that " '[h]ome solicitation sale' means a sale, lease, or rental of consumer goods or services, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term 'home solicitation sale' does not include a transaction . . . (5) pertaining to the sale or rental of real property, to the sale of insurance, to the sale of newspapers or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission . . . ."

in relevant part as "a sale, lease, or rental of consumer goods or services, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. . . ." General Statutes § 42-134a (a). "The term 'home solicitation sale' does not include" various types of transactions, only one of which is pertinent to the present appeal, namely, transactions "*pertaining to the sale or rental of real property*, to the sale of insurance, to the sale of newspapers or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission . . . ." (Emphasis added.) General Statutes § 42-134a (a) (5).

The parties dispute whether their contractual agreement for the design, staging, and leasing of home goods and services "pertain[ed] to the sale or rental of real property" under § 42-134a (a) (5). The defendants contend that this exception to the definition of a "home solicitation sale" should be construed narrowly to apply only to contracts for the sale or rental of real property, rather than to goods or services used to facilitate the sale or rental of real property. The plaintiff responds that the defendants' proposed construction of the statute ignores the expansive prefatory phrase "pertaining to," which, the plaintiff points out, Black's Law Dictionary defines as " '[t]o relate to; to concern.' " See Black's Law Dictionary (9th Ed. 2009) p. 1260 (defining "pertain"). The plaintiff argues that the agreement plainly "pertain[ed] to the sale . . . of real property" within the meaning of § 42-134a (a) (5) because the contractual language "clearly and repeatedly states that the sole, whole and entire purpose of the contract was to facilitate the sale of the property."

We begin our analysis with the dictionary definition of the phrase "pertaining to." See, e.g., *Maturo* v. *State Employees Retirement Commission*, 326 Conn. 160, 176, 162 A.3d 706 (2017) ("[w]hen a term is not defined in a statute, we begin with the assumption that the legislature intended the word to carry its ordinary meaning, as evidenced in dictionaries in print at the time the statute was enacted"). The word "pertain" means "[t]o have reference; relate" or "[t]o belong as an adjunct or accessory . . . ." American Heritage Dictionary of the English Language (New College Ed. 1979) p. 979; see also Webster's Third New International Dictionary (1976) p. 1688 (defining "pertain" as "to belong to something as a part or member or accessory or product"). Thus, a transaction is one "pertaining to" the sale or rental of real property if the transaction refers or relates to the sale or rental, or if the transaction is an adjunct or accessory to the sale or rental. Under the former definition, any transaction for goods or services that is associated with or connected to the sale or rental of real property is exempted from the HSSA, whereas, under the latter definition, any transaction for goods or services that facilitates or aids the convenience or effectiveness of the sale or rental would be exempt. See American Heritage Dictionary of the English Language, supra, p. 1097 (defining "relate" as "[t]o bring into logical or natural association" and "[t]o have connection, relation, or reference"); Webster's Third New International Dictionary, supra, p. 11 (defining "accessory" as "an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else").

The defendants contend that it would yield absurd and unworkable results to construe the real property exception to apply to all transactions for goods and services that relate to, or are an adjunct or accessory to, the sale or rental of real property and urge us to

adopt a limiting principle to ensure that the exception does not operate beyond its intended scope.[18] By way of example, the defendants point out that homeowners who purchase new windows from a door-to-door seller with the subjective purpose of making their home more attractive to potential buyers or renters, and thereby aiding or facilitating the sale or rental of the home, would not be afforded the consumer protections of the HSSA, whereas homeowners who purchase the same windows from the same seller for their own benefit (i.e., with no immediate intention of selling or renting the home) would receive the protections of the statutory scheme. The defendants argue that a limiting construction is necessary because such a random result would defeat the remedial purpose of the HSSA, contrary to the intent of the legislature.

The HSSA is a remedial statue that "must be afforded a liberal construction in favor of those whom the legislature intended to benefit." *Rizzo Pool Co.* v. *Del Grosso*, 232 Conn. 666, 678, 657 A.2d 1087 (1995). As a corollary, we have recognized that exceptions to such statues "should be construed narrowly." *Fairchild Heights, Inc.* v. *Dickal*, 305 Conn. 488, 502, 45 A.3d 627 (2012). In construing the scope of the real property exception to the HSSA, we are mindful that we must intrepret the "statute in a manner that will not thwart its intended purpose or lead to absurd results. . . . We must avoid

[18] In the words of Justice Antonin Scalia, applying the phrase " 'relate[s] to' . . . according to its terms [is] a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 335, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) (Scalia, J., concurring). Accordingly, when the application requires as a practical matter that some limitation be used to cabin such an unbounded phrase, the underlying doctrinal purpose or legislative intention will set those boundaries. See *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, U.S. , 141 S. Ct. 1017, 1033, 209 L. Ed. 2d 225 (2021) (Alito, J., concurring in the judgment) ("[t]o rein in th[e] phrase ['relate to'], limits must be found").

a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve." (Internal quotation marks omitted.) *Tayco Corp.* v. *Planning & Zoning Commission*, 294 Conn. 673, 686, 986 A.2d 290 (2010). We agree with the defendants that it would defeat the remedial purpose of the HSSA if the consumer protections it provided were dependent on the subjective purpose for which a homeowner purchases consumer goods and services. See *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 785, 105 A.3d 103 (2014) (examining legislative history, even though language of statute was "plain and unambiguous," because "a literal application of the statutory language would lead to a bizarre result"); *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 803, 955 A.2d 15 (2008) ("[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended" (internal quotation marks omitted)). We therefore turn to extratextual sources of legislative intent to aid our interpretation. See *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 309 Conn. 412, 422, 72 A.3d 13 (2013) ("[w]hen a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter" (internal quotation marks omitted)).

