

No. 17-____

IN THE
Supreme Court of the United States

RICHARD HOUGHTALING,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of Connecticut**

PETITION FOR A WRIT OF CERTIORARI

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December 8, 2017

QUESTIONS PRESENTED

I. Whether the petitioner's Fourth and Fourteenth Amendment rights were violated by (1) the Connecticut Supreme Court's holding that the petitioner did not exhibit a subjective expectation of privacy under *Katz v. United States*, 389 U.S. 347 (1967), and therefore had no standing to challenge the warrantless entry and search of residential property that he owned, but was leasing to another individual, with whom the petitioner was cultivating marijuana on the property, and (2) the Connecticut Supreme Court's refusal to allow the petitioner to challenge the warrantless entry and search of his leased property on an alternative theory of property-based standing, under the principles of *United States v. Jeffers*, 342 U.S. 48 (1951).

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**On Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Richard Houghtaling, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, rendered on July 25, 2017.

OPINIONS BELOW

The opinion of the intermediate Connecticut Appellate Court is officially reported at 155 Conn. App. 794. It is unofficially reported at 111 A.3d 931 (2015), and is reprinted in the Appendix (“App.”) to this petition, at 25a-67a. The opinion of the Connecticut Supreme Court is officially reported at 326 Conn. 330 (2017). It is unofficially reported at 163 A.3d 563, and is reprinted at App. 84a-115a.

JURISDICTION

The judgment of the Connecticut Appellate Court, affirming the judgment of conviction, was entered on March 17, 2015. On July 15, 2015, the Connecticut Supreme granted the petitioner's petition for certification to appeal. See App. 68a-69a. On July 25, 2017, the Connecticut Supreme Court affirmed the judgment of the Connecticut Appellate Court. See App.84a-115a. On September 13, 2017, the Connecticut Supreme Court denied the petitioner's motion for reconsideration. See App. 124a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), on the grounds that the State of Connecticut has violated the petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fourth Amendment to the Constitution of the United States** provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The **Fourteenth Amendment to the Constitution of the United States** provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law;. . . ."

Conn. Gen. Stat. (Rev. to 2017) § 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.

Conn. Practice Book § 61-6(a)(2)(A) provides: “When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to file 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. The issue to be considered in such 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 subsection shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution. The court shall not accept a nolo contendere plea pursuant to this subsection where the denial of the motion to suppress or motion to dismiss would not be dispositive of the case in the trial court. The court shall also decline to accept such a nolo contendere plea where the record available for review of the denial of the motion to suppress or motion to dismiss is inadequate for appellate review of the court’s determination thereof.”

STATEMENT OF THE CASE

This case arose from aerial surveillance that was part of a “marijuana eradication” operation in the northeast corner of Connecticut. The facts are set forth in greater detail below, but the basic contours of the story can be described in this paragraph. Police in a surveillance helicopter observed marijuana growing in the rear yard of a house that was owned by the petitioner, but which he had leased to another individual. Upon observing suspected marijuana, helicopter personnel notified officers on the ground. The ground officers arrived on the property—without a warrant—in four undercover vehicles, and they found a marijuana crop in the back yard. Shortly thereafter, the petitioner arrived on the scene. He pulled his van into the driveway, but upon seeing so many unfamiliar vehicles, he quickly exited from the driveway and drove off. The police saw the van’s quick exit, and took off in pursuit. It was a short pursuit. The petitioner had parked his van on the side of the street, less than two hundred yards from his driveway, facing back towards his property. The police approached the stationary van at gunpoint. Through a window they saw construction materials that were similar to those being used in the rear yard to construct a greenhouse for marijuana plants. The defendant and his passenger were arrested and brought back to the scene, where the defendant signed a statement admitting that he owned the property but had leased it, and that he was involved in a marijuana grow operation with his tenant.

A. The “Marijuana Eradication” Operation

“On August 9, 2010, the [Connecticut] Statewide Narcotics Task Force (task force)—comprised of federal, state, and local law enforcement officers—was

conducting a marijuana eradication operation in the northeast corner of the state.” *State v. Houghtaling*, at App. 88a. The operation involved an aerial team and a ground team. The aerial team consisted of a helicopter, pilot, and observer from the Massachusetts Air National Guard, and a “spotter,” Sgt. Patrick Torneo, from the Connecticut task force. The “ground team” was composed of at least five task force officers, and they communicated with the aerial team by phone and radio.

That afternoon, “the helicopter team notified the ground team of a suspected large crop of marijuana at 41 Raymond Schoolhouse Road in the town of Canterbury (property).” *Id.* Prior to their observations the police had not received any tips about that address. “From the air, the spotters were able to see dozens of marijuana plants within a fenced-in pool area behind the house, as well as several plants along the outside of the fence.” *Id.*, App. 88a-89a. Sgt. Torneo estimated that his observations were made from an altitude of between 500 feet and 1000 feet.¹ No one in the helicopter saw anyone on the property, and Torneo acknowledged there were no exigent circumstances prior to the ground team’s entry onto the property.

B. The Ground Team Enters and Searches the Property

“The property [at 41 Raymond Schoolhouse Road] consisted of 5.6 acres and was largely surrounded by dense forest. The only means of ingress and egress was a narrow dirt driveway more than 100 feet long and lined with trees on both sides. There were signs marked ‘No Trespassing’ posted on trees along the

¹ It is not known whether any of the observations were made with sensory-enhanced technology.

driveway, and, about halfway down the driveway, there was a metal gate that could block the driveway but that was not closed.” *Id.*, App. 89a. The aerial photographs (admitted as exhibits at the suppression hearing) reveal that the property consists of a house, a barn, and a detached garage, located in a rural, densely-wooded area.

About thirty minutes after receiving the GPS coordinates from the aerial team, members of the ground team converged on the property. They arrived “in [four] separate, undercover and unmarked vehicles, which bore no resemblance to police vehicles.” *Id.*, App. 89a, 113a. One of the vehicles, in fact, was a “pickup truck.” Transcript of Suppression Hearing (Jan. 31, 2013) (hereafter “Supp. Tr.”), pp. 61, 64. The police “parked their vehicles in front of the gate, donned protective vests, which identified them as police officers, and proceeded to the front door of the house on foot. As the members of the ground team approached the home, they saw no occupant vehicles or persons, smelled nothing, and heard nothing. The officers knocked on the front door but received no answer.” *Id.*, App. 89a. Meanwhile, the helicopter was still hovering above, keeping the property under constant surveillance.

Parenthetically, it should be noted that the police acknowledged that there were no exigent circumstances requiring immediate entry onto the property. They also acknowledged that they could have secured the perimeter of the property and obtained a search warrant within a couple of (daylight) hours. Their decision *not* to seek a warrant distinguishes this case from the overwhelming majority of American cases in

which police *do* seek a search warrant *after* observing suspected marijuana from the air.²

After getting no response at the front door, “[t]he ground team then left the front door and proceeded toward the back door. The air team had told the ground team that, if they continued around the side of the house, they would see ‘a whole lot of marijuana right out in the open.’” *Id.*, App. 89a.³ In fact, the aerial team was contemporaneously directing the ground officers as they proceeded around the side of the house and into the rear yard, telling them, *inter alia*: “All right. We see you’re at the correct house. *Behind, you know, in the yard you should be able to see plants.*” (Emphasis added.) Supp. Tr., p. 8.

“Before reaching the back door [which was inside the gated pool area], the officers saw a pool area with dozens of marijuana plants inside and additional plants surrounding the area.” *Houghtaling*, at App. 89a. The in-ground pool was attached to the back of the house; it had a solid white fence on the side facing the driveway, and a slatted fence on the side facing the woods.

² See, e.g., *California v. Ciraolo*, 476 U.S. 207, 209-10 (1986) (police officers observed suspected marijuana during airplane flight over defendant’s house, and then obtained a warrant to search the defendant’s property); *Florida v. Riley*, 488 U.S. 445, 448-49 (1989) (police officer observed suspected marijuana from a helicopter with his “naked eye,” and a search warrant was then obtained based on his observations).

³ These events occurred about two and one-half years prior to this Court’s decision in *Florida v. Jardines*, 569 U.S. 1 (2013), which is discussed *infra*. See also *Carroll v. Carman*, __ U.S. __, 135 S.Ct. 348, 352 (2014) (“We do not decide today. . . whether a police officer may conduct a ‘knock and talk’ at any entrance that is open to visitors rather than only the front door.”).

“The officers then continued to search the property, including a greenhouse located behind the pool, near the rear of the property. *Id.*, App. 89a. The opaque top and long sides of the greenhouse were completed (as shown by aerial and ground-level photographs), but the short ends were only partially completed (as shown in the ground-level photographs). “[T]here were piles of lumber on the ground nearby.” *Id.*

“Inside the greenhouse, the police were able to see numerous marijuana plants and two men, one of whom was later identified as [Thomas] Phravixay.” *Id.*, App. 89a-90a. When the police asked the men what they were doing, one of them “responded something to the effect of: tending to my marijuana.” Supp. Tr., p. 9. After receiving *Miranda*⁴ warnings, “Phravixay told the officers he was renting the home and later gave the officers written consent to search the property.” *Houghtaling*, at App. 90a.

C. The Petitioner’s Arrival at the Scene and the Subsequent *Terry*⁵ Stop

“While two members of the ground crew were returning to their vehicles to obtain an evidence kit, they noticed a white van pull into the driveway of the property, where the unmarked police vehicles were parked, and then reverse back into the street and depart “[v]ery quickly.” *Id.*, App. 90a. Sgt. Torneo, in the helicopter, also saw the van pull in and then leave.

“The officers were suspicious of the van, believing that its occupants might be involved in the marijuana grow operation, and decided to pursue the van. By the time the police got into a car, headed up the driveway

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

after the van, and arrived out on the road, the van was already parked at the side of the road, approximately one tenth of a mile away, facing back toward the driveway.” *Id.*, App. 90a, 112a-113a. The police parked their vehicle in the middle of the road, facing the petitioner’s van, effectively “stopping” it by blocking it in.

The officers approached the van with drawn weapons. The petitioner was in the driver seat, and his brother in law was in the passenger seat. The petitioner rolled down his window, and the officers asked him to turn off the engine and to show his license, registration and insurance information, which he provided. “When the officers asked the [petitioner] why he had pulled into the driveway and then left abruptly, he stated that he was going to visit a friend but left when he saw that the driveway was full of cars he did not recognize. As the trial court found, the [petitioner]’s answers to the officers’ questions were evasive, and, although he claimed to be visiting a friend, he would not name the friend. While the police were questioning the [petitioner], they were able to observe from outside the van that it contained lumber and irrigation piping similar to that which was used to construct the greenhouse. The officers then handcuffed the [petitioner] and the passenger, and brought them back to the property.” *Id.*, App. 91a.

“Upon arriving back at the property, the police advised the [petitioner] of his *Miranda* rights. The [petitioner] at first refused to speak with the police but then agreed to once the officers told him that Phravixay had consented to their search of the property, that they had found mail with the [petitioner]’s name on it in the house and in the mailbox, and that

Phravixay had identified the [petitioner] as the homeowner and the person who leased the property to him.” *Id.*, App. 91a. The petitioner signed a statement indicating that he had purchased the Canterbury house a year earlier, but when he could not afford the mortgage payments, he rented the property to Phravixay, whom he had known for several years. The petitioner also stated that four or five months earlier, he began helping Phravixay cultivate marijuana on the property “to recoup some of [his] money,” although petitioner claimed that “up until today [he] didn’t realize the extent of the grow operation.” *Id.*

D. The Search of the Property

After obtaining consent to search from both Phravixay and the petitioner, the police searched the house, barn, greenhouse, and yard. “The search ultimately revealed more than 1000 marijuana plants.” *Id.*, App. 90a. In addition, the police seized chemicals, fertilizers, potting soil, “grow lights,” filtration and aeration systems, and \$1,690 in cash. One officer described the grow operation as “extremely sophisticated” and as “[t]he largest, I believe, in Connecticut history.” Supp. Tr., pp. 21-22.

In the house, one officer found “some mail in the kitchen that had the defendant’s name on it”; and in the mailbox at the end of the driveway, another officer found additional mail addressed to the petitioner at 41 Raymond Schoolhouse Road. Supp. Tr., pp. 23, 85-86; *Houghtaling*, App. 94a, 107a. The police also found an aeration system that was addressed to the defendant at his Danbury residence. *Id.*, App. 107a.

E. The Search of the Petitioner's Danbury Residence

The police subsequently obtained a warrant to search the petitioner's house in Danbury, Connecticut. The search of the Danbury residence revealed "personal property" indicating that he lived there. A police officer estimated that the travel time between the Danbury house and the Canterbury house is a little less than two hours. Supp. Tr., p. 71.

F. The Motion to Suppress Evidence

Following his arrest at the scene, the petitioner was charged with several drug-related offenses. On July 3, 2012, he filed a motion to suppress all of the seized evidence as well as his statements to the police, and any fruits thereof. He asserted that his Fourth Amendment rights had been violated by the warrantless search of the property, and by the invalid *Terry* "stop" of his van.

A suppression hearing was held before the Hon. Michael E. Riley on January 31, 2013. At the hearing, the state called three police officers as witnesses, and the petitioner called one witness, also a police officer. The petitioner did not testify at the suppression hearing. "After the witnesses testified, the state argued that the [petitioner] had failed to establish his subjective expectation of privacy because all of his personal property was in the city of Danbury, where he lived with his wife and family, and the [petitioner] had failed by any other conduct to demonstrate a subjective expectation of privacy in the property where the search occurred [in Canterbury]." *Houghtaling*, App. 92a. Defense counsel argued that "the [petitioner]'s ownership of the property alone was sufficient to establish standing." *Id.*

“The trial court agreed with the state and denied the [petitioner]’s motion to suppress the evidence seized from the search of the property and the [petitioner]’s statements to the police.” *Id.*, App. 93a. In a memorandum of decision issued on March 6, 2013, see App. 1a-24a, “[t]he trial court concluded that the [petitioner] had failed to establish that he had a subjective expectation of privacy in the property. The court also found that the police possessed a reasonable and articulable suspicion sufficient to justify stopping the [petitioner]’s van after he entered and quickly exited the driveway. Lastly, the trial court concluded that the officers had probable cause to arrest the defendant.” *Id.*, App. 93a.⁶

G. The Conditional *Nolo Contendere* Plea

On March 22, 2013, the state filed a substitute information charging the defendant with possession of marijuana with intent to sell in violation of Conn. Gen. Stat. (Rev. to 2009) § 21a-277(b)), and possession of more than four ounces of marijuana in violation of Conn. Gen. Stat. (Rev. to 2009) § 21a-279(b). On that date, the defendant entered conditional pleas of *nolo contendere* to those charges, pursuant to a Connecticut statute that allowed him to reserve his right to appeal from the denial of his motion to suppress evidence. See Conn. Gen. Stat. § 54-94a; Conn. Practice Book § 61-6. On May 24, 2013, the defendant was sentenced to 5 years, execution suspended after 4 years, and 5 years probation for the charge of possession of marijuana with intent to sell, and a concurrent sentence of 4 years on the charge of possession of more than four

⁶ The trial court did note, however, that “the initial [warrantless] sweep around the home appears to be constitutionally suspect[.]” Mem. of Dec., p. 19, at App. 19a.

ounces of marijuana. The total effective sentence was 5 years, execution suspended after 4 years, and 5 years probation.

H. Petitioner's First Appeal in the Connecticut Appellate Court

The defendant appealed to the Connecticut Appellate Court from the denial of his motion to suppress evidence. On March 17, 2015, the Appellate Court affirmed the trial court's suppression ruling and the judgment of conviction. *State v. Houghtaling*, 155 Conn. App. 794 (2015), at App. 25a-67a.

The Appellate Court analyzed the standing issue based on a three-factor test set out in an earlier case, *State v. Boyd*, 57 Conn. App. 176, 185, cert. denied, 253 Conn. 912 (2000). Under *Boyd*, in order to meet the burden of establishing a subjective expectation of privacy, "a defendant must show facts sufficient to create the impression that (1) his relationship with the location was personal in nature, (2) his relationship with the location was more than sporadic, irregular or inconsequential, and (3) he maintained the location and the items within it in a private manner at the time of the search." *Id.*, 185.

Applying the *Boyd* test, the Appellate Court agreed with the trial court's conclusion that the petitioner had failed to prove that he had a subjective expectation of privacy in the property; as a result, the Appellate Court stated that it "need not reach the question of whether the expectation of privacy is one that society would deem reasonable." *Houghtaling*, App. 36a-37a and n. 10.

With respect to the *Terry* stop of the petitioner's van, the Appellate Court observed that "this case presents

a close question as to whether a reasonable and articulable suspicion existed that the driver had engaged in criminal conduct.” (Emphasis added.) *Id.*, App. 51a. The Appellate Court nevertheless concluded, based on the totality of the circumstances, that the stop was lawful; *id.*, App. 51a-53a; and that the police observation of construction materials in the van constituted probable cause to arrest. *Id.*, App. 53a-58a. The Appellate Court also held that the petitioner’s subsequent statements were lawfully obtained. *Id.*, App. 58a-67a.

I. The Petition for Certification to the Connecticut Supreme Court

Following the Appellate Court’s rejection of his claims, the petitioner filed a petition for certification to appeal to the Connecticut Supreme Court. That petition was granted by the Connecticut Supreme Court on July 15, 2015, limited to the following issues.

“1. Did the Appellate Court properly determine that the defendant did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search?

“2. If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant’s confession—the fruits of one or more preceding illegalities?

