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KATZ, J., concurring. In this appeal, the state does not challenge the trial court's finding that the defendant, Nicholas A. Brunetti, had been seized illegally by the police at his home and transported to the police station for interrogation in violation of his rights under the fourth amendment to the federal constitution.[1] The state contends, however, that ''the connection between the unconstitutional police conduct and the confession obtained from the defendant during his illegal detention was sufficiently attenuated to permit the use at trial of the confession and other evidence related to it.'' Specifically, the state relies on the evidence seized from the defendant's family's home to provide the otherwise missing probable cause for his detention and arrest.[2] The state contends that, ''the police acquired probable cause to arrest the defendant through independent means when they lawfully searched his parents' house and discovered his bloody clothing in their washing machine, a significant intervening circumstance which cut off any causal connection between the seizure and the confession.'' According to the state, therefore, the clothing served to purge the taint of the defendant's initial illegal seizure, and this court should uphold the trial court's decision to admit his confession into evidence. Finally, the state contends that the defendant confessed only after he had been confronted with the clothing properly seized and after he had waived his *Miranda*[3] rights, and that combined, these two factors acted as ''legitimate intervening circumstances to dissipate the taint of the defendant's earlier illegal arrest.'' (Internal quotation marks omitted.)

Following an analysis pursuant to *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), the plurality in the present case concludes that, under the circumstances of this case, the defendant is entitled to the suppression of evidence seized from his home pursuant to the prohibition against unreasonable searches and seizures afforded by article first, § 7, of the Connecticut constitution. The plurality does not decide, however, whether the defendant could prevail under the federal constitution, concluding that ''fourth amendment jurisprudence is not instructive,'' and, therefore, does not decide whether the state constitution affords the defendant greater protection than its federal counterpart. See footnote 7 of the plurality opinion. Because I would conclude that the warrantless search of the defendant's home was violative of the federal constitution, I write separately.[4]

I

The defendant filed a motion to suppress the evidence seized from his family's home in West Haven, claiming that the state could not demonstrate that the consent

to search the home was given voluntarily. Following a hearing on the motion, the defendant argued that the state had not proven that the *only* consent given, the one provided by his father, Anthony Brunetti, Sr., had been the product of a free and voluntary choice because his father had been influenced improperly by the police—specifically, the defendant's uncle, John Brunetti, a West Haven police detective. The trial court denied the defendant's motion and, accordingly, allowed the state to introduce into evidence the items seized during that search.

On appeal, the defendant acknowledges, as he must, that at trial he did not raise the refusal by his mother, Dawn Brunetti, to consent to the search as an independent basis upon which to grant his motion to suppress. Instead, the defendant argued only that the state had not proven that the consent given by his father had been the product of a free and voluntary choice. He contends nevertheless that he is entitled to review of this claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The plurality agrees, as do I. I believe, however, that the adequacy of the record to review the claim in this case warrants further explanation.

It is clear that the defendant's unpreserved claim raises an issue of constitutional magnitude. It is beyond dispute that one of the most fundamental propositions of our criminal jurisprudence is ''that searches and seizures inside a home without a warrant are presumptively unreasonable.'' *Payton* v. *New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); accord *State* v. *Guertin*, 190 Conn. 440, 446, 461 A.2d 963 (1983). It is equally well settled that, ''[a] warrantless search [or entry into one's home] is not unreasonable under . . . the fourth amendment to the constitution of the United States . . . if a person with authority to do so has freely consented . . . . The state bears the burden of proving that the consent was free and voluntary and that the person who purported to consent had the authority to do so.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Reagan*, 209 Conn. 1, 7, 546 A.2d 839 (1988). Such consent to search may not be established by mere acquiescence to police authority. *State* v. *Jones*, 193 Conn. 70, 79, 475 A.2d 1087 (1984).