The real property exception to the definition of a "home solicitation sale" was added to the HSSA in 1976 "[i]n order to conform to" the regulations promulgated by the Federal Trade Commission (FTC). 19 S. Proc., Pt. 3, 1976 Sess., p. 1241, remarks of Senator Louis Ciccarello; see Public Acts 1976, No. 76-165, § 1; see also Federal Trade Commission, Cooling Off Period for

Door-to-Door Sales, 35 Fed. Reg. 15,164 (September 29, 1970). The FTC rule, which was codified in 1974 at 16 C.F.R. § 429.0 et seq., was enacted to protect consumers from the deceptive sales practices and high-pressure tactics used by some door-to-door sellers of consumer goods and services. See Federal Trade Commission, Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,934, 22,937 (October 26, 1972). Under the FTC rule, like the HSSA, door-to-door sellers are required to furnish buyers, in a specified format, notice and explanation of their right to cancel the transaction within three business days. See 16 C.F.R. § 429.1 (b) (2020). The three day "cooling-off period" provides "the consumer with an opportunity to discuss his purchase with others, to reflect upon the provisions of the contract, and perhaps to do a little comparative shopping. This will give him some opportunity to discover misrepresentations made by the salesman, or to realize either that he is paying too high a price for the product or that he simply didn't know when he agreed to buy what he was being asked to pay." Federal Trade Commission, supra, 37 Fed. Reg. 22,942.

Similar to the HSSA, the FTC rule defines a "door-to-door sale" in relevant part as "[a] sale, lease, or rental of consumer goods or services in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller (e.g., sales at the buyer's residence or at facilities rented on a temporary or short-term basis, such as hotel or motel rooms, convention centers, fairgrounds and restaurants, or sales at the buyer's workplace or in dormitory lounges), and which has a purchase price of $25 or more if the sale is made at the buyer's residence or a purchase price of $130 or more if the sale is made at locations other than the

buyer's residence, whether under single or multiple contracts. . . ." 16 C.F.R. § 429.0 (a) (2020). "The term door-to-door sale does not include a transaction . . . [*p*]*ertaining to the sale or rental of real property*, to the sale of insurance, or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission." (Emphasis altered.) 16 C.F.R. § 429.0 (a) (6) (2020). The real property exception added to the HSSA in 1976, in other words, uses the exact words contained in the real property exception contained in the FTC rule promulgated in 1974.

The real property exception was adopted by the FTC to alleviate concerns expressed by the National Association of Real Estate Boards. See Federal Trade Commission, supra, 37 Fed. Reg. 22,948 and n.132. The FTC explained that, "[i]nsofar as the sale of real estate itself is concerned, neither the [FTC] nor members of the real estate sales industry believe that such sales would be subject to the rule as land would not fall within the scope of the definition of consumer goods or services. However, transactions in which a consumer engaged a real estate broker to sell his home or to rent and manage his residence during a temporary period of absence may fall within the class of transactions to which the rule would apply." Id., 22,948. In light of this concern, the FTC explicitly excluded transactions "pertaining to the sale or rental of real property" from the definition of a "door-to-door sale . . . ." (Internal quotation marks omitted.) Id., 22,948–49. In doing so, the FTC "emphasized that it is not intended to apply to the sale of goods or services such as siding, home improvements, and driveway and roof repairs." Id., 22,949.

It is clear that the real property exception to the FTC rule and analogous state statutes adopted in conformity therewith do not encompass routine transactions for home improvement goods and services, regardless of

the purpose for which these goods and services are purchased.[19] See, e.g., *Crystal* v. *West & Callahan, Inc.*, 328 Md. 318, 333, 614 A.2d 560 (1992) (holding that "home improvement transactions are not excluded from the Maryland Door-to-Door Sales Act" because "the General Assembly necessarily intended the exemption for real estate to be construed in the same manner as the comparable federal language is construed"). It is less clear, however, whether the real property exception excludes from the scope of the statute the purchase of goods and services that are inextricably related to, or an integral adjunct or accessory to, the sale or rental of real property, such as the engagement of a real estate broker. Stated another way, the FTC commentary fails to explain whether the real property exception was intended simply to codify the understanding that real property transactions are not goods and services under the rule, or whether it was intended to go farther and also exclude from the scope of the rule transactions for some goods and services that pertain to the sale or rental of real property.