“3. If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and

that the resulting confession was lawfully obtained?”

State v. Houghtaling, 317 Conn. 919 (2015), at App. 68a-69a.

After the grant of certification to appeal, the petitioner filed a motion seeking formal permission to raise two additional issues in the certified appeal. See Motion to Suspend Rules to Permit Consideration of Additional Issues, at App. 70a-82a.

The first issue for which he sought permission to raise, was not a new “issue,” but rather a request to argue an *alternative theory* of standing, based on *this* Court’s decision in *United States v. Jeffers*, 342 U.S. 48 (1951). The petitioner asserted in his motion that “*Jeffers* stands for the proposition that a person may be able to establish standing based on a property interest in contraband that is stored or kept, with permission, at another person’s premises.” Motion to Suspend Rules, at App. 75a. As pointed out in his motion, *Jeffers* had been cited twice in the petitioner’s original motion to suppress evidence, and one of those citations was in support of the proposition that “standing may be acquired. . . by virtue of a ‘property interest’ in the items which are seized, see *United States v. Jeffers*, 342 U.S. 48 (1951).” Defendant’s Motion to Suppress Evidence (July 2, 2012), p. 35. However, petitioner’s trial counsel did not argue the *Jeffers* theory to the suppression court, and that court’s memorandum of decision did not discuss *Jeffers*. And in the subsequent proceedings in the Connecticut Appellate Court, the petitioner, represented by new counsel, did not cite *Jeffers* in the appellate briefs. As a result, undersigned counsel, who represented the petitioner in all proceedings in the Connecticut Supreme Court, requested permission to rely on

Jeffers on the grounds that the “property-based” theory of standing was “sufficiently related to” and “intertwined” with the central question on which certification had been granted, i.e., “standing.”

The second issue the petitioner sought to raise was a state constitutional claim that police should be required to obtain a warrant before conducting aerial surveillance (in a non-emergency situation). Petitioner was aware that under this Court’s precedents; see *California v. Ciraolo*, 476 U.S. 207 (1986) and *Florida v. Riley*, 488 U.S. 445 (1989); aerial surveillance, conducted in navigable airspace and when not unreasonably intrusive, does not violate the Fourth Amendment. Accordingly, the petitioner sought to raise the claim that under article first, § 7, of the Connecticut constitution, police should be required to obtain a warrant (at least in non-emergency situations) before conducting aerial surveillance over residential premises.

On October 7, 2015, the Connecticut Supreme Court denied the petitioner’s request to raise the above issues. See App. 83a. Thus, the petitioner’s appeal in that court focused on two principal issues: whether the Appellate Court had erred in concluding that the petitioner did not have standing, under *Katz*, to challenge the search of the property, and, even if he did not have standing, whether the Appellate Court erred in holding that the *Terry* stop and warrantless arrest of the petitioner were lawful, and that his subsequent confession was lawfully obtained.

J. The Connecticut Supreme Court’s Opinion

The petitioner’s appeal was argued in the Connecticut Supreme Court on March 29, 2017. On July 25,

2017, the court issued an opinion affirming the judgment of the Connecticut Appellate Court. See *State v. Houghtaling*, at App. 84a-115a.

1. The “Standing” Claim

The Connecticut Supreme Court “agree[d] with the Appellate Court that the defendant lacked standing to challenge the search, and that his detention and subsequent arrest were lawful[.]” *Id.*, App. 88a.

En route to its conclusion, the Connecticut Supreme Court expressly “overrule[d]” the case of *State v. Boyd*, supra—on which the Appellate Court had relied—“to the extent that [*Boyd*] requires a defendant to meet its three factor test to establish his or her subjective expectation of privacy.” *Houghtaling*, App. 100a. The court rejected the “rigid” and “inflexible yardstick” approach of the *Boyd* test, and “clarif[ied] the proper method of evaluating a defendant’s subjective expectation of privacy.” *Id.*, App. 100a, 105a.

The court reiterated and endorsed the proposition that “[t]he first part of the *Katz*⁷ test requires only . . . [a person’s] conduct [to] have demonstrated an intention to keep activities and [property]. . . private, and that he did not knowingly expose [it] to the open view of the public.” *Houghtaling*, App. 98a-99a (quoting 1 W. LaFare, *Search and Seizure* (5th Ed. 2012) § 2.1(c), p. 585). See also *Houghtaling*, App. 105a (“Instead [of the *Boyd* test], we reaffirm that courts should properly test a defendant’s subjective expectations by looking for conduct demonstrating an intent “to preserve [something] as private,” and free from knowing exposure to the view of others.”) (citing *Bond v. United States*, 529 U.S. 334, 338 (2000)).

⁷ *Katz v. United States*, 389 U.S. 347 (1967).

In its analysis of the facts, the Connecticut Supreme Court stated that “[a]t the hearing on the motion to suppress, the [petitioner] failed to adduce sufficient evidence to establish his intent to keep the property private and free from knowing exposure to the view of others.” *Houghtaling*, App. 105a. More specifically, the court emphasized what the petitioner had failed to establish:

(1) “Although the [petitioner] did establish that he owned the property,” he “did not present a written lease or offer any testimony regarding the provisions of the lease.” *Id.*, App. 105a;

(2) The petitioner did not “present sufficient evidence that he maintained frequent contact with the property, retained the right to exclude others or engaged in other significant contact with the property.” *Id.*, App. 105a-106a;

(3) “[A]lthough it might have been possible for the [petitioner] to establish standing, he presented no evidence establishing the frequency and nature of his visits to the property, or whether he retained a right to exclude others from any or all of the property.” *Id.*, App. 107a;

(4) “Nor did [the petitioner] produce any evidence indicating that he stayed at the property or otherwise continuously used the property after leasing it to Phravixay. He established nothing but bare legal ownership.” *Id.*, App. 107a;

(5) “The defendant did not present sufficient evidence at the hearing to establish what his involvement with the marijuana cultivation actually was.” *Id.*, App. 108a-109a;

(6) “[T]he [petitioner] did not present sufficient evidence detailing his connection to the property or the grow operation that took place there, if such evidence existed at all.” *Id.*, App. 109a-110a;

(7) The petitioner “failed to adduce any evidence that he maintained a regular presence, was an overnight guest, retained the right to exclude others, or had any other significant connection to the property” *Id.*, App. 110a.

According to the court, “[t]he only other evidence perhaps connecting the [petitioner] to the property consisted of a few pieces of mail and an aeration system addressed to the [petitioner] at his Danbury residence. None of these items, however, established how often the [petitioner] visited the property or the nature of his relationship to the property, and thus did not sufficiently establish his subjective expectation of privacy.” *Id.*, App. 107a.

As for the mail, the court faulted the petitioner for “not submit[ting] the mail into evidence or even identify[ing] what type of mail it was.” *Id.* The court observed that “[w]ithout knowing the nature or the volume of the correspondence, we cannot assume that it was significant or anything other than junk mail. Additionally, no evidence was offered about whether or how often the [petitioner] went to the property to retrieve the mail.” *Id.* And with regard to the aeration system that was addressed to the petitioner at his Danbury residence, the court discounted its’ presence as a relevant factor because there was no evidence to establish “how it made its way from Danbury to Canterbury.” *Id.*, App. 107a-108a.

Because the Connecticut Supreme Court concluded that the petitioner failed to establish a subjective expectation of privacy, the court had “no occasion to address the [petitioner]’s claim that the officers were not justified in entering the property without a warrant.” *Id.*, App. 110a.

2. The *Terry* Stop and the Arrest

The Connecticut Supreme Court held that “the police possessed a reasonable articulable suspicion to stop the defendant and, later, had probable cause to arrest him.” *Id.*, App. 110a.

With respect to the *Terry* stop, the petitioner had argued that there was no evidence to support an inference that he was “fleeing” from the scene when he quickly exited from the driveway—because there was no evidence that he ever saw a police officer, and, as the Connecticut Supreme Court acknowledged, “[t]hat driveway was filled with cars *he could not* have recognized.” (Emphasis added.) *Houghtaling*, App. 113a. The court nevertheless held that “even if the [petitioner] was not fleeing from the police, the police possessed a reasonable and articulable suspicion and thus were justified in stopping the [petitioner].” *Id.*, App. 112a-113a, n. 14.

Having concluded that the stop was lawful, the court then held that the police observation, in the van, of “lumber and irrigation piping resembling the materials used in the greenhouse” that was under construction, was sufficient to establish probable cause for arrest. *Id.*, App. 114a-115a. Ergo, there were no grounds for suppressing the petitioner’s subsequent confession. *Id.*, App. 115a, n. 16.

REASONS FOR GRANTING THE WRIT

This case is rich in Fourth Amendment content: police aerial surveillance from a helicopter, a warrantless entry and search of residential property, a *Terry* stop of a vehicle, a warrantless arrest, consent to search, and a confession. Alas, the first two of those events were rendered irrelevant in this case by the petitioner’s inability to prevail below on the issue of “standing.” That should not be.

“*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable? See *Smith v. Maryland*, 442 U.S. 735, 740 (1979).” *California v. Ciraolo*, *supra*, 211; *Kyllo v. United States*, 533 U.S. 27, 33 (2001 (quoting portion of same)).

It is no secret that “*Katz* presents lower courts with a hard issue. . . .”; 1 W. LaFare, *Search & Seizure* (5th ed. 2012) § 2.1(d), p. 590; and this Court has acknowledged that the *Katz* test “has often been criticized as circular, and hence subjective and unpredictable.” *Kyllo v. United States*, *supra*, 34. “Because ‘the courts frequently do not distinguish between the two parts of the *Katz* test,’ little attention has been given to the independent significance of the first [subjective] factor or to precisely how it is to be interpreted.” 1 LaFare, *op. cit.*, § 2.1(c), p. 584.

Here, the Connecticut Supreme Court observed that “[i]n analyzing the subjective prong of the *Katz* test, we look for actions or conduct demonstrating that the [petitioner] sought to preserve the property or location as private” “[t]he first part of the *Katz* test requires only . . . [a person’s] conduct [to] have demonstrated

an intention to keep activities and [property]. . . private, and that he did not knowingly expose [it] to the open view of the public.” *Houghtaling*, App. 98a-99a (quoting 1 W. LaFare, op. cit., § 2.1(c), p. 585 (quoting from E. D. Bender, Note, “The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?,” 60 N.Y.U.L.Rev. 725, 753-54 (1985))). See also *Houghtaling*, App. 105a (“we reaffirm that courts should properly test a defendant’s subjective expectations by looking for conduct demonstrating an intent “to preserve [something] as private,” and free from knowing exposure to the view of others.”) (citing *Bond v. United States*, 529 U.S. 334, 338 (2000))).

It is clear that under the Connecticut Supreme Court’s standard for evaluating a person’s subjective expectation of privacy, the critical elements are “conduct” demonstrating an “intention” to preserve activities as private and to keep them free from “knowing exposure” to others. *Houghtaling*, App. 98a-99a, 105a. The petitioner satisfied this test, by a preponderance of the evidence,⁸ as a number of factors reveal.

First, the location of the petitioner’s Canterbury property fairly proclaims “privacy.” The *Houghtaling* opinion acknowledges that the property is “rural,” “isolated,” and “remote”; it was “largely surrounded by dense forest,” with a narrow and lengthy dirt driveway serving as the only means of ingress and egress, with

⁸ See e.g., *United States v. Johnson*, 2008 U.S. App. Lexis 18317, *4 (5th Cir. 2008) (“The defendant bears the burden of establishing a reasonable expectation of privacy by a preponderance of the evidence.”), cert. denied, 555 U.S. 1118 (2009); *United States v. Castellanos*, 716 F.3d 828, 833 (4th Cir.) (same), cert. denied, 134 S. Ct. 832 (2013); *State v. LaCount*, 750 N.W.2d 780, 792 (Wis.) (defendant failed to prove his subjective expectation of privacy by a preponderance of the evidence), cert. denied, 555 U.S. 1046 (2008).

multiple “No Trespassing” signs⁹ and a galvanized metal gate capable of blocking the driveway.¹⁰ *Id.*, App. 89a, 112a-113a.

Second, the petitioner’s relationship to the property involved more than “bare legal ownership.” *Houghtaling*, App. 107a. Obviously, the petitioner had permission to be on the property—the very day of the search, he was bringing building supplies to help complete construction of the greenhouse, which was being used to house, and hide from view, potted marijuana plants. The petitioner’s conduct in conveying those building materials to the property site clearly manifested his intention to keep the marijuana grow operation free from exposure to others.

Third, the presence of mail—both inside the kitchen and in the mailbox—suggests that petitioner had a

⁹ While such signs may not establish a legitimate expectation of privacy when posted around “open fields”; see *Oliver v. United States*, 466 U.S. 170, 182-83 (1984); the signs in this case were posted along the driveway. See generally, *Idaho v. Christensen*, 953 P.2d 583, 587 (Idaho 1998) (a “no trespassing” sign on a gate provides an “unambiguous message”); *State v. Morgan*, 2014 Ohio App. Lexis 1854, **15 (“‘No trespassing’ signs may be indications a property owner expects privacy within a certain area of the curtilage.”). See also V. Rownaghi, *Driving Into Unreasonableness: The Driveway, The Curtilage, and Reasonable Expectations of Privacy*, 11 Am. U.J. Gender Soc. Pol’y & L. 1165, 1191(2003) (“The posting of a [“no trespassing”] sign is a clear indication of a homeowner’s subjective intent to protect his/her privacy and exclude others from entering.”).

¹⁰ The *Houghtaling* opinion describes the driveway as “more than 100 feet long and lined with trees on both sides.” (Emphasis added.) *Houghtaling*, App. 89a. At the suppression hearing, the helicopter spotter “guessed” that the house is set back from the roadway “100 yards, maybe less.” (Emphasis added.). Supp. Tr., p. 124.

recent and continuing personal relationship with the property. The Connecticut Supreme Court’s criticism of the petitioner for not introducing the mail into evidence at the 2013 suppression hearing, or identifying its nature, is not entirely fair. The defendant was handcuffed at the van, and then subjected to a custodial arrest, and was hardly in a position to recognize the need to start collecting mail at the scene to establish his standing a few years down the road. Furthermore, the Connecticut Supreme Court simply “assume[d]” that the mail was neither “significant or anything other than junk mail.” *Houghtaling*, App. 107a. That assumption was unwarranted because the police—who presumably have some familiarity with the concept of standing—failed to seize that mail or make note of its nature.

Finally, perhaps the most significant factor is that the contraband was situated on the property in such a manner that it was not knowingly exposed to the view of others. No marijuana was visible from the front of the residence or from passersby on the road (even if they were standing on a “two-level bus,” *California v. Ciraolo*, supra, 211). No marijuana was visible from the end of the driveway closest to the house. No marijuana was visible to a person standing at the front door. In fact, any citizen or police officer would have to be standing in the middle of the back yard in order to be in a position to observe any contraband. This is due in part to the fact that the marijuana inside the house, barn, and greenhouse¹¹ was not visible to passersby. Furthermore, the marijuana *within* the gated pool

¹¹ The Connecticut Supreme Court’s opinion states that “[t]he ends of the [greenhouse] structure had no side walls[.]” *Houghtaling*, App. 89a. The photographic exhibits show that one end was open, and the other end was partially constructed. .

area was behind a solid white fence, thus shielding it from the view of anyone standing in the backyard. As for the marijuana that was *outside* the perimeter of the pool enclosure, alongside the slatted fence, that marijuana faced the dense forest, and the other marijuana was behind the pool house. In short, the petitioner and his tenant had exhibited a subjective expectation of privacy by undertaking normal and reasonable human efforts designed to prevent the marijuana grow operation from being exposed to *ground-level* public view. See *Rakas v. Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring) (in determining privacy expectations, the Supreme Court “has examined whether a person invoking the protection of the Fourth Amendment took *normal precautions* to maintain his privacy - - that is, precautions customarily taken by those seeking privacy.”) (Emphasis added.); *California v. Ciraolo*, supra, 211 (by constructing a fence around his marijuana garden, the petitioner “took normal precautions to maintain his privacy”).

Based on the efforts by the petitioner and his tenant to conceal the marijuana grow operation “from at least street-level views,” *California v. Ciraolo*, supra, 211, the following sentence from the majority opinion in *Ciraolo* is directly applicable here: “Clearly - - and understandably - - [the petitioner] has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits.” *Id.*¹² Indeed, the contraband on the petitioner’s

¹² The four dissenting justices in *Ciraolo* agreed that Mr. Ciraolo exhibited a subjective expectation of privacy in his backyard because, inter alia, “he had taken steps to shield those [backyard] activities from the view of passersby.” *Id.*, 222 (Powell, J., dissenting, joined by Brennan, Marshall, and Blackmun, Js.). And in *Florida v. Riley*, supra, the Court confirmed that the

Canterbury property was at least as insulated from public view as the marijuana garden in *Ciraolo*; the marijuana in this case could *not* be seen by “a citizen or a policeman perched on the top of a truck or a two-level bus,” or by anyone walking or driving past the house on “public thoroughfares.” *Id.*, 211, 213.