''[W]hether consent to a search has in fact been freely and voluntarily given, or was the product of coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. . . . *Schneckloth* v. *Bustamonte*, [412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)]. As a question of fact, it is normally to be decided by the trial court upon the evidence before that court together with the reasonable inferences to be drawn from that evidence.'' (Internal quotation marks omitted.) *State* v. *Reagan*, supra, 209 Conn. 7–8; accord *Dotson* v. *Warden*, 175 Conn. 614,

619, 402 A.2d 790 (1978). The ultimate question is whether the will of the consenting individual was overborne, or whether the consent was his unconstrained choice. *Schneckloth* v. *Bustamonte*, supra, 225–26. In reviewing the trial court's determination, we are mindful of our obligation to examine scrupulously the record concerning such matters. See *State* v. *Northrop*, 213 Conn. 405, 414, 568 A.2d 439 (1990); *State* v. *Harris*, 188 Conn. 574, 579–80, 452 A.2d 634 (1982), cert. denied, 460 U.S. 1089, 103 S. Ct. 1785, 76 L. Ed. 2d 354 (1983).

Against this backdrop, I turn to the record and the trial court's findings in its decision regarding the search of the defendant's home. At the hearing on the motion to suppress, the defendant's father, Anthony Brunetti, related that West Haven police detectives Joseph Biondi and Anthony Buglione took the defendant to the police station and that he and his wife followed soon thereafter to wait for their son. According to Anthony Brunetti, while he and his wife were waiting at the station, they were approached by Detective James Sweetman and State Trooper Mark Testoni. Sweetman asked both of the defendant's parents to sign a form giving the police their consent to search the family's home. Sweetman explained what the form was and informed the defendant's parents that they had the right not to sign it. Anthony Brunetti testified that, when his wife was asked to sign the consent form, she ''declined. She did not want to sign it.'' Dawn Brunetti also testified that she refused to sign the consent form.

Anthony Brunetti did sign the form, however, only after discussing the matter with his brother, John Brunetti, a West Haven police detective. According to Anthony Brunetti, he signed the form after his brother told him that if he did not sign the form, ''[the West Haven police] could obtain a search warrant and possibly keep you from going back into your home until the search warrant . . . is obtained.'' On the basis of this testimony, the defendant argued at the suppression hearing that his father's consent did not meet constitutional standards of voluntariness because it had been given only in response to police admonitions that refusal would be futile. Specifically, the defendant contended that, under *State* v. *Jones*, supra, 193 Conn. 80, his father's consent was not voluntary because ''the intimation that a warrant will automatically issue is as inherently coercive as the announcement of an invalid warrant.'' (Internal quotation marks omitted.)

The trial court denied the defendant's motion to suppress from the bench, orally articulating the basis of its decision and making specific findings regarding the issue. Of note is the trial court's discussion rejecting the defendant's reliance on *Jones*. The court stated: ''[T]his is not an issue as decided in [*Jones*], one of acquiescence to . . . a claim of lawful authority. It is not that. *It is clear that at least one of the parties [in*

the present case], one of the parents declined to consent to [the] search. . . . [The defendant's father] sought information, information to decide whether or not he should sign the consent. He sought information to make an informed decision. He made it clear for the record that he knew he did not have to sign it. He made that quite clear. There was no coercion, there was no force, there was no mere acquiescence. [The defendant's father] invited comment by his brother, sought his advice as he should. [His brother is] experienced in this area. And based upon that advice, [the defendant's father] consented to [the] search.'' (Emphasis added.)

In light of these factors, I would conclude that the record is sufficient for review of the defendant's claim that his mother's refusal to consent rendered the search invalid. Moreover, I disagree with the state's contention that the record merely reflects that the defendant's mother refused to sign the consent form and that such failure to sign is not tantamount to a refusal to consent. See *State* v. *Harris*, supra, 188 Conn. 580 (concluding that defendant's ''expressed willingness to speak constituted an explicit affirmative act evidencing waiver [of the right to refuse consent to the search], which the court could reasonably find persuasive despite the defendant's initial refusal to sign the waiver form''). As a matter of law, a decision not to sign a consent form does not preclude a finding based on other conduct or statements that the person actually did consent. See id. Indeed, the trial court is bound to consider the totality of the circumstances. *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 227. Conversely, however, *in the absence of evidence to the contrary*, a decision not to sign a consent form reasonably may lead to a finding that the person refused to give his or her consent. In either case, we cannot disturb the trial court's finding of fact as to consent to search unless that finding is clearly erroneous. *State* v. *Cobb*, 251 Conn. 285, 315, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