There is a dearth of case law and scholarly commentary to aid us in answering this question, but what little authority exists indicates that the real property exception is not limited to transactions for the sale or rental

[19] We note that, under the Home Improvement Act (HIA), General Statutes § 20-418 et seq., home improvement contracts "shall be considered a home solicitation sale pursuant to chapter 740 and shall be subject to the requirements of said chapter regardless of the location of the transaction or of the signing of the contract." General Statutes § 20-429 (e). Thus, home improvement contractors must provide purchasers with notice of their cancellation rights. See generally *Wright Bros. Builders, Inc.* v. *Dowling*, 247 Conn. 218, 231, 720 A.2d 235 (1998) ("The HIA is a remedial statute that was enacted for the purpose of providing the public with a form of consumer protection against unscrupulous home improvement contractors. . . .The aim of the statute is to promote understanding on the part of consumers with respect to the terms of home improvement contracts and their right to cancel such contracts so as to allow them to make informed decisions when purchasing home improvement services." (Citation omitted.)).

of real estate per se but, instead, encompasses a *narrow* category of transactions involving goods and services that relate to the sale or rental of real property. See, e.g., *Busch* v. *Model Corp.*, 708 N.W.2d 546, 551 (Minn. App. 2006) (holding "that the [contract for the] construction . . . of a new permanent garage . . . [fell] within the 'sales of real property' exception to the home solicitation sale statute" and that "[the] respondent [therefore] was not required to comply with the home solicitation statute's notification requirements"); *Doyle* v. *Chihoski*, 443 A.2d 1243, 1244 (R.I. 1982) (real property exception to staturory definition of "home-solicitation sale" exempts from Home Solicitation Sales Act "any agreement calling for the payment of a commission to a real estate broker who produces the requisite ready, willing, and able buyer"); *McDaniel* v. *Pettigrew*, 536 S.W.2d 611, 615 (Tex. Civ. App. 1976, writ ref'd n.r.e.) (rejecting claim that contract for sale of unimproved lot and new home construction "was not a realty contract but an agreement for services to be performed" under real property exception because "the parties intended that the house to be built [on] the lot was to become a part of the realty"). See generally D. Pridgen et al., Consumer Credit and the Law (April, 2021) § 14:14 (noting that real property exceptions to state cooling off statutes are "quite specific" but encompass some goods and services). Consistent with these authorities, we are persuaded that the real property exception to the definition of a "home solicitation sale" in § 42-134a (a) (5) is not strictly limited to the sale or rental of real property.[20]

[20] The defendants argue that the real property exception to the HSSA should be construed narrowly consistent with the statute of frauds, which does not apply to listing agreements or broker contracts. See, e.g., *Location Realty, Inc.* v. *Colaccino*, 287 Conn. 706, 722, 949 A.2d 1189 (2008) (broker "listing agreements are governed exclusively by [General Statutes] § 20-325a [and] such contracts do not fall within our statute of frauds" (internal quotation marks omitted)); *Brazo* v. *Real Estate Commission*, 177 Conn. 515, 522, 418 A.2d 883 (1979) ("in this state, a contract employing a broker to sell land is not within the [s]tatute of [f]rauds"). The language and purpose

First, a "home solicitation sale" under the HSSA, which is the equivalent of a "door-to-door sale" under the FTC rule, is limited to the "sale, lease, or rental of *consumer goods or services* . . . ." (Emphasis added.) General Statutes § 42-134a (a); accord 16 C.F.R. § 429.0 (a) (2020). Thus, the real property exception, by definition, must apply to "consumer goods or services." See General Statutes § 42-134a (b) (" '[c]onsumer goods or services' means goods or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken"); see also 16 C.F.R. § 429.0 (b) (2020) (defining "consumer goods or services" as "[g]oods or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken"). If the real property exception was intended simply to codify the prevalent understanding that the sale or rental of real property does not "fall within the scope of the definition of consumer goods or services"; Federal Trade Commission, supra, 37 Fed. Reg. 22,948; then the exemption would have been included in the definition of "consumer goods or services," rather than the definition of a "door-to-door sale" under the FTC rule or a "home solicitation sale" under the HSSA.

of the HSSA is fundamentally different from that of the statute of frauds, however, and the defendants' reliance on our case law construing the statute of frauds is therefore misplaced. Compare General Statutes § 52-550 (a) ("[n]o civil action may be maintained in the following cases unless the agreement . . . is made in writing and signed by the party . . . to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property"), with General Statutes § 42-134a (a) (5) ("[t]he term 'home solicitation sale' does not include a transaction . . . pertaining to the sale or rental of real property"); see also *Heyman* v. *CBS, Inc.*, 178 Conn. 215, 221, 423 A.2d 887 (1979) ("the primary purpose of the statute [of frauds] is to provide reliable evidence of the existence and the terms of the contract").