“[N]o two cases are the same.” *Schick v. Reed*, 419 U.S. 256, 268 (1974). That axiom is especially true with respect to fact-bound issues like “standing.” But in material respects, *Houghtaling* is sufficiently similar to *Ciraolo* for this Court to conclude that *Houghtaling* is inconsistent with, and conflicts with, *Ciraolo*—insofar as *Katz*’s subjective test is concerned. A writ of certiorari is therefore warranted because of this inherent conflict between the decision of a state supreme court and a decision of this Court, on an “important federal question” of Fourth Amendment jurisprudence. See Sup. Ct. R. 10(c).¹³

Petitioner recognizes that he would have had an arduous task if he had been given the opportunity to address *Katz*’s second, *objective* test. In that event, he would have argued that even though the aerial surveillance in this case was lawful under *Ciraolo* and *Florida v. Riley*, *supra*, those cases do not authorize the kind of subsequent *warrantless entry* of residential premises that occurred here. Beyond that, the petitioner would have argued, if given the opportunity,

respondent in *Ciraolo* “had a subjective expectation of privacy.” *Id.*, 449.

¹³ In the event this Court concludes that no conflict exists, petitioner still urges that the writ be granted. Although a petition for a writ of certiorari is “rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law”; Sup. Ct. Rule 10; this is one of those rare cases where extraordinary relief is warranted.

that *Ciraolo* and *Riley* should be overruled.¹⁴ Had petitioner been able to establish standing, he then would have argued that *Florida v. Jardines*, *supra*, clearly prohibited the ground officers from entering and searching in the back yard after they received no response at the front door.

Jardines was decided on March 26, 2013, just twenty days after the trial judge issued his suppression ruling in this case. On appeal, *Jardines* was cited in both the petitioner’s brief and state’s brief in the Appellate Court, but without express reliance thereon, and the Appellate Court opinion did not cite *Jardines*. The Connecticut Supreme Court opinion cited *Jardines* in a footnote, but suggested it was inapplicable because “the [petitioner] has presented no evidence that he resided at the property where the search occurred.” *Houghtaling*, App. 103a n. 10. Whether *Jardines* would afford “standing” to someone in the petitioner’s position, seems to be an open question. See 6 LaFave, *op. cit.*, 11.3(a) n. 30.40 (2017-18 Pocket Part, p. 19)

¹⁴ In his principal brief in the Connecticut Supreme Court, the petitioner theorized: “Given the rapid pace of technological change in the last three decades, and the new threat to privacy from drones, it is not fanciful to suggest that in a future decision, the [United States] Supreme Court might reconsider what society *now* accepts as a ‘reasonable’ expectation of privacy from aerial surveillance.” (Emphasis in original.) Br. of Def. in *State v. Houghtaling*, p. 27 n. 22.

In his reply brief, the petitioner again spoke to this point: “But should this case ever be reviewed by the United States Supreme Court, the [petitioner] will then assert that *Ciraolo* and *Riley* should be overruled, and, further, that police should be required to obtain a search warrant prior to engaging in ‘targeted’ aerial surveillance of residential premises (unless a recognized exception to the warrant requirement applies).” Reply Br. of Def. in *State v. Houghtaling*, p. 6.

(the Supreme Court’s reliance in *Jardines* “upon property principles rather than expectation-of-privacy considerations . . . raises the question of whether *Jardines* supplies a standing basis of possibly somewhat different dimensions than privacy-based standing”).

* * *

Apart from his claim of privacy-based standing under *Katz*, the petitioner maintains that his right to due process of law was violated when the Connecticut Supreme Court refused to allow him to raise an alternative theory of “property-based” standing under *United States v. Jeffers*, 342 U.S. 48 (1951). (As explained more fully in section I of the Statement of the Case, *Jeffers* was cited by petitioner’s trial counsel in the motion to dismiss, but was not argued as an alternative theory of standing; nor was the *Jeffers* theory argued by petitioner’s prior appellate counsel in the Connecticut Appellate Court.) In *Jeffers*, this Court held that a defendant had standing to object to a search based on a *property interest* in contraband (bottles of cocaine) that he stored in the closet of a relative’s hotel room, a room that he had permission to use. The Court observed that “[t]he [defendant] unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a *property interest* therein.” (Emphasis added.) *Id.*, 52. Because the Court then concluded that the defendant did have a property interest in the narcotics—for Fourth Amendment purposes—he therefore had standing: “It being his property, for purposes of the exclusionary rule, he was entitled on motion to have it suppressed as evidence on his trial.” *Id.* 54.

According to Professor LaFave, although this Court “has not had occasion since [the *Jeffers* decision] to evaluate fully a *Jeffers*-type situation, the Court’s more recent standing decisions indicate that the *Jeffers* rule has not lost is vitality.” 6 LaFave, op. cit. § 11.3(c), p. 209. “[T]he unstated premise in *Jeffers* was that the defendant had an expectation of privacy in his personal property [the cocaine] under the circumstances there presented.” *Id.* “It would seem clear beyond question that a defendant has standing if he is specifically permitted by the person with the possessory interest in the premises to store some specified effects there and is also permitted to enter the premises to check on those effects from time to time.” *Id.*, pp. 211-12. See *Mancusi v. DeForte*, 392 U.S. 364 (1968) (noting the “settled” proposition that even without “title to the searched premises[,]” a person “with a possessory interest in the premises might have standing.”) (citing to *Jeffers*); *Rakas v. Illinois*, supra, 136 (“Standing in *Jeffers* was based on *Jeffers*’ possessory interest in both the premises searched and the property seized.”); *United States v. Salvucci*, 448 U.S. 83, 90 n. 5 (1980) (quoting same).

The parallels between this case and *Jeffers* are obvious. By participating in a joint (albeit illicit) venture with his tenant, and with access to the premises, the petitioner had a demonstrable property interest in the contraband stored on the premises.

The principal issue on which the Connecticut Supreme Court granted certification was whether the petitioner had standing under *Katz*, i.e., whether the Appellate Court “properly determine[d] that the [petitioner] did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of

the search?” 317 Conn. 919, at App. 68a-69a. Pursuant to a rule of appellate procedure, “[t]he issues which the appellant may present are limited to those set forth in the petition for certification, except where the issues are further limited by the order granting certification.” Conn. Practice Book § 84-9. That rule, however, is flexible. The Connecticut Supreme Court has acknowledged that it “may, of course, suspend the limitation of [that rule] for good cause shown.” *State v. Torrence*, 196 Conn. 430 (1985). The court also has stated that “[w]hile Practice Book § [84-9] limits the issues the appellant may present to those raised in the petition for certification, we may, of course, suspend the limitation of § [84-9] when the dictates of justice require a more expansive analysis.” *Nardini v. Manson*, 207 Conn. 118, 119-20 n. 1 (1988). The cases cited in the petitioner’s motion to suspend the rules, see App. 76a-78a, clearly reveal that the Connecticut Supreme Court has considered additional issues or arguments where they were “sufficiently related to” or “intertwined” with the certified question, which is the case here.

Even though the Connecticut Supreme Court rejected the petitioner’s request to rely on a *Jeffers* theory of standing, the petitioner attempted to preserve that issue for federal review. For example, in his principal brief, the petitioner stated: “For purposes of possible federal review, the [petitioner] will simply state here that he believes *Jeffers* furnishes an alternative basis for a finding of standing.” Br. of Def. in *State v. Houghtaling*, p. 28 and n. 23. And the petitioner repeated that assertion in his reply brief. Reply Br. of Def. in *State v. Houghtaling*, p. 6.

The Connecticut Supreme Court undoubtedly has considerable discretion in determining the scope of its

review. But here, in refusing to allow the petitioner to raise an alternative theory of standing, the state court did more than abuse its discretion—it violated the petitioner’s Due Process rights by depriving him of a full and fair opportunity to litigate his Fourth Amendment challenge to the warrantless search. Under these circumstances, it would be appropriate for this Court to vacate the judgment of the Connecticut Supreme Court and to remand the case to that court with direction to consider the petitioner’s claim under *Jeffers*. See, e.g., *Combs v. United States*, 408 U.S. 224, 227-28 (1972) (vacating judgment of Court of Appeals and remanding to District Court to make factual determinations on the issue of standing).

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully Submitted,

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December 8, 2017

APPENDIX

1a

APPENDIX A

SUPERIOR COURT
J.D. OF WINDHAM AT DANIELSON

Docket No. CR 10 0142603

STATE OF CONNECTICUT

vs.

RICHARD A. HOUGHTALING

March 6, 2013

MEMORANDUM OF DECISION ON DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE

FACTS

On August 10, 2010, the defendant, Richard A. Houghtaling, was charged with the production and preparation of a controlled substance without a license, possession of more than four ounces of marijuana, the sale of illegal drugs and the operation of a drug factory, in violation of General Statutes §§ 21a-246, 21a-279 (b), 53a-48, 21a-277 (c). The present motion stems from the August, 2010 raid of a property located at 41 Raymond Schoolhouse Road, Canterbury, CT (the home). The following facts are relevant to the present motion.

On August 9, 2010, the Connecticut Statewide Narcotics Task Force (SNTF) was conducting an eradication operation in the northeast corner of the state. Two SNTF spotters were passengers in a Massachusetts Air National Guard helicopter, hovering between 500 and 1000 feet, and working in conjunction with a ground team. Earlier in the morning, several grow operations were located as a result of anonymous tips, and raids were conducted. The SNTF then focused its efforts over Canterbury, CT.

Shortly after noon, the helicopter notified ground troops about a suspected large crop of marijuana being grown at a secluded residence at 41 Raymond Schoolhouse Road in Canterbury. The property was comprised of 5.6 acres of land, and included a residence, in-ground pool, pool house, covered greenhouse, two-story barn and a detached garage. The residence was largely surrounded by dense forest, and the only means of ingress and egress was a narrow dirt driveway. Pinpointing the location based on the coordinates provided by the air team, the ground team moved in without a warrant. The helicopter remained above for the duration of the raid.

The raid was conducted by several police officers all driving separate, undercover and unmarked vehicles. The ground team started down the narrow, dirt driveway which was bounded by a stone wall. The trees on either side of the road contained "no trespassing" signs. Mid-way down the driveway, the police came to a steel horse gate that was open. They parked their vehicles in front of the gate and proceeded toward the home, which was 75 feet away, on foot. With all four vehicles parked, there was one car length remaining at the end of the driveway before Raymond Schoolhouse Road.

As the ground team approached the home, there were no occupant vehicles visible. They saw no one, and smelled and heard nothing. They knocked at the front door, but there was no answer. The officers then swept around the left side of the home intent on knocking at the rear door and came upon a pool surrounded by a fence. There were dozens of marijuana plants within the pool area, as well as several plants along the outside of the fence. None of the plants, however, were visible from the front of the home. They were clearly visible from the air as demonstrated by testimony and photographic exhibits.

Police then proceeded toward a greenhouse located behind the pool and toward the back of the property. As they approached, they noticed that the structure contained no side walls. Approaching from the side, police saw two men, later identified as Thomas Phravixay and Sisouk Phravixay. The greenhouse contained numerous marijuana plants in various stages of growth. Both men were subsequently identified, given their *Miranda* warnings and questioned. Thomas Phravixay told officers that he was renting the home. Shortly thereafter, Thomas Phravixay provided written consent to search the property.

At this time, the helicopter radioed to the ground team that a white work van had entered the driveway, turned around and left quickly. Two police officers followed the van. When they caught up, it was parked on the side of the road, several hundred feet from the entrance to the dirt driveway. The driver of the van committed no traffic violation, and all lights were functioning properly. The officers approached the two occupants with guns drawn.

The officers asked the two males, who were subsequently identified as Richard A. Houghtaling, the

defendant, and his brother-in-law, William Eichen, why they had turned around and left the property. Houghtaling informed the police that he had come to visit a friend, but left when he did not recognize the vehicles. At this time, the officers peered into the back of the van and observed several pieces of lumber and irrigation piping consistent with the ongoing construction of the green house on the back of the property. The officers placed handcuffs on Houghtaling and Eichen and transported them back to the property.

When they arrived, Houghtaling and Eichen were advised of their *Miranda* rights. Houghtaling was reluctant to speak. Officers then told him about Thomas Phravixay's consent to search, about the evidence they had seen so far, about the piece of mail they had found with Houghtaling's name on it, and told him he was going to jail. Houghtaling then gave a statement.

He told the officers that he bought the home a year ago, but could not afford the mortgage payments. So, he decided to rent the home to Thomas Phravixay, who he had known for several years. Thomas Phravixay paid rent periodically, and four or five months ago Houghtaling decided to help him cultivate marijuana. The police seized over one thousand marijuana plants, grow chemicals and materials, cultivation books, a scale and a rifle.

On July 2, 2012, the defendant filed a motion to suppress evidence. The state filed an opposition to the motion to suppress on December 19, 2012. Argument was heard at a suppression hearing on January 31, 2013. The state called three witnesses, and the defense called one. The defendant did not testify. Both sides introduced numerous exhibits.

ANALYSIS OF THE LEGAL ISSUES

The defendant has moved to suppress “(1) all evidence seized by law enforcement officers in connection with the warrantless search and seizure conducted at [41 Raymond Schoolhouse Road] on August 9, 2010; (2) all statements made by Mr. Houghtaling and others, including Thomas Phravixay, as a result of the illegal search and seizure; and (3) fruits of any and all other evidence obtained, derived or developed as a result of the illegal search and seizure and illegally obtained statements” For simplicity, the evidence will be divided into four categories: (1) evidence obtained from the search of the home; (2) the statements of Thomas Phravixay and others;¹ (3) the evidence obtained from the search of the work van the defendant was driving; and (4) the defendant’s statements. Preliminarily, the state has raised standing as an impediment to the defendant’s motion.

Standing

At the threshold, the defendant has the burden to prove first that he had an actual subjective expectation of privacy in the place searched or the object seized, and second that this expectation was constitutionally reasonable under the circumstances. *State v. Jackson*, 304 Conn. 383, 395, 40 A.2d 290 (2012); *State v. Bernier*, 246 Conn. 63, 72, 717 A.2d 63 (1998). Whether the defendant has satisfied this burden will require a fact-specific inquiry by the court into all the relevant circumstances. *State v. Joyce*, 229 Conn. 10, 23, 639 A.2d 1007 (1994). In this effort, the defendant relies on *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct.

¹ Because the pertinent facts and analysis concern Thomas Phravixay, and not Sisouk Phravixay, the court will use “Phravixay” throughout in reference to Thomas Phravixay solely.

691, 7 L. Ed. 2d 663 (1962), for the proposition that “a personal stake in the outcome of the controversy” in and of itself is sufficient to confer standing.

In *Baker*, a civil action, the plaintiffs challenged the constitutionality of a 1901 Tennessee statute apportioning the members of the General Assembly among the state’s counties. The plaintiffs argued that the statute denied them the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States because it debased their votes. *Baker*, however, is a pre-*Katz* case decided in 1962. It is not controlling in the instant matter. It was Justice Harlan’s concurrence in *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L.Ed. 2d 576 (1967) (Harlan, J., concurring), which the Supreme Court subsequently adopted in *Rakas v. Illinois*, 439 U.S. 128, 143-44, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978), reh. denied, 439 U.S. 1122, 99 S. Ct. 1035, 59 L. Ed. 2d 83 (1979), that set out the expectation of privacy analysis that persists today.

The essence of the standing inquiry is whether the defendant “had a reasonable expectation of privacy in the item searched and that his expectation was one that society would recognize as reasonable. *Rawlings v. Kentucky*, 448 U.S. 98, 104-105, 100 S. Ct. 2556, 65 L. Ed. 2d 633. (1980); *State v. Pittman*, 209 Conn. 596, 601, 553 A.2d 155 (1989) [I]t is the defendant who must show that he had an actual subjective expectation of privacy. *Rawlings v. Kentucky*, supra, at 104, 100 S. Ct. at 2561; *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); *State v. Brown*, 198 Conn. 348, 356, 503 A.2d 566 (1986). Whether the defendant has established a reasonable expectation of privacy is determined on a case by case basis; *State v.*

Mooney, 218 Conn. 85, 94, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991); by a factual inquiry into all of the relevant circumstances. *State v. Reddick*, 207 Conn. 323, 331, 541 A.2d 1209 (1988).” (Internal citations omitted.) *State v. Joyce*, 30 Conn. App. 164, 170-71, 619 A. 2d 872 (1993) rev’d on other grounds, 229 Conn. 10, 639 A. 2d 1007 (1994).

“Although often referred to as a subjective expectation of privacy, the defendant must demonstrate an *exhibition* of an actual expectation of privacy. (Emphasis in original.) *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir.1980); *California v. Greenwood*, 486 U.S. 35, 39, 108 S.Ct. 1625, 1628, 100 L. Ed. 2d 30 (1988); *Katz v. United States* *supra*, at 361, 88 S.Ct. at 516; 1 W. LaFave, *Search and Seizure* (2d Ed.1987) § 2.1(b), p. 308-309 The constitution protects what one seeks to preserve as private. *Katz v. United States*, *supra*, at 351, 88 S.Ct. at 511.” (Internal citations omitted; quotation marks omitted.) *State v. Joyce*, *supra*, 30 Conn. App. 171-72.

In *State v. Davidson*, Superior Court, judicial district of Hartford, Docket No. CR-H-8010-288-EN (July 8, 1981, *Satter, J.*), the court heard the defendant’s motion to suppress evidence obtained from a warrantless search of leased premises. The defendant in that case was the owner of a multi-unit building which he leased to tenants. He did not live in the building. The court denied the defendant’s motion, writing “[T]he central issue is whether or not, on these facts, defendant is entitled the protection of the Fourth Amendment right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The standard is expressed by the United States Supreme Court in the leading case of *Rakas v.*

Illinois, 439 U.S. 128, 143 (1978) as follows: Capacity to claim protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment has a *legitimate expectation of privacy* in the invaded place.