On the basis of the totality of the circumstances of the present case, the trial court's statement that, ''[i]t is clear that at least one of the parties, one of the parents declined to consent to [the] search,'' reflected its finding that the defendant's mother in fact had not consented, not that she merely had refused to sign the consent form. The context in which the trial court made that statement supports this conclusion because the court prefaced the remark by distinguishing the present case from *State* v. *Jones*, supra, 193 Conn. 79–80, wherein the issue of mere acquiescence was at play. In other words, the trial court was taking the present case out of the realm of silence, inferences, mere acquiescence, submission, acceptance, tacit agreement or compliance. Accordingly, the trial court made that statement as an expression of its finding that the defendant's mother had not consented to the search.

Indeed, it is evident by comparing the trial court's discussion of Dawn Brunetti's consent or lack thereof with its discussion of Anthony Brunetti's consent that, in the trial court's view, the decision to sign or not to sign the consent form was synonymous with a decision whether to consent to the search, absent evidence to the contrary. The trial court found that Anthony Brunetti voluntarily had consented to the search of his home based solely on his decision to sign the consent form following a discussion with his brother. The trial court did not discuss consent based on conduct or verbal acquiescence. Rather, the court discussed consent only in the context of the signed form. As I previously have indicated, the court stated: "[Anthony Brunetti] sought information, information *to decide whether or not he should sign the consent*. He sought information to make an informed decision. He made it clear for the record that he knew he did not have to sign it. He made that quite clear. There was no coercion, there was no force, there was no mere acquiescence. [The defendant's father] invited comment by his brother, sought his advice as he should. [His brother is] experienced in this area. And based upon that advice, [the defendant's father] consented to [the] search." (Emphasis added.) Therefore, the only evidence the trial court pointed to as evidence of Anthony Brunetti's consent was his decision to sign the form. That decision to sign reflected his consent. Similarly, Dawn Brunetti's decision not to sign reflected her refusal to consent to the search. The trial court's finding to that effect was not clearly erroneous in light of the record before it and its ability to observe the witnesses' demeanor.

Finally, I note that it was the state's burden to prove that the police had obtained consent to the search.[5] *State* v. *Reagan*, supra, 209 Conn. 7. To the extent that the record is not as complete as this court ideally would like, I am mindful of the defendant's efforts to perfect the record on this issue—filing a motion for an articulation on, inter alia, this issue and filing a motion for review of the trial court's denial of that motion—and the state's opposition to those efforts. Accordingly, I agree with the plurality that the record is adequate for review of the defendant's claim that the search and seizure were illegal because his mother did not consent to the search.

II

It is well recognized that the voluntary consent of any co-occupant of a residence to search premises jointly occupied is valid against the absent co-occupant, thereby permitting evidence discovered in the search to be used against him at a criminal trial. See *Frazier* v. *Cupp*, 394 U.S. 731, 740, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (rejecting petitioner's claim that his cousin's consent to search of duffel bag, which was being used jointly by both men and had been left in cousin's home,

would not justify seizure of petitioner's clothing found inside; joint use of bag rendered cousin's authority to consent to its search clear). In *United States* v. *Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), the United States Supreme Court held, therefore, that, ''when the state seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.'' That holding is rooted in the theory that one co-occupant exercises full control of the premises in the absence of another co-occupant because we rationalize that the absent one has assumed the risk that a warrantless search will be conducted in his absence and even perhaps against his wishes.[6] Id.; see *United States* v. *Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990) (''[t]he underpinning of third-party consent is assumption of risk''), cert. denied sub nom. *Chavira* v. *United States*, 501 U.S. 1234, 111 S. Ct. 2861, 115 L. Ed. 2d 1028 (1991). Notably, *Matlock* was premised on facts wherein the police arrested the defendant in the front yard of a house he occupied with others, did not ask the defendant for consent to search and, instead, sought and obtained consent from a co-occupant inside the house. Therefore, *Matlock* did not address the situation in which joint occupants both are present, contemporaneously are asked for their consent and give conflicting responses.