Second, as we previously explained, the plain language of the real property exception is not limited to transactions for the sale or rental of real property. Instead, the exception extends to transactions "*pertaining to* the sale or rental of real property . . . ." (Emphasis added.) General Statutes § 42-134a (a) (5); see also 16 C.F.R. § 429.0 (a) (2020). It is axiomatic that "[e]ach word used by the legislature should be given effect and, as far as possible, the entire enactment is to be harmonized. . . . Words and and phrases of a statute are to be construed according to the commonly approved usage of the language." (Citations omitted; internal quotation marks omitted.) *Ganim* v. *Roberts*, 204 Conn. 760, 763, 529 A.2d 194 (1987). Construing the language of the statute in conformance with the FTC rule, as the legislature intended, and consistent with the remedial purpose of the HSSA, we conclude that a transaction is one "pertaining to the sale or rental of real property" if it is inextricably related to, or an integral adjunct or accessory to, the sale or rental. Accordingly, the sale, lease, or rental of such consumers goods or services are excluded from the definition of a "home solicitation sale" under § 42-134a (a) (5).[21]

[21] In arriving at this conclusion, we recognize that, in 2013, the FTC clarified the scope of the real property exception as applied to mortgage assistance relief services. See Federal Trade Commission, Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 78 Fed. Reg. 3855, 3857 (January 17, 2013). The FTC determined that the real property exception did not apply "to services related to real property, such as mortgage modification, mortgage loan brokerage, and foreclosure rescue services" because, "[a]s determined by the [FTC] when it promulgated the [cooling-off] [r]ule, this exclusion, which renders the [r]ule inapplicable to the sale of real estate, does not necessarily reach so far as to exempt service-related transactions in which a consumer engages a real estate broker to sell his or her home or to rent and manage his or her residence during a temporary period of absence. Similarly, the exclusion does not necessarily reach so far as to exempt the . . . mortgage assistance relief services . . . ." (Footnote omitted.) Id., 3857 and n.24, citing Federal Trade Commission, supra, 37 Fed. Reg. 22,948. In the view of the FTC, "the [c]ooling-[o]ff [r]ule's right to cancel should extend to door-to-door sales of [mortgage assistance relief services]" because sellers "direct their claims to financially

Having determined that a limited category of consumer goods and services may be excluded from the HSSA under the real property exception, we next consider whether the agreement at issue in the present case was inexctricably related to, or an integral adjunct or accessory to, the sale of the defendants' residence at 3 Cooper Lane. We begin and end our analysis with the language of the agreement, which definitively settles the question. The agreement provides that "[i]t is understood that 3 Cooper Lane . . . is for sale and that Joan E. Frank . . . has entered into this agreement with [the plaintiff] to stage the [p]roperty for the purpose of sell-

distressed consumers who often are desperate for any solution to their mortgage problems and thus are vulnerable to the providers' purported solutions." Federal Trade Commission, supra, 78 Fed. Reg. 3857. These concerns are "exacerbated in situations in which sellers exercise undue influence over susceptible classes of purchasers" in the context of door-to-door sales. Id.

The FTC's 2013 statement does not undermine our conclusion that the real property exception in the HSSA encompasses a limited category of consumer goods or services. The 2013 statement was released more than thirty years after the promulgation of the FTC's cooling-off rule and, therefore, is "a hazardous basis for inferring the intent of [the] earlier" FTC. (Internal quotation marks omitted.) *State* v. *Nixon*, 231 Conn. 545, 560, 651 A.2d 1264 (1995); see also 2A N. Singer & S. Singer, Statutes and Statutory Construction (7th Ed. 2014) § 48:20, p. 641 ("a subsequent legislature may change an act to achieve whatever prospective meaning or effect it desires, but courts generally give little or no weight to the views of members of subsequent legislatures about the meaning of acts passed by previous legislatures"). Even if this postenactment statement could be deemed useful in illuminating the purpose and intent animating the 1974 FTC exception to the cooling-off rule, it was not available to the Connecticut legislature in 1976, when the real property exception to the HSSA was adopted, and, therefore, is not indicative of our own legislature's intent. In addition, we cannot ignore the fact that the 2013 statement relates to special concerns stemming from the fallout of the 2008 financial crisis, which specifically involved the mortgage lending industry. This context plainly informs the FTC's statement expressing the view that certain transactions pertaining to the sale or rental of real property may fall outside the scope of the real property exception if a seller targets vulnerable and desperate consumers who are not in a position to make "informed purchasing decisions . . . ." Federal Trade Commission, supra, 78 Fed. Reg. 3857. The agreement at issue in this case is far removed from such concerns.

ing the [p]roperty." The initial term of the lease was for four months or "until the buyer's contingencies are either satisfied or waived with respect to the purchase of the [p]roperty, whichever comes first. If, after the expiration of the four . . . months, [t]he [p]roperty is not in escrow, the lease shall continue on a month to month basis provided that either party may terminate upon [fifteen] business day prior written notice . . . ." Joan Frank was required to "inform [the plaintiff] when the [p]roperty goes into escrow, the date the contingencies are expected to be satisfied, and the date escrow is expected to close. [The plaintiff] may remove the [i]nventory once all of the buyer's contingencies have been met, expired or have been waived," or "[i]f the [p]roperty is not listed on the [multiple listing services] within [sixty] days of the completion of staging . . . ." Joan Frank was further required to "notify the prospective buyer of the [p]roperty that the [i]nventory is the subject of th[e] [a]greement and that [the plaintiff] has the absolute right hereunder to remove the [i]nventory from the [p]roperty before the close of escrow. [Joan Frank] shall provide [the plaintiff] with at least [ten] business days prior written notice . . . of the anticipated date of the close of escrow or other sale or transfer of the [p]roperty. . . . [The plaintiff] shall have not less than [three] business days (following the expiration of the time period pursuant to the [n]otice of [c]losing [d]ate or the [n]otice of [t]ermination) within which to complete its removal of all [i]nventory . . . ."