“In this case, where all the units in the building were rented and the defendant himself did not live there, the tenants acquired the dominant control and possession of the premises. (*Bentley v. Dynarski*, 150 Conn. 147, 150 (1962)). Defendant, as landlord, has only a limited right, pursuant to . . . Connecticut General Statutes, to enter only to inspect, make repairs, supply services, or exhibit to prospective purchasers, mortgagees, workmen or contractors. The defendant, having given up possession and control to the tenants, has no privacy right in the leased premises, and therefore no legitimate expectation of privacy. While tenants clearly have a right to safeguard their privacy in the rented premises (*Jones v. U.S.*, 362 U.S. 257 (1960)), a landlord, solely because of his property ownership, is not entitled to Fourth Amendment protection” (Citations omitted.) *State v. Davidson*, Superior Court, *supra*.

State v. Zindros, 189 Conn. 228, 456 A.2d 288 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984), is also instructive. In *Zindros*, the defendant-lessee was charged with arson stemming from a fire at a restaurant he operated. The defendant moved to suppress the evidence obtained as a result of a warrantless search of the premises. Eleven days after the fire, the landlord-lessor gave the police access to the premises. The lease had not been terminated at the time that officers conducted the search, no warrant was obtained and the defendant’s permission was not

given. The state attacked the defendant's standing to suppress the evidence, arguing that the defendant had no reasonable expectation of privacy in the premises searched. The trial court disagreed, and the state appealed. The Appellate Court upheld the trial court's finding that the defendant had a reasonable expectation of privacy in the premises that conferred standing to contest the constitutionality of the search, and our Supreme Court affirmed. *Id.*, 241. The defendant had a subjective expectation of privacy because he made efforts to secure the premises when he left them, expressed his intention to stay, stored his property there, intended to reopen the business and the landlord made no effort to terminate the lease. *Id.*² While there is no controlling Connecticut law on the issue of a landlord's standing to suppress evidence seized from leased premises, our Supreme Court's decision in *Davis* provides a reading of Connecticut's constitutional temperature.

In *State v. Davis*, 283 Conn. 280, 929 A.2d 278 (2007), the defendant appealed from the trial court's denial of his motion to suppress evidence obtained

² Admittedly, the precedential value of *Zindros* is limited by the "clearly erroneous" standard under which the Appellate Court reviewed the lower court's decision. The fact that *Zindros* involved the search of a commercial building, however, is a distinction without a constitutionally significant difference. "A person, of course, can have a legally sufficient interest in a place other than his own home so that the fourth amendment protects him from unreasonable governmental intrusion into that place. *Jones v. United States*, 362 U.S. 257, 263, 80 S. Ct. 725, 732, 4 L.Ed.2d 697 (1960); see *Rakas v. Illinois*, supra, 439 U.S. at 142-43, 99 S. Ct. at 429-30. This also applies to commercial premises. see *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-13, 98 S.Ct. 1816, 1819-21, 56 L.Ed.2d 305 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 1733-34, 18 L.Ed.2d 930 (1967)." *State v. Zindros*, supra, 189 Conn. 239.

from the search of an apartment in Norwich; CT. The apartment was being rented by Adrienne Cook, and the defendant was staying at the apartment. Cook contacted the police and informed them that the defendant was staying at her apartment and had refused to leave. The police went to the apartment and arrested the defendant, seizing a black duffel bag from the room in which the defendant had been staying. The duffel bag contained a gun and ammunition which linked the defendant to a murder.

The defendant moved to suppress the seizure of the duffel bag. The trial court denied the defendant's motion, finding that, because he had no reasonable expectation of privacy in the searched premises, he had no right to challenge the legality of the search. Our Supreme Court granted direct appellate review. On appeal, the defendant argued that article first, § 7, of the state constitution affords greater protection than the fourth amendment to the federal constitution, and urged the court to adopt both the "automatic standing" and "legitimately on the premises" rules.³ The court concluded that the Connecticut constitution does not embody either of these claimed rules of standing.

³ The "automatic standing" rule provides that "when a defendant has been charged with a possessory offense, [t]he possession on the basis of which [the defendant] is to be . . . convicted suffices to give him standing to challenge the legality of a search" (Internal quotation marks omitted; citations omitted.) *State v. Davis*, supra, 283 Conn. 294; *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), overruled by, *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). The "legitimately on the premises" rule provides that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." (Internal quotation marks omitted.) *State v. Davis*, supra, 283 Conn. 294.

As stated by Justice Palmer, “[B]ecause the rights protected under that state constitutional provision, like the rights protected under the fourth amendment, are personal, they may not be asserted vicariously.” *Id.*, 310. “The exclusionary rule protects only those defendants whose *own* constitutional rights have been violated; there is no compelling reason to make an exception for defendants charged with possessory offenses [A] mere possessory interest in a seized item does not necessarily mean that the possessor’s reasonable expectation of privacy has been infringed.” (Internal quotation marks omitted.) *Id.*, 314-15. “Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of [fourth amendment] rights’ because [r]elevant [and reliable] evidence is kept from the trier of fact and the search for truth at trial is deflected.” (Internal quotation marks omitted.) *Id.*, 316. “[T]he interests of our citizenry are best served by an exacting application of the exclusionary rule when the accused has established a violation of his constitutionally protected privacy rights.” *Id.*, 317. “[The court is] not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment [on] the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.” *Id.*, 322. In the end, the rights secured by the fourth amendment, and by article first, § 7, remain focused on the defendant’s reasonable expectation of privacy. see *Id.*, 323.

In the present case, the defendant-lessor has moved to suppress the evidence obtained from the search of the property he rented to Phravixay. Although this court is not bound by the *Davidson* case, it is persuasive both in light of *Zindros*, and our Supreme Court’s

more recent decision in *Davis*. Like the lessor in *Davidson*, the defendant rented the subject property to Phravixay who paid rent periodically. Phravixay lived at the home and stored his possessions there, while the defendant lived with his wife approximately two hours away in Danbury, CT. By way of the landlord-tenant relationship, Phravixay acquired dominant possession and control of the premises with the attendant rights to privacy. Having relinquished these rights, even if the defendant had a subjective expectation of privacy in the leased premises—which is not supported by the evidence submitted at the suppression hearing—this expectation is not one which society is willing to recognize as reasonable. A contrary finding would be an affront to common sense, as well as the significant rights that tenants enjoy under Connecticut statutes to be free from landlord interference. *Zindros* too, supports this conclusion.

While the *Zindros* court was confronted with opposite facts, the rationale remains. A tenant in possession, to the exclusion of the landlord, has a reasonable expectation of privacy in the leased premises. Like the defendant in *Zindros*, Phravixay had a lease agreement under which he made periodic payments to the defendant. No facts were introduced to suggest that this agreement had terminated at the time of the search. Phravixay stored possessions and resided at the leased premises, while the defendant did neither. Thus, while Phravixay had a reasonable expectation of privacy in the home, the defendant did not; the absence of this expectation is fatal to the defendant's motion.

Connecticut does not permit a defendant to vicariously assert the rights protected under the fourth amendment and the state constitutional provisions.

see *State v. Davis*, supra, 283 Conn. 310. As our Supreme Court has discussed, a rule more protective than the fourth amendment is an unacceptable deflection of the search for truth and a burden too heavy for the backs of our citizenry. Because the touchstone remains the defendant's reasonable expectation of privacy, and the defendant's expectation is unreasonable on these facts, the motion to suppress the evidence seized from the search of 41 Raymond Schoolhouse Road is denied.

Next the defendant, relying on *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), argues that all statements made by the defendant "and others" must be suppressed as fruits of the poisonous tree.⁴ "Under 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. Colvin*, 241 Conn. 650, 656, 697 A.2d 1122 (1997); *Wong Sun v. United States*, supra, 371 U.S. 485. Absent standing to suppress the evidence obtained at the home, however, the defendant cannot expand an exclusionary remedy, to which he is not entitled; to the statements made by his alleged coconspirators as fruit of the poisonous tree. Consequently, the defendant's motion to suppress the statements "of others" is denied. The defendant's motion to suppress his own statements is considered below.

⁴ At the suppression hearing, the court heard testimony that only the defendant and Thomas Phravixay gave statements to arresting officers. To the extent that the defendant also moves to suppress the statements of Sisouk Phravixay or William Eichen, this motion fails for the same reasons.

The Work Van

The defendant next moves to suppress the evidence seized from the work van as the fruit of a *Terry* stop that was not founded on reasonable suspicion. Even if the *Terry* stop was initially lawful, the defendant argues, the stop was unduly intrusive because it extended far past the time necessary to confirm or dispel police suspicion of criminal activity.

“The federal and state law of search and seizure in this area is well settled. Under the fourth amendment to the United States constitution and article first, [§ 7] . . . of our state constitution, a police officer is permitted in appropriate circumstances and in an appropriate manner to detain an individual for investigative purposes if the officer believes, based on a reasonable and articulable suspicion that the individual is engaged in criminal activity, even if there is no probable cause to make an arrest” *State v. Tuck*, 90 Conn. App. 872, 876- 77, 879 A.2d 553, 557 (2005).

“Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion Thus, [r]easonable and articulable suspicion is . . . based not on the officer’s inchoate and unparticularized suspicion or hunch, but [on] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience What constitutes a reasonable and articulable suspicion depends on the totality of the circumstances” *Id.*, 877.

“Flight from the police properly can be considered in determining whether a reasonable and articulable basis of suspicion exists where the defendant flees

before the police attempt to stop him.” (Internal quotation marks omitted.) *State v. Kimble*, 106 Conn. App. 572, 598, 942 A.2d 527 (2008). “Furthermore, when an individual suddenly changes his course of conduct upon seeing the police, such conduct tends to support a reasonable suspicion that the individual may be involved in criminal activity.” *State v. Tuck*, *supra*, 90 Conn. App. 880.

At the suppression hearing, multiple officers testified about the expedited manner in which the work van departed. There were numerous cars in the driveway, and police officers were wearing protective vests emblazoned with the letters of their respective enforcement organizations. Upon arriving at this scene, the defendant backed out and drove away “very quickly.” When Moskowitz and Wiener followed, they found the work van parked, on the side of the road and adjacent to the property. At the time of the defendant’s entry, police had concluded a preliminary search of the property. Moskowitz was part of the team that surveyed the greenhouse in the back of the property. The defendant’s flight, coupled with police knowledge that someone entering on the property might be involved in the grow operation, and the defendant’s subsequent parking of the van adjacent to the property, furnished a reasonable and articulable basis of suspicion on which officers could, at the very least, question the driver of the vehicle about his presence there. In addition, the fact that Wiener and Moskowitz approached the vehicle with guns drawn did not transform the investigatory stop into a *de facto* arrest, requiring probable cause.

In *State v. Rodriguez*, 121 Conn. App. 250, 994 A.2d 691, cert. denied, 298 Conn. 918, 996 A.2d 278 (2010), our Appellate Court considered and rejected a similar

argument. In *Rodriguez*, officers approached the vehicle with weapons drawn. The court found that such action did not transform the initial *Terry* stop into an arrest because the officers were conducting the stop of an individual that was believed to be involved with narcotics. *Id.*, 258. “Connecticut courts repeatedly have noted that [t]here is a well established correlation between drug dealing and firearms Federal courts also have recognized this fact of life.” (Internal quotation marks omitted.) *Id.* Wiener and Moskowitz were conducting the stop of an individual they suspected of being involved in one of “the most significant grow operations in Connecticut history.” Thus, their behavior was reasonable. see also *State v. Mann*, 271 Conn. 300, 328, 857 A.2d 329 (2004), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005), citing *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) (in assessing reasonableness under *Terry*, courts should “consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing”).” *Id.* There can be no doubt, however, that the defendant was seized for *Terry* purposes when the officers blocked the defendant’s vehicle with their car and approached with guns drawn.

Once officers approached the vehicle, they asked the defendant for his license and registration and the reason for his presence at the home. Officers testified that the defendant’s answers were evasive, and that he claimed to be visiting a friend, but did not name him. At this time, and from outside of the vehicle, the contents of the work van were visible to officers. Moskowitz testified that the van contained lumber and irrigation piping consistent with the materials used to construct the greenhouse on the property. At

this time, the defendant and Eichen were placed under arrest. The contents of the van were subsequently seized.

“Probable cause . . . 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” *State v. Mordowanec*, 259 Conn. 94, 109, 788 A.2d 48, cert. denied, 536 U.S. 910, 122 S. Ct. 2369, 153 L. E. 2d. 189 (2002). “Under the plain view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant” (Internal quotation marks omitted; citation omitted.) *State v. Browne*, 291 Conn. 720, 728 n.5, 970 A.2d 81 (2009). “Moreover, when police make a lawful custodial arrest of an occupant of an automobile, and the arrestee is detained at the scene, police may contemporaneously search without a warrant the interior passenger compartment of the automobile The passenger compartment encompasses all space reachable without exiting the vehicle.” (Internal quotation marks omitted.) *State v. Parker*, 84 Conn. App. 739, 747, 856 A. 2d 428, 434 (2004), cert. denied, 272 Conn. 912, 866 A. 2d 1285 (2005).

In the present case, the materials in the back of the van, which were in plain view, connected the defendant and Eichen to the grow operation. Although the incriminating character of the lumber and piping is not immediately apparent in a vacuum, they were observed by Moskowitz who was familiar with the grow operation at the home. At that time, officers had probable cause to arrest the defendant. Thus, the subsequent search of the work van is upheld under both

the plain view doctrine, and the search incident to a lawful arrest exception to the warrant requirement.

The result is the same even in light of the defendant's reliance on *Wong Sun*. The defendant argues that because the initial entry onto the property was unlawful, and the search of the van and his statement flowed from it, they must be suppressed.

“As a general principle, the exclusionary rule bars the government from introducing at trial evidence obtained in violation of the fourth amendment to the United States constitution. see *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). [The rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures To carry out this purpose adequately, the rule does not distinguish between physical and verbal evidence; . . . nor does it apply only to evidence obtained as a direct result of the unlawful activity Rather, the rule extends to evidence that is merely derivative of the unlawful conduct, or what is known as the fruit of the poisonous tree The application of the rule, however, is restricted to those situations where its objectives are most efficaciously served Limiting the rule's application recognizes that in some circumstances strict adherence to the . . . rule imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. *Brown v. Illinois*, 422 U.S. 590, 608-609, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975) (Powell, J., concurring). Thus, evidence 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. *Segura v. United States*, 468 U.S.

796, 805, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984).” (Internal quotation marks omitted; citations omitted.) *State v. Luurtsema*, 262 Conn. 179, 189-90, 811 A.2d 223 (2002), rev’d on other grounds, *State v. Salomon*, 287 Conn. 509, 949 A.2d 1092 (2008). The test under *Wong Sun* is “whether, granting establishment of the primary illegality, the evidence to which 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.” *Wong Sun v. United States*, supra, 371 U.S. 488.

Though the initial sweep around the home appears to be constitutionally suspect, the defendant’s arrest was based on the knowledge of the materials used to construct the greenhouse. While the defendant does not have standing to contest the search of the home, *Wong Sun* would necessitate the suppression of the search of the van if the evidence was come at by exploitation of the primary illegality. The defendant’s arrest was based on the knowledge of the materials used to construct the greenhouse, and the criminality of the materials in the van would not have been immediately apparent but for the initial police intrusion onto the property and their observation of the grow operation.⁵ The dispositive question, therefore, is whether the greenhouse is curtilage.

⁵ The court undertakes the curtilage analysis out of an abundance of caution for the defendant’s constitutional rights. It is likely that even if the greenhouse were to be considered curtilage, the result would be the same. There were piles of lumber on the ground outside of the greenhouse that were visible in plain view from the air (Ex. 1., Photos 6, 8, 9, 10.) These were the same materials, among others, seen in the back of the van. “[I]n testing the amount of evidence that supports probable cause, it is not the personal knowledge of the arresting officer, but the collective knowledge of the law enforcement organization at the

“In determining whether a resident can have a reasonable expectation of privacy in a given portion of his or her property, courts may consider, among other relevant factors (1) the proximity to the house of the area claimed to be curtilage, (2) whether the area is included within an enclosure surrounding the house, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by it. *United States v. Dunn*; 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326 (1987). When the police, having come onto private property to conduct an investigation, restrict their movements to areas that, under the above analysis, are considered semi-public, observations made from that vantage point are not illegal under the fourth amendment. 1 W. LaFave, *Search and Seizure* § 2.3(f), pp. 412-13.” *State v. Liptak*, 21 Conn. App. 248, 256, 573 A.2d 323, cert. denied, 215 Conn. 809, 576 A.2d 540 (1990), *State v. Charron* 2002 Ct. Sup. 1499 citing *State v. Eady*, 249 Conn. 431, 437, 733 A.2d 112 (1999). “[T]hese factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s umbrella of [f]ourth [a]mendment protection.” (Internal quotation marks omitted.) *State v. Ryder*, 301 Conn. 810, 823, 23 A.3d 694 (2011).

In the present case, the greenhouse was located a considerable distance toward the back of the property and away from the home and pool. Aerial photographs show that the greenhouse was also at the edge of a

time of the arrest that must be considered.” *State v. Batts*, 281 Conn. 682, 698, 916 A.2d 788, cert. denied, 442 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007).

large clearing. While the pool and pool house were surrounded by a fence attached to the home, the greenhouse was not enclosed. The structure was used solely for the cultivation of marijuana plants. In addition, little effort was made to protect the area from observation. The structure was covered by clear plastic sheeting, but it was incomplete and contained no side walls, permitting its contents to be readily viewed from the air or the ground. In the end, the area was not so intimately tied to the home itself that it should benefit from the home's umbrella of fourth amendment protection. Because there was no primary illegality on which the defendant's arrest was based, there can be no suppression under *Wong Sun*. Consequently, the defendant's motion to suppress the evidence seized from the van is denied.