To date, the United States Supreme Court has not spoken *directly* on this issue, and other federal and state courts that have considered the issue are split on whether, under the federal constitution, a person present and refusing consent has a constitutionally cognizable privacy interest when another similarly situated person consents to the search. The majority view holds that consent by a co-occupant should prevail, despite the objection of a co-occupant who is present. See 3 W. LaFave, Search and Seizure (4th Ed. 2004) § 8.3 (d), p. 159. These courts have adopted this rule, at least in broad principle,[7] but, significantly, several of those cases are distinguishable in that they involved criminal conduct *by* one co-occupant *against* the other, often domestic violence.[8] Thus, under the facts in those cases, the consenting party arguably had more significant rights at stake than the objecting, nonconsenting defendant.

The minority view, that consent of a co-occupant does *not* negate the express objection of a present co-occupant, is premised on an understanding of two related principles underlying the majority view. In accordance with the *Matlock* assumption of risk theory, ''the point is that a person's authority to consent in his 'own right' does not go so far as to outweigh an equal claim to privacy by a co-occupant on the scene, and

that the risk assumed by joint occupancy is merely an inability to control access to the premises *during one's absence.*'' (Emphasis added.) Id. Under this view, the courts ''have recognized that the assumption of risk inherent in co-occupancy has its limits. An entry or search, even though authorized by a co-occupant, may be so intrusive that it belies the conclusion that the parties assumed or even contemplated the risk of its occurrence by deciding to jointly inhabit the subject residence.'' *People* v. *Haskett*, 30 Cal. 3d 841, 857, 640 P.2d 776, 180 Cal. Rptr. 640 (1982). Indeed, it is reasoned that ''the consent of both is required when both are present because ordinarily, persons with equal 'rights' in a place would accommodate each other by not admitting persons over another's objection while he was present.'' (Internal quotation marks omitted.) 3 W. LaFave, supra, § 8.3 (d), p. 159.

Under a related property based theory, an absent co-occupant assumes some risk that present co-occupants may permit others to enter the home, but only because the absent co-occupant has relinquished control over the premises by virtue of his or her absence. The California Court of Appeal has explained that, under the fourth amendment to the federal constitution, ''[t]his rule of the authority of a co-occupant to give a consent to search is based upon the actual control which a co-occupant has over premises that are jointly occupied. However, the right of control of one co-occupant over jointly occupied property which constitutes an actual authority over such property, including the authority to give the police a consent to search the premises without the concurrence of other co-occupants, is not absolute. A joint occupant's right of privacy in his home is not completely at the mercy of another with whom he shares legal possession. . . . [J]oint occupancy of property, particularly residential property, obviously demands reasonable restrictions on the right of each joint occupant either by himself or through another to exercise full control over the property at all times regardless of the wishes of another joint occupant present on the premises.'' (Citations omitted; internal quotation marks omitted.) *People* v. *Reynolds*, 55 Cal. App. 3d 357, 368, 127 Cal. Rptr. 561 (1976), overruled in part on other grounds, *People* v. *James*, 19 Cal. 3d 99, 106 n.4, 561 P.2d 1135, 137 Cal. Rptr. 447 (1977); *Tompkins* v. *Superior Court*, 59 Cal. 2d 65, 69, 378 P.2d 113, 27 Cal. Rptr. 889 (1963).

This same position, distinguishing between an absent and a present, objecting co-occupant, also has been adopted by the Washington Supreme Court: ''Where the police have obtained consent to search from an individual possessing, at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, *only while the cohabitant is absent. However, should the cohabitant be present and able to object, the police must also obtain*