The sale of the defendants' residence was the stated purpose of the agreement, defined the duration of the agreement, and delimited its various terms. Under the agreement, for example, the plaintiff could remove the home furnishings and décor if the defendants' residence was not listed for sale within a prescribed period of time or if, after listing, a buyer had been found and the buyer's contingencies had been met, expired, or waived.

Additionally, the initial lease term was delineated by the procurement of a buyer for the residence and automatically continued on a monthly basis, so long as the defendants' residence was not in escrow or the lease was not terminated. Given that the terms of the agreement were intertwined with the sale of the property, we conclude that the agreement was inextricably related to, or an integral adjunct or accessory to, the sale of the defendants' residence and, therefore, excluded from the definition of a "home solicitation sale" pursuant to § 42-134a (a) (5). Accordingly, the trial court correctly determined that the agreement was not subject to the notice of cancellation provisions in the HSSA.

III

Lastly, we address the defendants' claim that the trial court's award of damages was improper. The defendants contend that the trial court awarded the plaintiff "double damages" by rendering judgment against both George Frank and Joan Frank for the same loss and incorrectly calculated the amount of damages for which Joan Frank was liable on the breach of contract count by including the conversion value of the home furnishings and décor. The plaintiff acknowledges that it "may collect only once for the same injury" but argues that the trial court "properly awarded the appropriate amount as to each count representing recovery for each wrong complained of." The plaintiff further argues that the trial court properly included the value of the home furnishings and décor in its award of damages on the breach of contract count because Joan Frank's wrongful conduct resulted "in the total loss of that inventory to the plaintiff."

We begin our analysis with the defendants' double recovery claim. "Plaintiffs are not foreclosed from suing multiple defendants, either jointly or separately, for

injuries for which each is liable, nor are they foreclosed from obtaining multiple judgments against joint [or successive] tortfeasors." (Footnote omitted; internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 111–12, 952 A.2d 1 (2008). "This rule is based on the sound policy that seeks to ensure that parties will recover for their damages." *Gionfriddo* v. *Gartenhaus Cafe*, 211 Conn. 67, 71, 557 A.2d 540 (1989). "The possible rendition of multiple judgments does not, however, defeat the proposition that a litigant may recover just damages only once. . . . Double recovery is foreclosed by the rule that only one satisfaction may be obtained for a loss that is the subject of two or more judgments." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 71–72; see *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 29 n.14, 699 A.2d 964 (1997) ("the principle against double recovery for the same loss applies in both tort and contract law"); 2 Restatement (Second), Judgments § 49, comment (b), p. 36 (1982) ("[a] judgment against one obligor under a contract does not terminate the claim against another obligor under the contract"). In general, a loss is satisfied when a judgment of economic damages rendered in favor of the plaintiff in compensation for the loss has been paid in full. See *Gionfriddo* v. *Gartenhaus Cafe*, supra, 69, 75–76 (plaintiff was precluded from suing joint tortfeasor for wrongful death of decedent under double recovery doctrine because "the plaintiff received compensatory, exemplary and treble damages in the amount of $1,187,763" for his loss in prior action, which "the defendants . . . satisfied . . . in full"); see also *Mazziotti* v. *Allstate Ins. Co.*, 240 Conn. 799, 807, 695 A.2d 1010 (1997) ("The satisfaction of a judgment refers to compliance with or fulfillment of the mandate thereof. . . . There is realistically no substantial difference between the words paid and satisfied in the judgment context." (Citation omitted; internal quotation marks omitted.)).

The trial court's judgment on count one of the complaint against George Frank and count two of the complaint against Joan Frank awarded money damages in different amounts for the same underlying loss. George Frank is personally liable for the damages awarded on count one; Joan Frank is personally liable for the damages awarded on count two.[22] Any payments made by George Frank in satisfaction of the judgment against him reduces the amount owed by Joan Frank, and any payments made by Joan Frank in satisfaction of the judgment against her reduces the amount owed by George Frank. See *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 72 n.5 (" 'When a judgment has been rendered against one of several persons each of whom is liable for a loss claimed in the action on which the judgment is based . . . [a]ny consideration received by the judgment creditor in payment of the judgment debtor's obligation discharges, to the extent of the amount of value received, the liability to the judgment creditor of all other persons liable for the loss.' Thus, '[a] payment by one person liable for a loss reduces pro tanto the amount that the injured person is entitled to receive from other persons liable for the loss.' "), quoting 2 Restatement (Second), supra, § 50 and comment (c), pp. 40–42.