The Defendant's Statements

Finally, the defendant moves to suppress the statement he made to officers following his transportation from the roadside to the home. The defendant argues that the statement should be suppressed as "fruits of his unlawful detention and arrest" because the *Terry* stop was not based on reasonable suspicion, and the ultimate arrest was not based on probable cause. These arguments were addressed fully above. The *Terry* stop and ultimate arrest of the defendant were constitutional. The only question remaining, therefore, is whether the prosecution has met its burden of proving that the defendant's statement was voluntarily made.

"The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v.*

Arizona, 384 U.S. 436, 444, 86S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *State v. Mullins*, 288 Conn. 345, 361, 952 A.2d 784 (2008). “[T]he state bears the burden of persuasion on the issue of voluntariness, and it must convince the trial court by a preponderance of the evidence that the confession sought to be admitted was voluntarily given The standard for voluntariness of a *Miranda* waiver is the same as the standard for voluntariness of a confession Additionally, we have noted: Irrespective of *Miranda* . . . any use in a criminal trial of an involuntary confession is a denial of due process of law In order to be voluntary a confession must be the product of an essentially free and unconstrained choice by the maker [T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant’s] will to resist and bring about confessions not freely self-determined.” (Internal quotation marks omitted; citations omitted.) *State v. Ortiz*, 101 Conn. App. 411, 424-25, 922 A.2d 244, cert. denied, 283 Conn. 911, 928 A.2d 538 (2007).

“[S]tatements by the police designed to lead a suspect to believe that the case against him is strong are common investigative techniques and would rarely, if ever, be sufficient to overbear the defendant’s will and to bring about a confession to a serious crime that is not freely self-determined” *State v. Lawrence*, 282 Conn. 141, 176, 920 A.2d 236 (2007). “Refusal to sign a waiver form or a written statement, although some evidence of the absence of waiver, may be outweighed by affirmative conduct indicative of a knowingly and intelligently made decision not to remain silent” *State v. Santiago*, 73 Conn. App. 205, 238, 807 A.2d 1048 (2002), rev’d on other grounds, 269 Conn. 726, 850 A.2d 199 (2004). Silence by itself is not enough to

evidence an invocation of the right to remain silent, nor is the refusal to answer a particular question. *State v. Smith*, 107 Conn. App. 746, 752, 946 A.2d 926, cert. denied, 288 Conn. 905, 953 A.2d 650 (2008); *State v. Torres*, 85 Conn. App. 303, 316, 858 A.2d 776, cert. denied, 271 Conn. 947, 861 A.2d 1179 (2004). Invocation of either right must be unambiguous; the police are under no obligation to clarify an ambiguity. *Berghuis v. Thompkins*, ___ U.S. ___ 130 S. Ct. 2250 (2010); *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

The defendant does not dispute that he was advised of his *Miranda* rights. The state also produced evidence from several officers that the defendant and Eichen received their rights shortly after being brought back to the home. Within the course of twenty-five minutes, the defendant signed a notice and waiver of rights form (Ex. 7.); a form consenting to the search and examination of evidence in the home and his vehicle (Ex. 8.); and signed a written statement (Ex. 9.) Police officers admitted to outlining the strength of their case to the defendant before his confession, and the defendant asserts that he was “reluctant to speak to detectives at first and then realized [they] had more information on the operation than he thought and finally admitted he was the homeowner.” The statements by police, however, were mere investigative tactics and were insufficient to overbear the defendant’s will. Indeed, the continued signing of three separate forms, over the course of a twenty-five minute period, directly contradicts the notion that the defendant’s waiver, consent and statement were involuntary. The defendant argues that his failure to initial each line on the bottom of the notice and waiver of rights form calls into question the voluntariness of his statement. The court disagrees. Even if the defendant

signed no forms at all, the court could find that his affirmative conduct was indicative of a knowing and intelligent decision not to remain silent. see *State v. Santiago*, supra, 73 Conn. App. at 238. The prosecution has carried its burden. The defendant was advised of his rights. His hesitance was not tantamount to the unambiguous invocation of his rights prior to his express waiver of them, and his statements were a product of his own free will. Consequently, the defendant's motion to suppress his statements is denied.

CONCLUSION

Based on the foregoing, the defendant's motion to suppress the evidence seized and derived from the search of 41 Raymond Schoolhouse Road, including the evidence seized from his work van, his own statement and the statements others, is denied.

/s/ Judge Riley
RILEY, J.

25a

APPENDIX B

155 Conn. App. 794

CONNECTICUT LAW JOURNAL

AC 35720

STATE OF CONNECTICUT

v.

RICHARD A. HOUGHTALING

March 17, 2015

Gruendel, Beach and Alvord, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of possession of marijuana with intent to sell and possession of more than four ounces of marijuana, the defendant appealed to this court. He claimed that the trial court improperly denied his motion to suppress certain evidence seized from a property that he owned and his statement to the police. Members of a narcotics task force were conducting a marijuana eradication operation when officers in a helicopter observed what they believed to be a large crop of marijuana being grown on certain property. When officers went to the property, they saw a pool area containing marijuana plants and two men inside a greenhouse, which had no walls and also contained marijuana plants. One of the men, P, indicated to the

officers that he was renting the home and provided written consent to search the property. Thereafter, a white van pulled into the driveway, and then turned around and left quickly. Police officers followed the van and observed it park on the side of the road near the property. The defendant was driving the van, and he was questioned, handcuffed, transported to the property, and advised of his *Miranda* rights. The defendant gave a statement to the officers indicating that he had purchased the home one year prior, that he rented it to P because he could not afford the mortgage payment, and that he started helping P cultivate marijuana about four or five months prior. *Held:*

1. The defendant could not prevail on his claim that the trial court incorrectly determined that he lacked standing to challenge the search of the property, that court having properly found that the defendant did not have a reasonable expectation of privacy in the property: the evidence and testimony failed to demonstrate that the defendant's relationship with the property was personal in nature or that it was more than sporadic, irregular or inconsequential, as the fact that P paid monthly rent that was less than the defendant's monthly mortgage payment did not support his claim that he was a cotenant, the fact that there was some mail in the kitchen with the defendant's name on it did not support his contention that he was at the property frequently, the defendant did not establish his claim that he received and stored items on the property, and his claims that he made home improvements to the property and that he slept there were unsupported by the facts in the record; accordingly, because the defendant did not have a subjective expectation of privacy in the property at the time of the search, the trial court did not err in denying his

motion to suppress the evidence obtained from the search of the property.

2. The trial court properly denied the defendant's motion to suppress evidence seized from the van he was driving and properly found that the police officers possessed a reasonable and articulable suspicion to conduct a motor vehicle stop; that court did not err in considering the defendant's entering onto the isolated property while the police were investigating the large marijuana grow operation and his actions in backing out of the driveway and leaving quickly as factors contributing to a reasonable suspicion that he may have been involved in criminal activity, as his unprovoked flight upon noticing the police was properly considered as a factor contributing to a reasonable and articulable suspicion of criminal behavior, and it was not clearly erroneous for the court to have concluded that the defendant was engaged in evasive behavior that rose to the level of flight.

3. The defendant could not prevail on his claim that even if his initial stop by the police was justified, they lacked probable cause to arrest him, which was based on his claim that because one of the arresting officers, M, had not been to the greenhouse in the initial sweep, M never discovered anything based on his personal knowledge to justify detaining the defendant: although M testified that he had not been inside the greenhouse before he brought the defendant back to the property, M never indicated that he had not seen the greenhouse, which was visible from the rear of the house, and the record supported an inference that he saw lumber and irrigation piping in the area of the greenhouse prior to conducting the stop of the van, which contained similar materials that were in plain view; furthermore, given the testimony of the police officers

that the defendant had provided evasive answers when asked why he had been to the property and left quickly, and that the van contained lumber and irrigation piping materials that were consistent with materials observed on the property that were being used in the construction of the greenhouse that housed components integral to the marijuana grow operation, there was sufficient evidence to support the belief that the defendant was involved in a drug related felony, which established a sufficient nexus between the defendant and the marijuana cultivation on the property to establish probable cause for his arrest.

4. The trial court properly denied the defendant's motion to suppress the statement he gave to the police; that court's determination that the defendant was advised of his *Miranda* rights prior to giving his statement was not clearly erroneous and was supported by the evidence in the record, the totality of the circumstances surrounding the defendant's waiver of his right to remain silent supported the finding that the waiver was valid, and the court properly determined that the defendant's statement was voluntary and that the evidence presented indicated that the officers' conduct was not sufficient to overbear the defendant's will.

Argued November 21, 2014—
officially released March 17, 2015

Procedural History

Substitute information charging the defendant with the crimes of possession of marijuana with intent to sell and possession of more than four ounces of marijuana, brought to the Superior Court in the judicial district of Windham, geographical area number

eleven, where the court, *Riley, 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; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

David V. DeRosa, with whom, on the brief, was *Austin B. Johns*, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, and *Matthew A. Crockett*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Richard A. Houghtaling, appeals from the judgment of conviction following his conditional plea of nolo contendere¹ to one count of possession of marijuana with intent to sell in violation of General Statutes § 21a-277 (b) and one count of possession of more than four ounces of marijuana in violation of General Statutes § 21a-279 (b). The plea followed the trial court's denial of the defendant's motion to suppress evidence seized from a property the defendant owned, statements made by the defendant and others,² and the fruits of the allegedly unlawful

¹ The defendant's plea was conditioned on his right to appeal from the denial of his motion to suppress evidence in accordance with General Statutes § 54-94a.

² The defendant contends for the first time in his reply brief that the court improperly denied his motion to suppress the statements of Thomas Phravixay. "It is well established . . . that [an appellate] court will not review claims that are raised for the first time in a reply brief." *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 181 n.52, 84 A.3d 840 (2014). Accordingly, we deem this claim waived.

search and seizure and unlawfully obtained statement. On appeal, the defendant claims that the court's denial of his motion to suppress was improper because (1) he had a reasonable expectation of privacy in the area searched, including the home and the area surrounding it, (2) his fourth amendment rights were violated by the warrantless search³ conducted by the statewide narcotics task force, (3) the police lacked a reasonable and articulable suspicion to conduct a motor vehicle stop of the van operated by the defendant and his resulting arrest was unsupported by probable cause, and (4) the defendant's statement given to police was involuntary.

The following facts were found by the court. On August 9, 2010, a marijuana eradication operation was being conducted by the statewide narcotics task force in the northeastern part of the state. The operation included members of the task force positioned in a Massachusetts Air National Guard helicopter and a ground team conducting raids. In the early afternoon, officers in the helicopter observed what they believed to be a large crop of marijuana being grown in the area of 41 Raymond Schoolhouse Road in Canterbury (property). The officers in the helicopter provided the ground team with the coordinates, and the officers in the ground team approached the property. Several officers were on the ground, driving separate, unmarked vehicles. They drove down the narrow, dirt driveway, near which was posted a "no trespassing" sign. The officers stopped in front of an open, steel gate, parked their vehicles, walked toward the house, and knocked at the front door. After no one answered, the officers walked around the side of the home. The

³ See footnote 17 of this opinion.

officers saw a pool area containing dozens of marijuana plants. They walked toward a greenhouse, which had no side walls. As they approached, they saw two men inside the greenhouse, which contained marijuana plants. The two men, identified as Thomas Phravixay⁴ and Sisouk Phravixay, were given *Miranda*⁵ warnings. Phravixay indicated to officers that he was renting the home. Shortly thereafter, Phravixay provided written consent to search.

At some point after encountering the two men, officers returned to their vehicles. Matthew Moskowitz, a member of the Bristol Police Department assigned to the statewide narcotics task force, radioed that a white van had entered the driveway, turned around and left quickly.⁶ Moskowitz and Officer Mark Wiener, a member of the state police assigned to the statewide narcotics task force, followed the van and observed it parked on the side of the road. The officers approached the van with their weapons drawn and asked the occupants, later identified as the defendant and William Eichen, the defendant's brother-in-law, why they had turned into the property and then left. The defendant explained that he went to the property to visit a friend, but that he left because he did not recognize the vehicles. The officers then looked into the back of the van and saw lumber and irrigation piping, which they believed to be consistent with the construction of

⁴ As the trial court noted, the relevant facts and analysis concern Thomas Phravixay, not Sisouk Phravixay. Thus, references in this opinion to Phravixay refer to Thomas Phravixay only.

⁵ See *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁶ Although the court indicated that someone positioned in the helicopter had radioed this information to the ground team, it is undisputed that Moskowitz radioed the information.

the greenhouse on the property. The defendant and Eichen were then handcuffed and transported to the property, where they were advised of their *Miranda* rights. Although initially reluctant to speak, the defendant gave a statement after the officers provided him with information, including that Phravixay had consented to a search, the evidence the officers had seen so far, that officers had found mail with the defendant's name on it, and that he was "going to jail." The defendant stated that he had purchased the home one year ago and had decided to rent it to Phravixay because he could not afford the mortgage payment. He also said that Phravixay paid him "periodically for the rent," and that he had decided to help Phravixay cultivate marijuana about four or five months ago.

The defendant filed a motion to suppress on July 3, 2012, and the state filed an objection on December 19, 2012. A hearing was held on January 31, 2013, at which the defendant did not testify. The court issued a written memorandum of decision denying the defendant's motion to suppress on March 6, 2013. The defendant subsequently entered a conditional plea of *nolo contendere* to one count of possession of marijuana with intent to sell and one count of possession of more than four ounces of marijuana, and was sentenced to five years imprisonment, suspended after four years, with five years of probation. This appeal followed.

I

STANDING

The defendant first claims that the court incorrectly determined that he lacked standing to challenge the

search of the property.⁷ He specifically argues that he had a reasonable expectation of privacy in the property searched such that the warrantless search violated his rights under the fourth amendment to the United States constitution and article first, § 7, of the constitution of Connecticut.⁸ We are not persuaded.

Two Part Test

We first set forth the applicable law surrounding standing to contest an allegedly illegal search. “The touchstone to determining whether a person has standing to contest an allegedly illegal search is

⁷ The trial court and the defendant use the term “standing.” We observe that “[c]ourts have questioned whether it serves any useful analytical purpose to consider [the] principle [that fourth amendment rights are personal] a matter of standing, distinct from the merits of a defendant’s [f]ourth [a]mendment claim . . . [and have concluded] that the definition of [fourth amendment] rights is more properly placed within the purview of substantive [f]ourth [a]mendment law than within that of standing.” (Internal quotation marks omitted.) *State v. Kimble*, 106 Conn. App. 572, 581, 942 A.2d 527, cert. denied, 287 Conn. 912, 950 A.2d 1289 (2008); see also *Rakas v. Illinois*, 439 U.S. 128, 138-40, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). We note that “[t]he inquiry under either approach is the same.” *Rakas v. Illinois*, supra, 139. Because the defendant frames his claims in terms of standing, we also use that language.

⁸ The defendant does not set forth a separate claim, accompanied by an independent analysis, under the Connecticut constitution. In his appellate brief, the defendant claims that the Connecticut constitution provides similar protection. We, therefore, do not address this claim separately. See *State v. Fields*, 265 Conn. 184, 190 n.8, 827 A.2d 690 (2003) (“We have repeatedly apprised litigants that we will not entertain a state constitutional claim unless the defendant has provided an independent analysis under the particular provisions of the state constitution at issue . . . Without a separately briefed and analyzed state constitutional claim, we deem abandoned the defendant’s claim” [Internal quotation marks omitted.]).

whether that person has a reasonable expectation of privacy in the invaded place. *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Joyce*, 229 Conn. 10, 20, 639 A.2d 1007 (1994). Absent such an expectation, the subsequent police action has no constitutional ramifications In order to meet this rule of standing . . . a two-part subjective/objective test must be satisfied: (1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises]; and (2) whether that expectation [is] one that society would consider reasonable. . . . This determination is made on a case-by-case basis. . . . Whether a defendant's actual expectation of privacy . . . is one that society is prepared to recognize as reasonable involves a fact-specific inquiry into all the relevant circumstances." (Citations omitted; internal quotation marks omitted.) *State v. Hill*, 237 Conn. 81, 92, 675 A.2d 866 (1996).

"Furthermore, [t]he defendant bears the burden of establishing the facts necessary to demonstrate a basis for standing . . . and the trial court's finding [on the question of standing] will not be overturned unless it is legally or logically inconsistent with the facts found or involves an erroneous rule of law." (Citation omitted; internal quotation marks omitted.) *State v. Boyd*, 57 Conn. App. 176, 184, 749 A.2d 637, cert. denied, 253 Conn. 912, 754 A.2d 162 (2000); see also *State v. Mitchell*, 56 Conn. App. 561, 566, 744 A.2d 927 (defendant has burden of proving that he had reasonable expectation of privacy in premises), cert. denied, 253 Conn. 910, 754 A.2d 162 (2000). "The right of privacy is personal to the party seeking to invoke it, and thus cannot be left to the court's speculation." *State v. Michael D.*, 153 Conn. App. 296, 310, 101 A.3d 298, cert. denied, 314 Conn. 951, 103 A.3d 978 (2014).