the cohabitant's consent. Any other rule exalts expediency over an individual's Fourth Amendment guaranties.'' (Emphasis added.) *State* v. *Leach*, 113 Wash. 2d 735, 744, 782 P.2d 1035 (1989); see *State* v. *Walker*, 136 Wash. 678, 684–86, 965 P.2d 1079 (1998) (reaffirming *Leach*, but refusing to extend it to circumstances in which co-occupant is present but not asked for consent); see also *United States* v. *Impink*, 728 F.2d 1228, 1234 (9th Cir. 1984) (''We do not hold that police must invariably seek consent from the suspect before relying on a third party's consent. However, when the police intentionally bypass a suspect who is present and known by them to possess a superior privacy interest, the validity of third party consent is less certain. . . . [We] conclude that effective consent was precluded by the combined elements of this case. Where a suspect is present and objecting to a search, implied consent by a third party with an inferior privacy interest is ineffective.'' [Citations omitted.]). Three other states also have recognized the fourth amendment rights of a co-occupant who is present and objecting. See *State* v. *Randolph*, 278 Ga. 614, 615, 604 S.E.2d 835 (2004) (agreeing with reasoning by Washington Supreme Court in *Leach*), cert. granted, U.S. , 125 S. Ct. 1840, 161 L. Ed. 2d 722 (2005); *Saavedra* v. *State*, 622 So. 2d 952, 956 (Fla. 1993) (joint occupant validly may consent ''only if the party who is the target of the search is not present or if the party is present and . . . does not object to the search''), cert. denied, 510 U.S. 1080, 114 S. Ct. 901, 127 L. Ed. 2d 93 (1994); *Silva* v. *State*, 344 So. 2d 559, 562 (Fla. 1977) (''[t]hough a joint occupant should have authority to consent to a search of jointly held premises if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another''); *Dorsey* v. *State*, 2 Md. App. 40, 43, 232 A.2d 900 (1967) (where one co-occupant was ''present and expressly objected'' to search, search invalid despite consent given by other co-occupant).

In a related context, the Minnesota Supreme Court has held that, when one co-occupant is present on the scene but not asked for his consent, the consent by an *absent* co-owner is not sufficient authorization to render the warrantless search constitutional. In *In the Matter of the Welfare of D.A.G.*, 484 N.W.2d 787, 790 (Minn. 1992), the court reasoned that the ''waiver'' and ''assumption of risk'' rationales behind *Matlock* do not exist when the person against whom the search is directed is present and the consenting co-occupant is not. ''First, an absent third party's consent should not be used to 'waive' another individual's constitutional rights when that individual is present at the search to give or withhold consent in his or her own right. Similarly, the risk that one co-inhabitant might permit the common area of a jointly occupied premises to be searched in the absence of another is qualitatively dif-

ferent from the risk that a warrantless search will be conducted over the objection of a present joint occupant: A present, objecting joint occupant cannot be said to have assumed the risk that an absent third party will vicariously waive his or her constitutional rights.'' Id. The court concluded that, ''in a competition between an absent cotenant's right to consent to a search and another cotenant's constitutional right to be free from that warrantless search, the constitutional right must prevail. In this case, [the co-occupant's] consent to search was subordinate to [the defendant's] right to object to that search because [the defendant] was present and able to object to the warrantless search.'' Id.

The present case does not involve a search pursuant to the consent of one absent co-occupant and silence by another co-occupant present at the scene. Nor does it involve the consent of one co-occupant and silence by another co-occupant, both present at the scene.[9] In other words, we are not faced with the situation in which both co-occupants are present but only one consents while the other remains silent. The issue here is whether, when one co-occupant *refuses* to consent, the co-occupant who consents has the right to override and, in essence, waive the constitutional rights of the other nonconsenting co-occupant. Out of necessity, we rationalize that an absent co-occupant has assumed the risk that a warrantless search will be conducted in his absence and even perhaps against his wishes. Under such circumstances, I agree with the general principle that when people have joint access and control over property, ''it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.'' *United States* v. *Matlock*, supra, 415 U.S. 171 n.7. The risk of leaving a co-occupant in control of the premises is qualitatively different, however, from the risk that a co-occupant will permit a warrantless search to be conducted *over the objection* of a present joint occupant. Indeed, it is difficult to ascertain from what act a person might infer an assumption of risk when that person has not relinquished control over the premises by his or her absence and actively has asserted a refusal to consent to the search. It similarly is questionable that a co-occupant assumes the risk that the police unlawfully will seize and remove him from his home, thereby precluding him from having an opportunity to object to a search therein, as in the present case.