It is undisputed that the plaintiff's loss was wholly unsatisfied when the trial court rendered judgment in

[22] The California default judgment compensated the plaintiff for George Frank's breach of the agreement, just as the trial court's judgment on count two compensated the plaintiff for Joan Frank's breach of the agreement. The trial court's award of damages against George Frank on count one, enforcement of the California default judgment, was the same as the amount awarded by the California court: $259,746.10. The trial court's award of damages against Joan Frank on count two, breach of contract, was for $283,106.45. The award of damages against Joan Frank was not calculated on the basis of the California judgment but, instead, was determined by the trial court on the basis of evidence presented at trial regarding the damages sustained by the plaintiff as a result of Joan Frank's breach of the agreement. On appeal, the defendants do not challenge the discrepancy between the damages awarded against George Frank and Joan Frank.

favor of the plaintiff on counts one (enforcement of the California judgment against George Frank) and two (breach of contract against Joan Frank). Although the plaintiff may recover only once for its loss, the trial court was "not foreclosed" from rendering judgment in favor of the plaintiff against both defendants "jointly *or separately*, for injuries for which each is liable . . . to ensure that [the plaintiff] will recover for [its] damages." (Ciations omitted; emphasis added; footnotes omitted.) *Gionfriddo* v. *Gartenhaus Cafe*, supra, 211 Conn. 71. We therefore reject the defendants' double recovery claim.

Lastly, the defendants contend that the amount of damages awarded to the plaintiff on its breach of contract claim against Joan Frank was incorrect because it included the value of the home furnishings and décor installed at 3 Cooper Lane. The following additional facts are relevant to this claim. The agreement provided that, at the conclusion of the lease term for the rental of the home furnishings and décor, the plaintiff "shall have not less than [three] business days . . . within which to complete its removal of all [i]nventory, with [Joan Frank's] permission, which will not be unreasonably withheld." (Emphasis in original.) Furthermore, the agreement required Joan Frank to acquire, prior to installation of the home furnishings and décor, a $200,000 "insurance policy insuring the value of the [i]nventory and a [g]eneral [l]iability policy of insurance, each naming [the plaintiff] as an additional insured." Following installation, the plaintiff was required to provide Joan Frank "with a list of the [i]nventory and values. If [i]nventory is damaged, lost, stolen or destroyed, [Joan Frank] will immediately notify [the plaintiff] in writing, and file all necessary reports, including those required by [the] insurer or by law. . . . [Joan Frank] shall be primarily liable to [the plaintiff] for any loss or liability related to the [i]mprove-

ments and shall pay to [the plaintiff] any '[s]tipulated [l]oss [v]alue' or other damages not covered by insurance."

At trial, the plaintiff admitted into evidence a list of the home furnishings and décor installed at 3 Cooper Lane pursuant to the parties' agreement, as well as documentation of their value and photographs depicting their quality and appearance after installation. On the basis of this evidence, the trial court found that the home furnishings and décor were "appropriate" for the defendants' "luxury home in an affluent community . . . ." The trial court also found "credible the plaintiff's uncontested evidence [namely] the schedule of values of the inventory based on standard industry pricing for used furniture of the quality provided to the defendants. The plaintiff has lost the use of the inventory, and, moreover, the defendants have been wrongfully using the furniture in their personal residence for approximately three years. The inventory was . . . supposed to be there [only] for a period of months. Consequently, the plaintiff had to replace the inventory. The essence of the staging agreement was to give the defendants' residence a showroom quality appearance, and, as noted, the inventory is reflective of that quality. Therefore, the court awards damages related to the inventory loss for the plaintiff and against Joan Frank on the first count in the amount of $235,598. Additionally, the evidence establishes that Joan Frank is responsible to the plaintiff for the rental loss and related late fees in the amount of $47,508.45. In view of the foregoing, the court awards damages on the second count for the plaintiff and against . . . Joan Frank . . . in the amount of $283,106.45."

It is well established that "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous." (Cita-

tions omitted; internal quotation marks omitted.) *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 68, 717 A.2d 724 (1998). "In a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the verdict to which it is entitled. . . . A factual finding may be rejected by this court only if it is clearly erroneous. . . . A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . We are, therefore, constrained to accord substantial deference to the fact finder on the issue of damages. In deciding whether damages properly have been awarded, however, we are guided by the well established principle that such damages must be proved with reasonable certainty." (Citation omitted; internal quotation marks omitted.) Id., 68–69.

"The general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in the same position as that which he would have been in had the contract been performed. . . . It has traditionally been held that a party may recover general contract damages for any loss that may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself." (Internal quotation marks omitted.) *Torosyan* v. *Boehringer Ingelheim Pharmaceuticals, Inc.*, 234 Conn. 1, 32, 662 A.2d 89 (1995). Thus, in a breach of contract action, the plaintiff's damages are limited to those that "the defendant had reason to foresee as the probable result of the breach at the time when the contract was made." *Neiditz* v. *Morton S. Fine & Associates, Inc.*, 199 Conn. 683, 689 n.3, 508 A.2d 438 (1986); see also 3

Restatement (Second), Contracts § 351 (1) and (2), p. 135 (1981) ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made. . . . Loss may be foreseeable as a probable result of a breach because it follows from the breach . . . in the ordinary course of events . . . ."). "[T]he question whether a particular element of loss was reasonably foreseeable is a question of fact . . . ." (Internal quotation marks omitted.) *Ambrogio* v. *Beaver Road Associates*, 267 Conn. 148, 162, 836 A.2d 1183 (2003).