Subjective Expectation of Privacy

To evaluate whether a defendant has demonstrated a subjective expectation of privacy in a location, our courts employ the following test: “a defendant must show facts sufficient to create the impression that (1) his relationship with the location was personal in nature, (2) his relationship with the location was more than sporadic, irregular or inconsequential, and (3) he maintained the location and the items within it in a private manner at the time of the search.” *State v. Boyd*, supra, 57 Conn. App. 185; see also *State v. Braswell*, 145 Conn. App. 617, 642, 76 A.3d 231 (“[e]vidence of the defendant’s relationship with the location is necessary to establish a reasonable expectation of privacy”), cert. granted on other grounds, 310 Conn. 939, 79 A.3d 892 (2013).

The trial court made several factual findings in determining that the defendant did not exhibit a subjective expectation of privacy in the property. The court found that Phravixay lived at the property, stored possessions there, and “paid rent periodically” to the defendant. The court found that the defendant neither stored possessions at the property nor lived there, and that he lived approximately two hours away in Danbury. Further, noting that the defendant had not introduced any facts to suggest that the rental agreement had ended at the time of the search, the court concluded that the defendant did not have a reasonable expectation of privacy in the property.

First *Boyd* Factor

We now consider the defendant’s claims under applicable law. The defendant, conceding that “ownership of the property alone does not establish standing,” argues that he had a personal relationship with the

property. He claims that he was “a co-occupant on the property, and not just an absentee landlord . . .” First, the defendant argues that he owned the property and leased it to Phravixay for a monthly rent at a rate that was less than his monthly mortgage payment, which he claims suggests cotenancy.⁹ Second, he claims that he received and stored items on the premises, but he only mentions an aeration system found at the property but addressed to him in Danbury. Third, he claims that because he received mail at the property, he was there frequently.

Notwithstanding the defendant’s arguments, the personal nature of his relationship to the property was not sufficiently developed through the evidence or testimony at the hearing. His arguments on appeal are thus unsupported by the record.

The fact that Phravixay paid monthly rent that was less than the defendant’s monthly mortgage payment, without more, provides no support for the claim that the defendant was a cotenant. The defendant did not present evidence indicating in what manner he retained the rights, if at all, to use the premises despite Phravixay’s rental of the property.¹⁰ See *State v.*

⁹ The defendant additionally claims that the fact that the officers asked him for consent to search the property indicates that the officers themselves believed that he had an expectation of privacy in the property. Douglas Hall, a sergeant with the statewide narcotics task force, testified that after they found out that the defendant owned the home, “at that point, even though it really wasn’t necessary in doing so, we ended up obtaining a consent to search from him as well.” Thus, we cannot conclude from the officer’s testimony that the police believed that the defendant had an expectation of privacy in the home.

¹⁰ We note that the court considered both the fact that the defendant owned the property and that he rented it to Phravixay in concluding that even if the defendant had exhibited a

Brown, 198 Conn. 348, 358, 503 A.2d 566 (1986) (no evidence presented that defendant's rental of garage included both bays or relative rights of others to use garage or driveway).

With regard to the claim that the defendant received and stored items on the premises, the defendant cites only to an aeration system. The defendant acknowledges that the aeration system was addressed to him in Danbury, but he argues that it was used on the property. Cf. *State v. Zindros*, 189 Conn. 228, 240, 456 A.2d 288 (1983) (considering, in determining whether defendant had subjective expectation of privacy in premises, that defendant testified he had personal property inside building which he claimed to be worth more than \$6000), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984). Douglas Hall, a sergeant with the statewide narcotics task force, testified that other than the mail found in the kitchen, he could not think of any other personal items within the home that were identifiable to the defendant.

The only evidence adduced at the hearing with regard to mail was Hall's testimony that he believed there was "some mail" in the kitchen with the defendant's name on it, and Moskowitz' testimony that he found mail in the mailbox with the defendant's name on it. The defendant suggests that the officers'

subjective expectation of privacy in the property, it is not one that society is willing to recognize as reasonable on the basis of the statutory rights of tenants. See General Statutes § 47a-16 (restricting circumstances under which landlord may enter dwelling unit rented to tenant). Because we agree with the court's conclusion that the defendant did not establish a subjective expectation of privacy in the property, we need not reach the question of whether the expectation of privacy is one that society would deem reasonable.

observation of the mail shows that he was at the property frequently, but he offered no testimony or evidence to support this contention.

Second *Boyd* Factor

The defendant additionally argues that his relationship with the property was more than sporadic, irregular or inconsequential. He argues that he “actively participated in home improvement in the enclosed yard surrounding the house,” a claim that he supports with only the fact of his possession of “material to repair the greenhouse”¹¹ He claims that this shows he was at the property on a regular basis. Additionally, in his reply brief, he claims that “there is as much indication he slept at the property as the Phravixay brothers did.”

¹¹ The defendant additionally argues that his “comments made in an admission to the police, and on which the prosecution relies to inculcate him . . . amount to an evident expectation of privacy in the property.” We observe that “[p]rivacy expectations do not hinge on the nature of defendant’s activities—innocent or criminal.” *United States v. Fields*, 113 F.3d 313, 321 (2d Cir.), cert. denied, 522 U.S. 976, 118 S. Ct. 434, 139 L. Ed. 2d 334 (1997); *id.*, 320 (defendant possessed reasonable expectation of privacy in apartment where he prepared crack cocaine for resale, because even though he did not live there or stay overnight there, “[h]e had a key . . . paid \$125 per week for the privilege of using the apartment, made use of it on 40 or 50 occasions, could bring guests and, with minor restrictions, could come and go as he pleased, even if [the resident] was not present”). Although the defendant in this case did admit to “help[ing] Tom [Phravixay] cultivate the marijuana,” he also stated that he “didn’t realize the extent of the grow operation” and “didn’t really think much of what was going on at the house” Without more, his statement is insufficient to establish a subjective expectation of privacy.

The defendant's claims that he actively participated in home improvement in the enclosed yard and that the property "was a place he . . . spent time at and possibly slept at" are entirely unsupported by facts in the record.¹² Cf. *State v. Kennedy*, 20 Conn. App. 354, 359-60, 567 A.2d 841 (1989) (review of record revealed that defendant, grandson of homeowner, had established expectation of privacy in basement garage, noting factors including that he had made repairs around house), cert. denied, 214 Conn. 805, 573 A.2d 317 (1990).

Third *Boyd* Factor

The defendant claims that his "considerable efforts to preserve [the] property as private" demonstrate his subjective expectation of privacy in the property. The defendant mentions the "sparsely populated area" in which he purchased the property, the location of the residence on the property, a posted no trespassing sign, and a gate as examples of his efforts to keep the property private. The state contends that "[t]hese attributes do not reveal the defendant's actual expectation of privacy in the property, when he leased it to another person, left no personal possessions there, and resided nearly two hours away." (Emphasis omitted.) We agree with the state.

¹² Moskowitz testified: "[T]he subject that we had detained on the property had said that he was renting the home from the homeowner, who he pointed out when we brought [the defendant] onto the property and said: That's him; he owns the house." There was no evidence presented as to the amount of time the defendant spent at the property, nor was there any evidence presented that he had slept at the property. Moreover, there was testimony of only one, small bed in the house and that one of the two men first encountered in the greenhouse "indicated that he was the person that resided there"

The relevant inquiry is whether the defendant exhibited a subjective expectation of privacy at the time of the search. The third *Boyd* factor addresses whether the defendant “maintained the location and the items within it in a private manner at the time of the search.” *State v. Boyd*, supra, 57 Conn. App. 185; see also *State v. Mooney*, 218 Conn. 85, 110, 588 A.2d 145 (resolving question of whether defendant had reasonable expectation of privacy in duffel bag and cardboard box at time of search), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991); *State v. Brown*, 129 Conn. App. 552, 557, 19 A.3d 1282 (noting, in determining expectation of privacy, testimony of resident of apartment that “at the time of the search the defendant would stay at her house three to four times a week with her permission”), cert. denied, 302 Conn. 914, 27 A.3d 372 (2011). The defendant did elicit testimony from Hall that he believed a “no trespassing” sign and a gate were located on the property. The defendant’s statement to police, however, indicated that shortly after buying the house about one year ago, he could not afford the mortgage and so he began renting the house to Phravixay. Without more, it is unclear when the gate and sign were installed, who installed these two items, and for whose privacy were they installed. Overall, the defendant failed to show how these two features, which he claims were suggestive of an effort to maintain the property as private, were indicative of his own expectation of privacy, rather than the expectation of Phravixay, the resident of the leased premises.¹³

¹³ The defendant argues that “[w]hether he was active in keeping the property private from people from the road or whether he purchased a property that was made private by a previous owner, the effect is the same on the expectation of privacy.” He further

The defendant did not testify at the hearing, and there was no testimony that he had exhibited a subjective expectation of privacy in the property.¹⁴ See *State v. Harris*, 122 Conn. App. 521, 527, 3 A.3d 82 (2010) (noting defendant did not testify and conceded that no testimony was presented that he held subjective expectation of privacy in hallway closet); cf. *State v. Harris*, 10 Conn. App. 217, 223, 522 A.2d 323, 327 (1987) (noting defendant did not testify but that other testimony indicated that bedroom searched was under exclusive control of defendant, and because it was conceded by state to be defendant's bedroom, defendant

argues that "there is no evidence that the tenants did anything to make the property as private as the [task force] found it when they entered the property" These arguments prove unavailing in light of our case law holding that it is the defendant's burden to prove that he had a reasonable expectation of privacy in the property searched, rather than the state's burden to prove otherwise. *State v. Mitchell*, supra, 56 Conn. App. 566.

¹⁴ The defendant relies heavily on *State v. Zindros*, supra, 189 Conn. 246-47, and *United States v. Botsch*, 364 F.2d 542, 543 (2d Cir. 1966), cert. denied, 386 U.S. 937, 87 S. Ct. 959, 17 L. Ed. 2d 810 (1967), to support his argument that he had a reasonable expectation of privacy in the property searched. The defendant's argument with respect to these cases conflates the analysis applicable to whether an individual possesses the authority to consent to a search of an area with the analysis applicable to whether a defendant possesses a reasonable expectation of privacy in an area. It is not necessary for a court to reach the validity of consent unless the defendant has established that he possessed a reasonable expectation of privacy in the area searched. See *State v. Zindros*, supra, 244 ("[t]he state recognizes that if it is found that the defendant had a reasonable expectation of privacy, it must prove that the consenting party possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected" [internal quotation marks omitted.]).

had reasonable expectation of privacy there).¹⁵ The defendant called one witness, Master Sergeant Patrick Torneo, who was posted in the helicopter on the day of the search. The defendant did not elicit any testimony from Torneo that could support his burden to show that he had a reasonable expectation of privacy in the area searched.¹⁶ Accordingly, we determine that the court did not err in denying the defendant's motion to suppress the evidence obtained from the search of the property because the defendant failed to establish a reasonable expectation of privacy in the property.¹⁷

¹⁵ The defendant finally argues that "it is good policy to find standing to curb unlawful and counterproductive police actions." We note that the United States Supreme Court has explained that "since the exclusionary rule is an attempt to effectuate the guarantees of the [f]ourth [a]mendment . . . it is proper to permit only defendants whose [f]ourth [a]mendment rights have been violated to benefit from the rule's protections." (Citation omitted.) *Rakas v. Illinois*, supra, 439 U.S. 134; see also *State v. Jevardjian*, 307 Conn. 559, 566, 58 A.3d 243 (2012) ("the application of the exclusionary rule, a remedial measure intended to protect against fourth amendment violations, would be inappropriate in the absence of a showing of some such infringement of the defendant's own fourth amendment rights").

¹⁶ The defendant noted that he intended to call another officer who did not respond to his subpoena, but he stated that he intended to question him on an unrelated matter.

¹⁷ Because we determine that the defendant did not establish that he had a reasonable expectation of privacy in the property such that he could contest the search, we do not address his argument that the greenhouse was part of the curtilage and that the warrantless search did not fit under any exception to the warrant requirement. In *State v. Brown*, supra, 198 Conn. 359 n.9, our Supreme Court determined that the defendant's claim that a garage was part of the curtilage and thus protected by the fourth amendment failed because the court already had determined that the defendant did not possess a reasonable expectation of privacy in the garage. "The common law concept

CLAIMS ARISING FROM
MOTOR VEHICLE STOP

The defendant next claims that the motor vehicle stop of the van driven by the defendant and the resulting arrest were unconstitutional.¹⁸ We consider each in turn.

Motor Vehicle Stop

The defendant claims that the motor vehicle stop was not supported by a reasonable and articulable suspicion that he was engaged in criminal activity.¹⁹ We disagree with the defendant's claim.

of curtilage . . . does not provide a separate basis for fourth amendment protection. It simply refers to areas immediately surrounding the home in which expectations of privacy are normally the greatest. . . . The focus remains the reasonable expectation of privacy which an individual possesses in the area. Our finding that the defendant failed to establish that he had a reasonable expectation of privacy in the garage defeats his claim regardless of how it is labeled." *Id.*

¹⁸ The defendant cites to *State v. Lamme*, 216 Conn. 172, 579 A.2d 484 (1990), a case in which our Supreme Court interpreted article first, § 9, of the Connecticut constitution. Because the defendant does not set forth a separate claim, accompanied by an independent analysis, under the Connecticut constitution, we do not address this claim separately. See footnote 8 of this opinion.

¹⁹ "When considering the validity of a [stop pursuant to *Terry v. Ohio*, [392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)]], our threshold inquiry is twofold. . . . First, we must determine at what point, if any, did the encounter between [the police officer] and the defendant constitute an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officer] possessed a reasonable and articulable suspicion at the time the seizure occurred." (Internal quotation marks omitted.) *State v. Rodriguez*, 121 Conn. App. 250, 255, 994 A.2d 691, cert. denied, 297 Conn. 918, 996 A.2d 278

We first note “our standard of review of a trial court’s findings and conclusions in connection with a motion to suppress. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the court’s [ruling]” (Internal quotation marks omitted.) *State v. Jones*, 113 Conn. App. 250, 266, 966 A.2d 277, cert. denied, 292 Conn. 901, 971 A.2d 40 (2009).

We next set forth the applicable law surrounding the constitutionality of motor vehicle stops. “Pursuant to *Terry v. Ohio*, [392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], a police officer has the authority, under the fourth amendment to the United States constitution, to stop the operator of a car if the officer has a reasonable and articulable suspicion that the operator has engaged in illegal conduct Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion The police officer’s decision . . . must be based on more than a hunch or speculation. . . . In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together

(2010). Because neither party appears to challenge the court’s finding that “the defendant was seized for *Terry* purposes when the officers blocked the defendant’s vehicle with their car and approached with guns drawn,” we consider whether the officers possessed a reasonable and articulable suspicion at that time.

with rational inferences from those facts, reasonably warrant that intrusion.” (Citation omitted; internal quotation marks omitted.) *State v. Ocasio*, 112 Conn. App. 737, 744, 963 A.2d 1109, cert. denied, 292 Conn. 904, 973 A.2d 106 (2009). “What constitutes a reasonable and articulable suspicion depends on the totality of the circumstances.” (Internal quotation marks omitted.) *State v. Jones*, supra, 113 Conn. App. 260. “On appeal, [t]he determination of whether reasonable and articulable suspicion exists rests on a two part analysis: (1) whether the underlying factual findings of the trial court are clearly erroneous; and (2) whether the conclusion that those facts gave rise to such a suspicion is legally correct.” (Internal quotation marks omitted.) *State v. Arokium*, 143 Conn. App. 419, 428, 71 A.3d 569, cert. denied, 310 Conn. 904, 75 A.3d 31 (2013).

The court denied the defendant’s motion to suppress evidence seized from the van, finding that the officers possessed a reasonable and articulable suspicion to conduct a motor vehicle stop. The court credited the officers’ testimony at the hearing and found that “[t]he defendant’s flight, coupled with police knowledge that someone entering on the property might be involved in the grow operation, and the defendant’s subsequent parking of the van adjacent to the property, furnished a reasonable and articulable basis of suspicion on which officers could, at the very least, question the driver of the vehicle about his presence there.”

The defendant argues that merely driving onto the driveway, backing up, and parking on the street cannot be sufficient to establish a reasonable suspicion that he was engaged in criminal activity, and he also points to the lack of evidence that he had committed any traffic violation. “[A]n investigative stop can be

appropriate even where the police have not observed a violation because a reasonable and articulable suspicion can arise from conduct that alone is not criminal.” (Internal quotation marks omitted.) *State v. Clark*, 297 Conn. 1, 10, 997 A.2d 461 (2010); see *State v. Lipscomb*, 258 Conn. 68, 71 and n.3, 779 A.2d 88 (2001) (police had reasonable and articulable suspicion to stop motor vehicle despite not observing motor vehicle violation, where officers observed behavior consistent with soliciting prostitute). “We do not consider whether the defendant’s conduct possibly was consistent with innocent activity but, rather, whether the rational inferences that can be derived from it reasonably suggest criminal activity to a police officer.” *State v. Madison*, 116 Conn. App. 327, 336, 976 A.2d 15, cert. denied, 293 Conn. 929, 980 A.2d 916 (2009).