Surely, in the present case, the assumption of risk cannot be found by virtue of the marital bond between the defendant's parents. Indeed, when two persons have forged a marital bond, as in this case, they retain their individual constitutional rights. One *could* argue that they remove any and all boundaries between them—in other words, that spouses surrender all privacy or other individual interests with respect to one another. ''Some

might [even] argue that this represents the ideal in marriage, and perhaps they are right. But although marriage may be the most intimate of all human relations, this ideal does not reflect reality, either in practice or in the eyes of the law (e.g., prenuptial agreements, community property exemptions for property obtained prior to marriage). Not all spouses share everything with their mates, which is another way of saying that spouses do not surrender every quantum of privacy or individuality with respect to one another.'' *United States* v. *Duran*, 957 F.2d 499, 504 (7th Cir. 1992). When persons are co-occupants, there obviously must exist reasonable demands and restrictions on each person's right to exercise full control over the property at all times regardless of the wishes of another co-occupant present on the premises. A co-occupant's right of privacy in his home cannot, however, be completely at the mercy of another with whom he shares legal possession. Although one co-occupant may follow the lead of the other when she or he objects so that the joint occupants can act collectively, the protection of constitutional rights should not depend on mere accommodation.[10]

Therefore, I would decide the issue left open in *Matlock* and conclude that, under the federal constitution, a consent to search given by one co-occupant is invalid as against the other when both are on the scene and one has refused to consent. In my view, the courts that have sanctioned consent searches even when a co-occupant is present and objecting are unpersuasive because they invoke the third party consent doctrine from *Matlock* without properly considering a significant distinction in that case—that the nonconsenting co-occupant was *absent*, albeit involuntarily, and thereby assumed the risk of the search. See *State* v. *Leach*, supra, 113 Wash. 2d 742–43. I am persuaded by the reasoning that ''the person whose property is the object of a search should have controlling authority to refuse consent. . . . Though a joint occupant should have authority to consent to a search of jointly held premises if the other party is unavailable, a present, objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another.'' (Citation omitted.) *Silva* v. *State*, supra, 344 So. 2d 562; accord *Tompkins* v. *Superior Court*, supra, 59 Cal. 2d 69. In other words, the ability to control access to one's home should not be subordinated to a co-occupant *when one remains on the premises and is able to object to access by others*. Therefore, when the police have obtained consent to search from an individual possessing control over the premises, that consent remains valid against a co-occupant only while the co-occupant is absent. If, however, the co-occupant should be present and objects, the police must obtain a warrant. Any other rule truly would ''[exalt] expediency over an individual's Fourth Amendment guarant[e]es.'' *State* v. *Leach*, supra, 744.

Accordingly, I concur with the plurality that the express denial of consent in this case by the defendant's mother rendered the search illegal. I similarly concur that "by demonstrating his own legitimate expectation of privacy and challenging the search based on his mother's refusal to consent, the defendant is not vicariously asserting his mother's constitutional rights, but, rather, is vindicating his own." See footnote 4 of the plurality opinion. It is axiomatic that "[u]nder the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality." (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 42, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Santos*, 267 Conn. 495, 511, 838 A.2d 981 (2004). As the defendant properly asserts, the fruits of the illegal search include "all seized items; all observations made at the house, including testimony about the contents of [the] defendant's bedroom . . . all testimony and evidence about the laboratory testing of the seized items; all statements made by [the] defendant subsequent to the search; and the clothing, necklace, and photographs that were taken after the defendant's (illegal) arrest." Therefore, the clothing should have been suppressed.

III

There are, however, further ramifications of the determination that the search was illegal. In this case, the state agrees that the defendant's seizure was illegal because it was not supported by probable cause. Therefore, the state must demonstrate that the defendant's second inculpatory statement to the police, a fruit of that illegality, was purged of the taint.[11] Indeed, it was incumbent on the trial court to determine whether the defendant's second statement should have been suppressed as a consequence of the illegal seizure.

Under the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality. *State* v. *Reynolds*, supra, 264 Conn. 42. "Application of the exclusionary rule, however, is not automatic. [E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint . . . ." (Internal quotation marks omitted.) *State* v. *Brocuglio*, 264 Conn. 778, 787, 826 A.2d 145 (2003). "[N]ot all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which [the] instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (Internal quotation marks omitted.) *State* v. *Spencer*, 268 Conn. 575, 599, 848 A.2d 1183, cert. denied, U.S. , 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004).