We conclude that the trial court's award of damages for the plaintiff's loss of the home furnishings and décor was not clearly erroneous.[23] The agreement required Joan Frank to permit the plaintiff to remove the home furnishings and décor at the conclusion of the lease term, to insure them for $200,000, and to pay the plaintiff "damages not covered by insurance" if they were "damaged, lost, stolen or destroyed . . . ." The trial court found that Joan Frank breached the agreement and "wrongfully us[ed] the furniture in [the defendants'] personal residence for approximately three years," thus causing the plaintiff's total loss of the inventory valued at $235,598. In light of these facts, which the defendants do not challenge on appeal, we perceive no error in the trial court's finding that the plaintiff's loss of the home furnishings and décor was a reasonably foreseeable consequence of Joan Frank's breach of the agreement. We therefore uphold the trial court's award of damages in favor of the plaintiff.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and McDONALD and KAHN, Js., concurred.

[23] Joan Frank does not challenge the trial court's award of $47,508.45 for the lost rental value of the home furnishings and décor and related late fees; nor does she claim that the award of damages for both rental loss and inventory loss for the home furnishings was improper.

D'AURIA, J., with whom MULLINS, J., joins, concurring in part and dissenting in part. I agree with parts II and III of the majority opinion, specifically, the court's determinations that the contract at issue was not a "home solicitation sale" within the meaning of General Statutes § 42-134a (a) (5) and that the trial court's award of damages was proper. I respectfully dissent, however, from part I of the majority opinion, which holds that the state court in California had personal jurisdiction over the defendant George A. Frank on the basis of the application of California law and, specifically, the "closely related" doctrine. I do not believe it is prudent for us to consider and decide the issue of personal jurisdiction on the basis of a theory that the plaintiff did not advance, either in the trial court or before this court. If the court is unable to uphold the trial court's determination of personal jurisdiction over George Frank in California on the basis of the factual record developed and the legal theory the plaintiff has argued, I would end the inquiry and reverse the trial court's judgment as to George Frank on count one of the plaintiff's complaint.

I agree completely that the full faith and credit clause of the United States constitution governs an action to enforce a foreign judgment in this state and requires that we "accord to the judgment of another state the same credit, validity and effect as the state that rendered the judgment would give it. . . . This rule [is tempered by] the proposition that lack of jurisdiction [in that foreign court] renders a foreign judgment void." (Citation omitted.) *Packer Plastics, Inc.* v. *Laundon*, 214 Conn. 52, 56, 570 A.2d 687 (1990). I also agree that "[t]he party raising a jurisdictional claim as a defense against the enforcement of a foreign judgment bears the burden of proving, by a preponderance of the evidence, facts that demonstrate that the foreign court lacked jurisdic-

tion." (Internal quotation marks omitted.) Part I of the majority opinion, quoting *Maltas* v. *Maltas*, 298 Conn. 354, 364 n.11, 2 A.3d 902 (2010). However, I am unaware of authority holding that our full faith and credit obligation requires that we research and vindicate arguments that the plaintiff has not made in support of the foreign judgment.

The trial court in this case found that George Frank had failed to carry his burden of demonstrating that the California court lacked jurisdiction, rejecting his argument that he did not consent to jurisdiction in California because he was not a party to the "Staging Services and Lease Agreement" (agreement) and, therefore, that the forum selection clause in the agreement "cannot form a proper basis for jurisdiction." Rather, the trial court found, on the basis of the factual record, that George Frank had been properly served in Connecticut and had "signed a guarantee of the staging agreement with a company [the plaintiff] that has a principal place of business in California and that provides that Los Angeles is the appropriate forum." The trial court therefore determined that the court in California had personal jurisdiction over George Frank on the basis of proper service of process and constitutionally sufficient minimum contacts. George Frank originally appealed from the trial court's judgment nearly seven years ago.

This case has now been before this court twice and before the Appellate Court once. In both courts, and in all three appeals, the parties have briefed and argued the issue of whether the court in California had personal jurisdiction over George Frank in rendering a default judgment against him on the terms that the trial court addressed. See *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 714–15, 183 A.3d 1164 (2018); *Meribear Productions, Inc.* v. *Frank*, 165 Conn. App. 305, 311–15, 140 A.3d 993 (2016). Specifically, George Frank has

consistently argued that he lacked sufficient minimum contacts with California and that the assertion of personal jurisdiction over him in that state offended traditional notions of fair play and substantial justice, in violation of the due process clause of the fourteenth amendment to the United States constitution. See *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 478, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) ("an individual's contract with an out-of-state party *alone* [cannot] automatically establish sufficient minimum contacts in the other party's home forum" (emphasis in original)). The plaintiff has not raised any alternative ground to affirm the trial court's judgment against George Frank. See Practice Book § 63-4 (a) (1) (A).

The majority declines to address the jurisdictional question that both the trial court and the Appellate Court decided, that George Frank and his wife, the named defendant, Joan E. Frank, have challenged and briefed on appeal, and that the plaintiff has responded to in kind. Rather, the majority states: "We need not address the defendants' minimum contacts argument because we conclude that George Frank consented to personal jurisdiction in California."