This court has previously upheld the validity of motor vehicle stops where there has been no indication of a motor vehicle violation, but where the surrounding circumstances have justified the stop. In *State v. Rice*, 172 Conn. 94, 98-99, 374 A.2d 128 (1976), the court determined that police had a reasonable and articulable suspicion to stop a motor vehicle departing from a driveway, where police were responding to a call reporting a serious crime involving a gun early in the morning when few cars were on the roads.²⁰ In the

²⁰ In another case, *State v. McMullen*, 2 Conn. App. 537, 541-42, 480 A.2d 594 (1984), the defendant’s vehicle was the only car on the street after midnight, heading in the direction away from the location toward which police were traveling to respond to a silent alarm. This court, despite concluding that “there was nothing suspicious about the vehicle,” stated that “significant facts, and deductions therefrom, implicated it in a less direct manner.” *Id.*, 542. The *Rice* and *McMullen* courts recognized that the circumstances presented in those cases were different from cases involving motor vehicle stops conducted on the basis of

present case, Hall testified that by the time the defendant pulled into the driveway, police had already (1) been made aware by the air team that there existed on the property “a whole lot of marijuana right out in the open,” (2) viewed the extensive marijuana grow operation occurring on the property, including in the pool area and the partially constructed greenhouse, and (3) encountered the two men who were working inside the greenhouse, one of whom indicated to police that he was tending to marijuana. Hall testified that the police were going to their vehicles to get items in preparation for the search, for which Phravixay had provided consent, when the radio transmission concerning the van occurred. Moskowitz, who observed the van and made the radio transmission, testified that “[w]e believed at that point in time [that the driver] was part of the investigation.”

First, the court did not err in considering the defendant’s entering onto the property while the police were investigating the large marijuana grow operation as a factor contributing to reasonable suspicion. “The nature of the crime under investigation, the degree of suspicion, the location of the stop, the time of day, the reaction of the suspect to the approach of police are all facts which bear on the issue of reasonableness.” (Internal quotation marks omitted.) *State v. Miller*, 137 Conn. App. 520, 539, 48 A.3d 748, cert. denied, 307 Conn. 914, 54 A.3d 179 (2012). “[P]roximity in time and place of the stop to the crime is highly significant in the determination of whether an investigatory

“peculiarities in [the vehicle’s] operation”; *id.*, 541-42; “a course of patently suspicious behavior” by the defendant, or where the defendant had been “singled out by an informant . . .” *State v. Rice*, *supra*, 172 Conn. 98. Both courts, however, determined that the surrounding circumstances rendered the stop reasonable.

detention is justified by reasonable and articulable suspicion.” (Internal quotation marks omitted.) *State v. Hernandez*, 87 Conn. App. 464, 471, 867 A.2d 30, cert. denied, 273 Conn. 920, 871 A.2d 1030 (2005); see also *State v. Kimble*, 106 Conn. App. 572, 598, 942 A.2d 527 (noting defendant’s “unexplained presence at the scene” in analysis of reasonable and articulable suspicion), cert. denied, 287 Conn. 912, 950 A.2d 1289 (2008). The defendant himself notes that “the aerial photographs entered into evidence . . . demonstrate that this was an isolated property” It was thus reasonable for the court to consider the defendant’s presence at the isolated property, which was the site of a large marijuana grow operation, as a factor in the reasonable suspicion analysis.

Second, the defendant’s actions in backing out of the driveway and leaving quickly were considered properly by the trial court as contributing to a reasonable and articulable suspicion that the defendant may have been involved in criminal activity. “[R]eviewing courts . . . must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. . . . This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.” (Citation omitted; internal quotation marks omitted.) *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 750-51, 151 L. Ed. 2d 740 (2002). The court recognized that “multiple officers testified about the expedited manner in which the work van departed.” Moreover, the officer’s explanation as to why leaving the property quickly would arouse police suspicion was drawn from his training and experience. Moskowitz testified that “[b]ecause

of our training and experience with the way people typically are affiliated with these organizations, if they see things that are not in [the] order in which they left them, they will typically err on the side of safety and flee the area believing that law enforcement has caught onto their business.” It is inaccurate for the defendant to argue that the officer “articulated no inferences of deductions from his training and experience to justify a stop”

Regarding the defendant’s contention that he “was not fleeing at the time of the stop,” we do not find the court’s consideration of the manner in which the defendant departed the property clearly erroneous.²¹ The court’s finding that the defendant fled had adequate support in Moskowitz’ testimony. Moskowitz testified that he “noticed the white van pull in the driveway and then immediately back out and start to flee the area.” When asked to characterize the manner in which the van departed the driveway, he said, “[v]ery quickly.” Hall additionally testified that “it came across the radio that a van had pulled into the driveway and was hightailing it out of there, was pretty much how they put it.” “[U]nprovoked flight upon noticing the police” may properly be considered as a factor contributing to a reasonable and articulable suspicion of criminal behavior. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). “[W]hen an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about

²¹ This argument regarding lack of flight appears to be the defendant’s only challenge to the court’s factual findings underlying its determination that police possessed a reasonable and articulable suspicion. Pursuant to our standard of review, we consider whether this factual finding is clearly erroneous.

his business. . . . But unprovoked flight . . . by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite.” (Citations omitted.) *Id.*, 125. In addition to outright flight, “[n]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion. . . . Furthermore, when an individual suddenly changes his course of conduct upon seeing the police, such conduct tends to support a reasonable suspicion that the individual may be involved in criminal activity.” (Citation omitted; internal quotation marks omitted.) *State v. Mann*, 271 Conn. 300, 324, 857 A.2d 329 (2004), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005).²²

In addition to observing the defendant quickly leave the property, the officers, when they left to try to locate

²² Even if not rising to the level of flight, the behavior could still properly be considered in the reasonable suspicion analysis as evasive behavior. In *State v. Benton*, 304 Conn. 838, 851, 43 A.3d 619 (2012), our Supreme Court considered a defendant’s challenge as to whether his behavior of uttering an expletive, standing on his pedals to accelerate, and veering his bicycle in a different direction when uniformed police officers stepped into the roadway could be a proper factor in the reasonable suspicion analysis. The defendant argued that “his act of veering was an ambiguous response to police presence and could reasonably be construed as an innocent maneuver required to avoid the physical obstacle posed by the police.” *Id.*, 850. The court considered that these behaviors “could, at the very least, be reasonably construed as nervous, evasive behavior, which is a pertinent factor in determining reasonable suspicion.” (Internal quotation marks omitted.) *Id.*, 851. The court concluded that these behaviors when combined with the knowledge that “the defendant’s companions unambiguously reversed direction and rode away upon spotting the police officers”; *id.*; made it “objectively reasonable for the officers to conclude that the defendant was fleeing from them” *Id.*, 852; cf. *State v. Hammond*, 257 Conn. 610, 625, 778 A.2d 108 (2001) (no flight where defendant simply walked away from approaching police).

the van, discovered it about one-tenth of a mile down the road, parked “facing back toward the residence as if it had turned around.” Having heard testimony that the defendant pulled into a property used for a significant marijuana grow operation, in a location that the defendant himself characterized as “a sparsely populated area of the state,” backed out of the driveway and left quickly upon noticing the police,²³ presumably turned around, and parked one-tenth of a mile down the road facing back toward the property from which he had just departed quickly, it was not clearly erroneous for the court to have determined that police reasonably could have concluded that the defendant was not merely going about his business, but that he was indeed engaged in evasive behavior that could rise to the level of flight.

We recognize that this case presents a close question as to whether a reasonable and articulable suspicion existed that the driver had engaged in criminal conduct. We find it significant, however, that the officers were engaged in the investigation of an evident ongoing felony at the time they conducted an investigatory stop of the van so that there was a direct and immediate spatial and temporal link between the apparent felony and the defendant’s presence in the van. The investigation of this evident felony in progress leads us to conclude that the situation presented is distinguishable from those cases in which it has been deter-

²³ It is not unreasonable to infer that the defendant recognized the unusual presence at the secluded property as law enforcement, as supported by the court’s notation in its memorandum of decision that [t]here were numerous cars in the driveway, and police officers were wearing protective vests emblazoned with the letters of their respective enforcement organizations.”

mined that the police lacked a reasonable and articulable suspicion. For example, in *State v. Peterson*, 153 Conn. App. 358, 376, 101 A.3d 337, cert. granted, 314 Conn. 947, 103 A.3d 980 (2014),²⁴ this court determined that police lacked reasonable suspicion despite the defendant's presence at the home of a suspected drug dealer, reliable information that the defendant was engaged in the sale of marijuana, and observation of the defendant on a previous occasion engaging in behavior that was consistent with drug sales. We noted that "any suspicion of *ongoing* crime was necessarily founded in conjecture or the police's subjective notions of the defendant's propensity to engage in criminal behavior." (Emphasis added.) *Id.*

In *State v. Oquendo*, 223 Conn. 635, 641, 613 A.2d 1300 (1992), our Supreme Court determined that police lacked a reasonable suspicion to stop a man carrying a duffel bag and wearing a thick jacket on a warm night, which an officer stated that burglars often wear to protect themselves when breaking windows. The court noted that "[a]lthough burglaries had been reported in the general area . . . [the officer] had not received any report that a burglary had been committed in that area on the evening of [the stop]." *Id.*, 655; see also *State v. Milotte*, 95 Conn. App. 616, 622-23, 897 A.2d 683 (2006) (noting that "[t]here were no recent reports of crimes in the area, and [the officer] knew that the vehicle and its owner were not wanted by the authorities," in determining that officer lacked reasonable suspicion to stop defendant mainly on

²⁴ Our Supreme Court has granted review in *Peterson* and will consider: "Did the Appellate Court properly determine that the totality of the circumstances did not provide sufficient reasonable and articulable suspicion for police to detain the defendant?" *State v. Peterson*, 314 Conn. 947, 103 A.3d 980 (2014).

basis of her belief he was trying to avoid her because of time of day and fact that he traveled on streets and made stops at locations with which she believed he had no connection), appeal dismissed, 281 Conn. 612, 917 A.2d 25 (2007). In *State v. Donahue*, 251 Conn. 636, 646-47, 742 A.2d 775 (1999), cert. denied, 531 U.S. 924, 121 S. Ct. 299, 148 L. Ed. 2d 240 (2000), the court deemed unpersuasive the state's argument justifying a stop on the basis of an increase in crime in the area, among other factors, including driving in a deserted area late at night and making an abrupt turn into an empty, unlit parking lot of a closed business.

We understand the facts in the present case to provide a more compelling argument that the officers possessed a reasonable suspicion than the facts in our precedent concluding otherwise. We consider the facts of this case to be more in line with those precedential decisions where our standards for reasonable suspicion were satisfied, including *State v. Januszewski*, 182 Conn. 142, 149, 438 A.2d 679 (1980), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981), in which our Supreme Court upheld the determination that police possessed a reasonable suspicion to conduct an investigatory stop after observing two persons in the front seat of an automobile parked in a commuter parking lot during the day and where the occupants exhibited plainly furtive conduct as an officer approached.

Considering the totality of the circumstances, we agree with the court that the stop of the van was supported by a reasonable and articulable suspicion that the defendant was engaged in criminal activity.

Probable Cause to Arrest

The defendant argues that even if the initial stop was justified, the police lacked probable cause to arrest him.²⁵ In support of his argument, the defendant claims that “[Moskowitz, one of the arresting officers] had not been to the greenhouse in the initial sweep.” He thus argues that “Officer Moskowitz never discovered anything based on his personal knowledge to justify detaining [the defendant].”

“On appeal, a court’s factual findings underlying its probable cause determination are subject to review under the clearly erroneous standard. . . . We accord plenary review, however, to the determination that the facts as found amount to probable cause.” (Citation omitted.) *State v. Robinson*, 105 Conn. App. 179, 191, 937 A.2d 717 (2008), *aff’d*, 290 Conn. 381, 963 A.2d 59 (2009). “However, [w]e [will] give great deference to the findings of the trial court because of its function to

²⁵ The defendant further argues that the “arrest of the [defendant] was without probable cause that was untainted by an illegal search” To the extent that the defendant challenges his arrest as unsupported by probable cause on the basis of his argument that the knowledge of the lumber and irrigation piping was gained by way of an illegal warrantless search of the property, his claim is defeated by the determination previously made that he did not have a reasonable expectation of privacy in the area searched. “[T]he Supreme Court has long held that a reasonable expectation of privacy in the subject of a search is a prerequisite for fourth amendment protection.” (Citation omitted; footnote omitted; internal quotation marks omitted.) *State v. Gonzalez*, 278 Conn. 341, 348-49, 898 A.2d 149 (2006); see *State v. Pierre*, 139 Conn. App. 116, 128-29, 54 A.3d 1060 (2012) (declining to address defendant’s claim that statement should be suppressed as “fruit of the poisonous tree,” where defendant did not have reasonable expectation of privacy in area searched and thus could not challenge as fruit of poisonous tree statement made after police discovered gun and marijuana), *aff’d*, 311 Conn. 507, 88 A.3d 489 (2014); see also footnote 14 of this opinion.

weigh and interpret the evidence before it and to pass upon the credibility of witnesses.” (Internal quotation marks omitted.) *State v. Arline*, 74 Conn. App. 693, 699-700, 813 A.2d 153, cert. denied, 263 Conn. 907, 819 A.2d 841 (2003).

“A police officer may arrest a person without a warrant when the officer has probable cause to believe that the person has committed or is committing a felony The determination of whether probable cause exists under the fourth amendment to the federal constitution, and under article first, § 7, of our state constitution, is made pursuant to a totality of circumstances test. . . . With respect to warrantless arrests . . . the trial court, in determining whether the arrest is supported by probable cause, is required to make a practical, nontechnical decision whether, under all the circumstances . . . there is a fair probability that the defendant had committed or was committing a felony. . . . Moreover, it is also important to note that [t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction.” (Citations omitted; internal quotation marks omitted.) *State v. Thomas*, 98 Conn. App. 542, 554, 909 A.2d 969 (2006), cert. denied, 281 Conn. 910, 916 A.2d 53 (2007). “Actions and things observed by an experienced law enforcement officer may have more significance to him in determining whether the law is being violated at a given time and place than they would have to a layman . . . and such experience is entitled to at least some weight on the ultimate question of probable cause.” (Internal quotation marks omitted.) *Id.*, 555.

The court credited the officers’ testimony that after stopping the vehicle, they asked the defendant why he had been to the home and that he provided evasive

answers, claiming “to be visiting a friend, but did not name him.” The contents of the van, including materials Moskowitz identified as lumber and irrigation piping, were visible to the officers. The court concluded that “[i]n the present case, the materials in the back of the van, which were in plain view, connected the defendant and Eichen to the grow operation. Although the incriminating character of the lumber and piping is not immediately apparent in a vacuum, they were observed by Moskowitz, who was familiar with the grow operation at the home. At that time, officers had probable cause to arrest the defendant.”

The defendant challenges the court’s finding of probable cause by arguing that “Moskowitz indicated that he had never seen the greenhouse until after [the defendant] was in custody” and, thus, could not have connected the lumber and irrigation piping in the van with the construction of the greenhouse on the property. A review of Moskowitz’ testimony reveals that he had not been inside the greenhouse before he brought the defendant back to the property, but Moskowitz never indicated that he had not seen the greenhouse. Moskowitz testified that he had been behind the house prior to pulling over the van. He also testified that he was returning to his vehicle to obtain paperwork to present to Sisouk Phravixay and Thomas Phravixay. It is undisputed that the greenhouse was visible from the rear of the house, the two men initially were encountered in the vicinity of the greenhouse, and the greenhouse structure had no side walls. Moreover, Moskowitz testified that while he had the defendant pulled over: “I observed tubing and construction equipment similar to the tubing and construction equipment that was in the rear of the house where the greenhouse was being constructed. We

had asked him why he was leaving the area; he said he was going to visit a friend and didn't understand why police were at the house, so he left. We began to question him as to why he had the construction equipment similar to the greenhouse equipment in his van then."²⁶

Accordingly, we conclude that the record supports the inference that Moskowitz saw the lumber and irrigation piping in the area of the greenhouse prior to conducting the stop of the van. The court's factual finding, based on the evidence and reasonable inferences drawn therefrom, was not clearly erroneous. See *State v. Days*, 89 Conn. App. 789, 797, 875 A.2d 59 (court's finding was supported by evidence and reasonable inferences drawn therefrom), cert. denied, 275 Conn. 909, 882 A.2d 677 (2005).²⁷

The record supports the inference that Moskowitz saw the lumber and irrigation piping on the property outside the greenhouse prior to conducting the investigatory stop of the van. Moskowitz' testimony established that he "noticed the white van pull in the driveway and then immediately back out and start to

²⁶ This testimony by Moskowitz was supported by Hall's testimony, in which he stated that the officers conducting the investigatory stop of the van "recognized materials inside the—from looking in the van, that clearly looked like the same materials which were being used to construct the greenhouse that the two individuals were in."

²⁷ The defendant further argues that because there was no evidence of communication among the officers as to the nature of the building materials located near the greenhouse, the court erred in relying on the collective knowledge doctrine. Having determined that the court's factual finding that the "lumber and piping . . . were observed by Moskowitz, who was familiar with the grow operation at the home," was not clearly erroneous, it is unnecessary to consider the collective knowledge of the police.

flee the area” Those observations having been demonstrated by the record, we must now consider whether the facts amounted to probable cause to believe that the defendant had committed or was committing a felony. The officers’ testimony established that the defendant provided evasive answers as to why he had been to the property and left quickly. Their testimony further established that the van the defendant was operating contained lumber and irrigation piping, which was consistent with the materials observed on the property that were being used in the construction of the greenhouse that housed components integral to the marijuana grow operation. The defendant’s possession of these construction materials viewed in light of the totality of the circumstances supported the belief that the defendant was involved in a drug related felony, specifically, the marijuana cultivation occurring at the property. See *State v. Holloman*, 20 Conn. App. 521, 527-28, 568 A.2d 1052 (items discovered in vehicle together with fact that defendant matched description established probable cause to believe that defendant was person who had robbed liquor store), cert. denied, 214 Conn. 805, 573 A.2d 317 (1990).