"The initial determination is, therefore, whether the challenged evidence is in some sense the product of illegal government activity. *United States* v. *Crews*, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); see also *State* v. *Miller*, 29 Conn. App. 207, 216, 614 A.2d 1229 (1992), aff'd, 227 Conn. 363, 630 A.2d 1315 (1993) ([b]ecause the seizure of the gun did not owe its origin in material part to the [illegal] *Terry* stop, the *Terry* stop cannot provide a basis for excluding the gun from evidence)." (Internal quotation marks omitted.) *State* v. *Hammond*, 257 Conn. 610, 627, 778 A.2d 108 (2001).

In the present case, because the clothing seized from the defendant's family's home should have been suppressed, it cannot serve as a significant intervening circumstance to cut off any causal connection between the seizure and the confession. In other words, the seizure of the clothing does not provide the probable cause needed to support the defendant's initial illegal seizure. Because the defendant's statement was the fruit of that illegality, and because the state could not demonstrate that the illegal seizure of the defendant's person and his resulting statements were sufficiently attenuated so as to render his second statement admissible, its suppression was required. *State* v. *Northrop*, supra, 213 Conn. 413 ("[i]t is well established that statements obtained through custodial interrogation following the seizure of a person without probable cause, in violation of the fourth amendment, should be excluded unless intervening events break the causal connection between the arrest and the confession"); see also *Taylor* v. *Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); *Dunaway* v. *New York*, 442 U.S. 200, 216, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *Brown* v. *Illinois*, 422 U.S. 590, 600–604, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Accordingly, I concur with the plurality that the trial court improperly failed to suppress the defendant's statement, as well as his clothing.

[1] "The fourth amendment right to be free from unreasonable searches and seizures is made applicable to the states by incorporation through the due process clause of the fourteenth amendment. See *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)." *State* v. *Mann*, 271 Conn. 300, 302 n.1, 857 A.2d 329 (2004), cert. denied U.S. , 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005).

[2] The state also claims that the defendant's second statement in which he confessed to the police "was sufficiently attenuated to purge any taint flowing from the illegal seizure . . . [because] the defendant received *Miranda* warnings and waived his constitutional rights in writing before he agreed to speak to the detectives about the murder." Reliance on this factor per se is insufficient. *Dunaway* v. *New York*, 442 U.S. 200, 216–19, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *State* v. *Luurtsema*, 262 Conn. 179, 191–97, 811 A.2d 223 (2002).

[3] *Miranda* v. *Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] "It is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. . . . [Therefore] [w]e have frequently relied upon decisions of the United States Supreme Court interpreting the fourth amendment, as well as other amendments to the United States constitution, to define the contours of the protections provided in the various sections of the declara-

tion of rights contained in our state constitution. We have also, however, determined in some instances that the protections afforded to the citizens of this state by our own constitution go beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Rizzo*, 266 Conn. 171, 206, 833 A.2d 363 (2003).

I agree with the plurality that the defendant in the present case did an extensive analysis of the *Geisler* factors in briefing his state constitutional claim. The defendant did not concede, however, that he could not prevail under the federal constitution, but, rather, sought to assert claims under both the state and federal constitutions. Generally, when we rely solely on the state constitution, we do so when the federal constitution clearly does not afford the relief requested; see, e.g., *State* v. *Ross*, 230 Conn. 183, 248, 646 A.2d 1318 (1994) (''[t]he defendant urges us to exercise our independent authority under the state constitution to declare any imposition of the death penalty invalid as cruel and inhuman punishment because it no longer comports with contemporary standards of decency and civilization''), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995); or we conduct an analysis under the state and federal constitutions together, treating the rights as coextensive. See, e.g., *Leydon* v. *Greenwich*, 257 Conn. 318, 333, 777 A.2d 552 (2001) (''we base our conclusion on the protections afforded under the first amendment to the federal constitution and article first, §§ 4, 5 and 14, of the state constitution'').

Although two prongs of *Geisler* require a comparison of the treatment of the issue under the federal constitution and our sister states' constitutions to determine whether we should recognize an independent right under our constitution, none of the state court cases cited by the plurality analyzes the issue under the state constitution; rather, they treat the federal and state constitutions as providing coextensive rights or they rely solely on the federal constitution, thus providing none of the rationale for recognizing an independent right under our constitution. In the present case, because the cases upon which the plurality relies do not conduct an independent state constitutional analysis, I fail to see a persuasive justification for deviating from our normal course and deciding the issue under the state constitution alone.