In support of this conclusion, the majority has discovered a different legal theory, which is based on California law, that, when applied to the factual record here, the majority holds resulted in personal jurisdiction over George Frank on the basis of consent, regardless of whether he signed the agreement containing the forum selection clause. Specifically, the majority applies California's "closely related" doctrine, an exception to the general rule that a nonsignatory to a contract is not bound by a forum selection clause contained in that contract. See *Berclain America Latina, S.A. de C.V.* v. *Baan Co. N.V.*, 74 Cal. App. 4th 401, 405, 87 Cal. Rptr. 2d 745 (1999). Under the closely related doctrine, a forum selection clause may be enforced against a non-

signatory who is "so closely involved in the agreement or associated with a party to the transaction as to be functionally equivalent to that party." Id., 403; see also *Net2Phone, Inc.* v. *Superior Court*, 109 Cal. App. 4th 583, 588, 135 Cal. Rptr. 2d 149 (2003), review denied, California Supreme Court, Docket No. S117411 (August 27, 2003). Applying California law, the majority concludes that George Frank was so "closely related" to the agreement that he is bound by its forum selection clause and, on the basis of this theory, concludes that he therefore consented to personal jurisdiction in California. In support of this conclusion, the majority cites to the following facts: George Frank participated in the negotiation of the agreement; he made substantive changes to the agreement; he executed Addendum B, a credit card authorization for payment of the staging services; he was married to the agreement's signatory, Joan Frank; and he personally benefited from the agreement.

Although the majority has "no trouble concluding that [George Frank] received a direct benefit under the agreement," that is a finding that the trial court did not make. Indeed, because the home at issue was only in Joan Frank's name and George Frank was not a signatory to the agreement, any benefit George Frank derived from using the furniture while he lived in the house with her might be more aptly described as indirect. Further, much of this indirect benefit stems from the breach of the agreement, not the agreement itself. Nor do I have the same confidence as the majority does that, without the input of the parties, I know with any certainty whether the closely related doctrine, which has not been litigated in Connecticut, properly applies to this case.[1] In particular, I note that, in each of the

[1] Nor do I consider this case a good candidate for seeking supplemental briefing from the parties because the plaintiff has not sought to inject this theory into the case. See, e.g., *State* v. *Armadore*, 338 Conn. 407, 419–20, 258 A.3d 601 (2021) (appellate courts have discretion to order supplemental briefing).

California cases cited by the majority, it was the defendant who sought the protection of the forum selection clause. See *Net2Phone, Inc.* v. *Superior Court*, supra, 109 Cal. App. 4th 587; *Bancomer, S. A.* v. *Superior Court*, 44 Cal. App. 4th 1450, 1461, 52 Cal. Rptr. 2d 435 (1996); *Lu* v. *Dryclean-U.S.A. of California, Inc.*, 11 Cal. App. 4th 1490, 1493–94, 14 Cal. Rptr. 2d 906 (1992). Because the courts of California have not weighed in on whether the closely related doctrine applies under these facts, I hesitate to presume that it does.

But, even if I had confidence in the factual record or in my own ability to determine and apply California law, I would be disinclined to decide this civil case, between two well represented parties, in the way the majority does. Although the majority is correct that, "[i]n resolving a claim raised by the parties, we are not required to constrain our analysis to the law relied on by the parties"; *In re David B.*, 167 Conn. App. 428, 448 n.10, 142 A.3d 1277 (2016); I believe the court's resolution of this personal jurisdiction issue taxes the limits of that latitude, although I would hasten to add that reasonable minds can differ on this point. More particularly, in addition to my concern that we might be going beyond the confines of our adversarial system in our discovery of an additional doctrine that supports the plaintiff, I am at least equally concerned about cases in which we do *not* summon a similar ingenuity to bring a different approach to an issue that might arguably be related to that which is under consideration. How will we know when to do so and when not to?

To be sure, this is not an easy line to draw, and appellate courts struggle mightily to do so with any consistency. As the majority indicates, distinguishing between "claims or issues" that the parties themselves have not raised, on the one hand, and "arguments or factors" pertaining to claims or issues they *have* raised, on the other, can be challenging. See, e.g., *Jobe* v. *Com-*

missioner of Correction, 334 Conn. 636, 644 n.2, 224 A.3d 147 (2020); *State* v. *Santiago*, 318 Conn. 1, 124, 122 A.3d 1 (2015). Nor is it easy to determine whether a legal argument is "subsumed within or intertwined with arguments related to the legal claim" before the court. (Internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, supra, 644 n.2. The court's foray into California law not cited or argued by the parties is too far for me in the present case, however, and I would not reach the ground for upholding personal jurisdiction over George Frank that the majority reaches.

In my view, the majority's determination not to affirm on the ground on which the trial court decided the case must mean the majority has grave doubts that it can affirm on that ground. This to say that, if the court believed it could affirm on the more straightforward and conventional minimum contacts analysis that the trial court found and the parties briefed, I doubt seriously it would venture into California law. So, although George Frank, in the majority's view, was so "closely related" to the agreement with the forum clause that he is deemed to have consented to jurisdiction in California, this close relationship to a contract with the California plaintiff apparently falls short of establishing minimum contacts, either by itself or in combination with any other facts of record. For the purposes of my opinion, I accept this implied determination that personal jurisdiction over George Frank cannot constitutionally be sustained and would stop there.

I therefore respectfully dissent as to the determination of personal jurisdiction over George Frank.