[5] To the extent, however, that the dissent claims that the state never had an opportunity to address the issue of the consent of the defendant's mother, I disagree with that assertion. Because the defendant was contesting the validity of his father's consent, the state had every incentive to prove under its theory of consent, if it could, that the defendant's mother had acquiesced to the search and, thus, that her refusal to sign the consent form had no import.

[6] The reasons often given to support searches conducted pursuant to a third party's consent when one co-occupant is absent or unavailable and the third party is present are that: (1) the third party is waiving his own rights and not those of the co-occupant; and (2) the co-occupant has assumed the risk that the third person will waive his constitutional rights. See *United States* v. *Matlock*, supra, 415 U.S. 171 n.7; J. Wefing & J. Miles, ''Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems,'' 5 Seton Hall L. Rev. 211, 279 (1974).

[7] The following cases exemplify the majority position that consent by only one joint occupant is necessary, even when another co-occupant objects to the search. See *United States* v. *Morning*, 64 F.3d 531, 536 (9th Cir. 1995) (upholding consent by co-occupant, despite refusal to consent by defendant), cert. denied, 516 U.S. 1152, 116 S. Ct. 1030, 134 L. Ed. 2d 108 (1996); *Lenz* v. *Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995) (''*Matlock*'s third-party consent rule applies even when a present subject of the search objects''); *United States* v. *Donlin*, 982 F.2d 31, 33 (1st Cir. 1992) (''[t]hird party consent remains valid even when the defendant specifically objects to it''); *United States* v. *Hendrix*, 595 F.2d 883, 884–85 (D.C. Cir. 1979) (wife's consent prevailed over objection of husband who was arrested when he came out of apartment); *People* v. *Sanders*, 904 P.2d 1311, 1313 (Colo. 1995) (''[t]he valid consent of a person with 'common authority' will justify a warrantless search of a residence despite the physical presence of a nonconsenting co-occupant''); *People* v. *Cosme*, 48 N.Y.2d 286, 288–92, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979) (presence of protesting occupant at scene does not invalidate co-occupant's consent); *Laramie* v. *Hysong*, 808 P.2d 199, 204 (Wyo. 1991) (''we do not perceive a constitutional significance to the refusal to consent of a co-owner or occupant who is present''); see also *United States* v. *Garcia*, 57 M.J. 716, 719–20 (N.M. Crim. App. 2002) (''the majority

of appellate cases . . . tend to indicate an accused's presence and explicit refusal to consent is 'constitutionally insignificant,' so long as the consenting cotenant has equal access or control over the premises to be searched''), rev'd on other grounds and remanded, 59 M.J. 447 (A.F. Crim. App. 2004).

[8] The following cases are ones in which consent has arisen in the context of criminal activity by the nonconsenting co-occupant: *United States* v. *Donlin*, 982 F.2d 31, 32–33 (1st Cir. 1992); *United States* v. *Hendrix*, 595 F.2d 883, 884–85 (D.C. Cir. 1979); *People* v. *Sanders*, 904 P.2d 1311, 1312–13 (Colo. 1995); *People* v. *Cosme*, 48 N.Y.2d 286, 288–89, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979).

[9] Therefore, the present case does not require that we decide whether, when one co-occupant has consented, the police actively must seek to obtain the consent of *all* occupants present on the premises. Cf. *State* v. *Walker*, supra, 136 Wash. 2d 684–85 (rejecting fourth amendment claim when police did not seek consent of present co-occupant).

[10] As one commentator has noted, the point at which the difficult choice between consent and objection must be made is only where the occupants have equal use and control of the premises and where both are present. ''When two or more persons have equal use of a place in which both are present, the consent of one does not normally eliminate the need for the consent of the other(s) before a search is made; ordinarily, persons with equal 'rights' in a place would accommodate each other by not admitting persons over another's objection while he was present.'' L. Weinreb, ''Generalities of the Fourth Amendment,'' 42 U. Chi. L. Rev. 47, 63 (1974–1975).

[11] The state has argued not only that the evidence seized during the search of the family's home was properly admitted, but it also has argued that the seized clothing provided probable cause for the defendant's arrest, which in turn purged the taint of his unlawful seizure, thereby allowing the trial court properly to admit his confession into evidence.