We thus conclude that the facts established a sufficient nexus between the defendant and the marijuana cultivation occurring at the property to establish probable cause for his arrest.

III

STATEMENT MADE TO POLICE

Last, the defendant argues that the court erred in failing to suppress the statement he gave to police. The defendant first challenges the factual finding of the

court that he was advised of his *Miranda* rights.²⁸ The defendant additionally contends that even if he had been advised of his rights, (1) he did not waive his *Miranda* rights and (2) his statement “was not a product of a free and unconstrained choice”

We note our standard of review. “The trial court’s findings as to the circumstances surrounding [a] defendant’s interrogation and confession are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . . On the ultimate issue of voluntariness, however, we will conduct an independent and scrupulous examination of the entire record to ascertain whether the trial court’s finding is supported by substantial evidence.” (Internal quotation marks omitted.) *State v. Linarte*, 107 Conn. App. 93, 106, 944 A.2d 369, cert. denied, 289 Conn. 901, 957 A.2d 873 (2008).

Advisement of *Miranda* Rights

We first consider the defendant’s challenge to the timing of the advisement of rights. The defendant claims that the “police did not demonstrate that they

²⁸ The court determined that “[t]he defendant does not dispute that he was advised of his [rights under *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)].” The defendant argues on appeal that “there is a serious question based on [the] record whether the *Miranda* rights were ever given to [the defendant] prior to the custodial interrogation” and superficially makes the additional claim, without further analysis, that it “became unclear as to when the *Miranda* rights were given, if at all.” The trial record reveals that the defendant did not challenge whether his *Miranda* rights were given. In his motion to suppress evidence, the defendant conceded that “[o]nce back at the property, law enforcement officers advised [the defendant] of [his] *Miranda* rights.” Moreover, the defendant does not dispute that he signed the notice and waiver of rights form. We thus consider the defendant’s challenge to contest the timing of the advisement of rights.

gave as required by *Miranda* the warning prior to questioning him.” The court found that “[t]he state . . . produced evidence from several officers that the defendant . . . received [his] rights shortly after being brought back to the home. Within the course of twenty-five minutes, the defendant signed a notice and waiver of rights form . . . a form consenting to the search and examination of evidence in the home and his vehicle . . . and signed a written statement . . .” (Citations omitted.) The court further noted that “[t]he prosecution has carried its burden. The defendant was advised of his rights.”

The defendant argues that Wiener “could not indicate how long they had talked prior to taking the [defendant’s] statement” and that his testimony is evidence that the defendant was not advised of his *Miranda* rights prior to questioning. Wiener testified that he read the defendant his *Miranda* rights at 3:55 p.m. and that he began taking the defendant’s statement at 4 p.m. Wiener further testified that he was “not sure how long we spoke for before I actually degraded it to paper.” Wiener’s testimony can properly be viewed as stating that he was not sure how many minutes transpired, after the defendant began his statement at 4 p.m., before he began to memorialize the defendant’s words on paper. This understanding is entirely consistent with Wiener’s testimony that “I read him his rights. . . . And then I went over the incident and I asked for his side of the story after a little bit of conversation, and then he provided me his side of the story and I put it on paper” Accordingly, we conclude that the court’s determination that the defendant was advised of his rights is not clearly erroneous.

This conclusion is supported by evidence in the record. In addition to Wiener’s testimony, Moskowitz testified that “[w]e verbally read [his rights] to him prior to questioning, and I believe that was at the residence following us placing him in handcuffs.” The court did not err in crediting the officers’ uncontroverted testimony. See *State v. Cabral*, 275 Conn. 514, 532, 881 A.2d 247 (agreeing that evidence adduced at hearing on motion to suppress supported court’s determination that defendant was advised of *Miranda* rights prior to speaking to police, where officer testified without contradiction that he had so warned defendant), cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005); *State v. Ortiz*, 101 Conn. App. 411, 423, 922 A.2d 244 (court’s “factual findings were based on direct testimony from the officers at the hearing that they had advised the defendant of his rights, which the court found credible”), cert. denied, 283 Conn. 911, 928 A.2d 538 (2007).

Waiver of *Miranda* Rights

Having concluded that the court properly determined that the defendant was advised of his rights prior to giving his statement, we next consider the defendant’s claim that he did not waive his right to remain silent. We note at the outset of our discussion that the defendant’s claim is narrowly drawn. With regard to the waiver issue, he claims that the police did not obtain a “specific” waiver of his rights.²⁹

²⁹ The defendant does not argue that he did not understand his *Miranda* rights. See *State v. Azukas*, 278 Conn. 267, 288, 897 A.2d 554 (2006) (“It is useful to begin our analysis by noting that the defendant does not claim that he did not understand his *Miranda* rights. Rather, he makes the narrow claim that he never *waived* them.” [Emphasis in original.]); *State v. Reynolds*, 152 Conn. App. 318, 354, 97 A.3d 999 (noting that defendant did not

The defendant claims that “it appears that the police never did obtain a specific waiver, either orally or [in] writing, of [the defendant’s] *Miranda* rights.” “To be valid, a waiver must be voluntary, knowing and intelligent The state has the burden of proving by a preponderance of the evidence that the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights In considering the validity of a waiver, we look to the totality of the circumstances of the claimed waiver.” (Citation omitted; internal quotation marks omitted.) *State v. Azukas*, 278 Conn. 266, 288, 897 A.2d 554 (2006). “Although we usually defer to findings made by the trier of fact, such deference is qualified in questions of this nature by the need to examine the record scrupulously to ascertain whether the factual findings were supported by substantial evidence.” (Internal quotation marks omitted.) *State v. Miller*, supra, 137 Conn. App. 531. “[A]fter giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights [A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.” *Berghuis v. Thompkins*, 560 U.S. 370, 388-89, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010).

The defendant argues that his failure to initial the bottom portion of the notice and waiver of rights form indicates that he did not *waive* his *Miranda* rights.³⁰

challenge fact that he received and understood *Miranda* warning and that he therefore “acted with full understanding of what rights were available to him following the *Miranda* warning”), cert. denied, 314 Conn. 934, 102 A.3d 85 (2014).

³⁰ The bottom portion of the notice and waiver of rights form states: “I waive these rights as indicated by placing my initials

Declining to initial the statements, however, does not automatically render the *Miranda* waiver invalid. “[Although a] defendant’s express written and oral waiver is strong proof that the waiver is valid . . . the failure to sign a form or give a written statement does not necessarily indicate an involuntary waiver.” (Citation omitted; internal quotation marks omitted.) *State v. Gonzalez*, 74 Conn. App. 580, 586, 814 A.2d 384, cert. denied, 263 Conn. 915, 821 A.2d 771 (2003); *id.*, 587 (defendant initialed form but refused to sign it); see also *State v. Shifflett*, 199 Conn. 718, 732-33, 508 A.2d 748 (1986) (defendant waived right to remain silent by making oral statements despite express refusal to sign waiver portion of form).

The totality of the circumstances surrounding the defendant’s waiver of his right to remain silent supports the finding that the waiver was valid. The defendant was advised of his rights, as evidenced by Wiener’s testimony that he read the defendant his *Miranda* rights directly from the notice and waiver of rights form and that the defendant signed the form, indicating that he had been advised of his rights. Wiener testified that he then interviewed the defendant and transcribed the defendant’s statement onto a written statement form. The statement admitted the defendant’s involvement in the grow operation. Wiener went over the warning contained on the top of the form, which states that the signer “make [s] the following statement, without fear, threat, or promise.” Wiener testified that the defendant was given an

after one or more of the following statements.” When asked by the court why the bottom portion of the form was not initialed by the defendant, Wiener testified: “It might have been an oversight that he didn’t put his initials here, or maybe I didn’t ask him to initial it, but I read the form in its entirety.”

opportunity to review the statement before signing the form. The defendant then signed the form. Wiener testified that although the defendant was reluctant to speak at first, at no time did the defendant give any indication that he did not want to speak to him or ask for a lawyer.³¹

Voluntariness of Statement

Finally, the defendant argues that police overbore his will to resist, including by making comments that coerced him to respond. We disagree and conclude that the court properly determined that his statement was voluntary.

“In order to be voluntary a confession must be the product of an essentially free and unconstrained choice by the maker. . . . [T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant’s] will to resist and bring about confessions not freely self-determined The ultimate question of whether a defendant’s will has been overborne, thus resulting in an involuntary statement in a particular case, involves, as noted, an assessment of the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” (Citation omitted; internal quotation marks omitted.) *State v. Stephenson*, 99 Conn. App. 591, 596-97, 915 A.2d 327, cert. denied, 282 Conn. 903, 919 A.2d 1037 (2007).

The defendant claims that his statement was involuntary based on the testimony of Wiener and Hall, which he argues suggests coercion. Wiener testified

³¹ Hall and Moskowitz also testified that the defendant did *not* say that he did not want to talk.

that he “asked [the defendant] for his side. Basically, like, ‘This is what we have here: you’re the homeowner, you denied it, we had to chase you up the street to get you to stop and now it’s up. I mean, we, you know, one way or the other you’re going to jail. You can have your side on paper or not. It’s up to you.’ And he did—he was cooperative at that point.”³² The court considered these statements and concluded that “[t]he statements by police . . . were mere investigative tactics and were insufficient to overbear the defendant’s will.”

“[S]tatements by the police designed to lead a suspect to believe that the case against him is strong are common investigative techniques and would rarely, if ever, be sufficient to overbear the defendant’s will and to bring about a confession to a serious crime that is not freely self-determined” (Internal quotation marks omitted.) *State v. Doyle*, 104 Conn. App. 4, 17, 931 A.2d 393, cert. denied, 284 Conn. 935, 935 A.2d 152 (2007); see also *State v. Reyes*, 81 Conn. App. 612, 617, 841 A.2d 237 (2004) (upholding determination defendant’s statement was voluntary, finding officer’s statement to defendant that “[he] better tell the truth or [he] was going to do a lot of time in jail” was not coercive). Accordingly, we agree with the court that the evidence presented indicated that the

³² The defendant additionally points to Hall’s testimony in which Hall stated: “I don’t think he ever actually said he didn’t want to talk. . . . [I]nitially, he was lying to us and playing games as to him knowing anyone there or being present, and then once—once he was confronted with the fact that we knew he was lying to us, that he actually owned the house, he decided, he—at least, in our opinion, at that point—wanted to start being honest with us.” Hall then stated that this occurred “[p]robably close to the time that he signed his rights, so it would have been around 4 o’clock.”

officers' conduct was not sufficient to overbear the defendant's will.

Having concluded that the statements of Hall and Wiener did not render the defendant's statement involuntary, we briefly note that the surrounding circumstances support the determination that the statement was voluntarily given. The defendant does not offer any other circumstances of the interrogation or characteristics of himself that would encourage a finding that his statement was involuntary.³³ The defendant was not detained for any significant period of time before being interrogated, as the court found that the defendant received his rights "shortly after being brought back to the home." The interrogation itself was relatively short in duration, with the court noting that the defendant signed the notice and waiver of rights form, a form consenting to the search of the home and his vehicle, and a written statement, all within twenty-five minutes. See *State v. Bell*, 93 Conn. App. 650, 667, 891 A.2d 9 (2006) (detention for six hours before interview lasting one and one-half hours not sufficient to render statement involuntary). Moreover, testimony indicated that the defendant was given an opportunity to review the statement before he signed it. On the basis of our review of the totality of the circumstances, we conclude that the court

³³ We again note that the defendant's claim is narrowly drawn. He does not argue that he did not understand or that he had any trouble communicating with the officers. See *State v. Wright*, 76 Conn. App. 91, 108, 818 A.2d 824 (2003) (considering totality of circumstances, including that "[a]t no time did the defendant reveal that he did not understand his circumstances or that he had difficulty communicating with the officers"), cert. denied, 267 Conn. 911, 840 A.2d 1175 (2004).

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properly determined that the defendant's statement was a product of his own free will.

Accordingly, we reject the defendant's claim that the court erred in denying his motion to suppress the statement he made to police.

The judgment is affirmed.

In this opinion the other judges concurred.

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APPENDIX C

317 Conn. 919

CONNECTICUT LAW JOURNAL

STATE OF CONNECTICUT

v.

RICHARD A. HOUGHTALING

August 4, 2015

ORDERS

The defendant's petition for certification for appeal from the Appellate Court, 155 Conn. App. 794 (AC 35720), is granted, limited to the following issues:

"1 Did the Appellate Court properly determine that the defendant did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search?

"2 If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant's confession—the fruits of one or more preceding illegalities?

"3 If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and that the resulting confession was lawfully obtained?"

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McDONALD, J., did not participate in the consideration of or decision on this petition.

The Supreme Court docket number is SC 19510.

Richard Emanuel and *David V. DeRosa*, in support of the petition.

Nancy L. Walker, deputy assistant state's attorney, in opposition.

Decided July 15, 2015

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APPENDIX D

IN THE CONNECTICUT SUPREME COURT

SC 19510

STATE OF CONNECTICUT

v.

RICHARD HOUGHTALING

August 5, 2015

**MOTION TO SUSPEND THE RULES TO PERMIT
CONSIDERATION OF ADDITIONAL ISSUES**

Pursuant to Practice Book § 60-3, the defendant-appellant in the above entitled action respectfully moves the Court to suspend the requirements of Practice Book § 84-9, in order to permit the defendant to raise two additional issues in this certified appeal. As explained below, one of those issues is closely related to, and *may* be encompassed within the first certified question, while the other issue is clearly outside the scope of the certified questions.

I. BRIEF HISTORY OF THE CASE

This case arose from aerial surveillance that was part of a “marijuana eradication” operation. The “operation” included officers from the Connecticut Statewide Narcotics Task Force (SNTF) and the Massachusetts Air National Guard. At about 2:15 in the afternoon of August 9, 2010, a National Guard helicopter, with a National Guard pilot and “observer,” and one SNTF

member aboard as a “spotter,” was conducting aerial surveillance in Windham County. Although the surveillance team acted on some “phone call tips” from a “narcotics hotline,” the police had *not* received a tip regarding the defendant’s property. Flying at an altitude between 500 and 1000 feet—and without seeking prior judicial authorization—the helicopter flew over residential property located at 41 Raymond Schoolhouse Road in the Town of Canterbury. (The property was owned by the defendant, who resided in Danbury.) When officers in the helicopter “observed what they believed to be a large crop of marijuana being grown in the area of [that address],” they communicated “the coordinates” to “a ground team [that] conduct[s] raids.”¹ *State v. Houghtaling*, 155 Conn. App. 794, 798 (2014). The ground team, which consisted of at least five officers, *did not* seek a search warrant before entering onto the property. In addition, the police acknowledged that there were *no* exigent circumstances (such as the possible destruction of evidence or escape of suspects) requiring immediate entry, and that they could have secured the perimeter of the property while obtaining a search warrant.

The ground team drove onto the property in separate, unmarked “undercover” vehicles. “They drove down the narrow, dirt driveway, near which was posted a ‘no trespassing’ sign. The officers stopped in front of an open, steel gate, parked their vehicles, walked toward the house, and knocked at the front door. After no one answered, the officers walked around the side of the home.” *State v. Houghtaling*, *supra*, 798. The leader of the ground crew explained that as they

¹ The suppression hearing did not reveal whether any observations from the helicopter were made with sensory-enhanced technology that *might* violate constitutional standards.

walked around the side of the home, they were receiving directions from the helicopter about the location of marijuana.

After finding marijuana in the pool area, they proceeded further into the backyard where “there was a large, partially completed greenhouse building,” the sides of which were open. Inside the greenhouse were two men and marijuana plants. When asked what they were doing, one of the men responded that they were “tending” to the marijuana. One of the men, Thomas Phravixay, told the police that he was renting the home, and he thereafter gave the police written consent to search.

While the police were on the property, the defendant drove up in a white van, with his brother-in-law in the passenger seat. The defendant started to turn into the driveway, but then “turned around and left quickly.” *State v. Houghtaling*, supra, 799. He drove only a tenth of a mile, and then turned around and was headed back towards his property when police stopped or blocked his van. They approached with drawn guns and asked the defendant and his passenger “why they had turned into the property and then left.” *Id.* The defendant explained that he had gone to the property to visit a friend, but left because “he did not recognize the [unmarked] vehicles” in the driveway. *Id.* Looking inside the van, the police “saw lumber and irrigation piping, which they believed to be consistent with the construction of the greenhouse on the property.” *Id.* The defendant and his brother-in-law then were “handcuffed and transported to the property,” and given *Miranda* warnings. *Id.* The defendant was “initially reluctant to speak.” *Id.* However, after police told him that Phravixay had consented to a search, and that the “officers had found mail with the

defendant's name on it, and that he was 'going to jail,'" the defendant gave a statement. *Id.* He "stated that he had purchased the home one year ago and had decided to rent it to Phravixay because he could not afford the mortgage payment. He also said that Phravixay paid him 'periodically for the rent,' and that he had decided to help Phravixay cultivate marijuana about four or five months ago." *Id.* The defendant also signed a consent to search form. The ensuing search of the property took six to eight hours, and included the house, barn, and greenhouse. The search yielded several hundred marijuana plants, chemicals, fertilizers, light fixtures, filtration and aeration systems, and other items utilized in a marijuana growing operation.

The defendant moved to suppress the evidence and statements, and an evidentiary hearing was held before Judge Michael E. Riley on January 31, 2013. On March 6, 2013, Judge Riley issued a memorandum of decision denying the motion to suppress. Pursuant to Gen. Stat. § 54-94a, the defendant thereafter entered a conditional plea of nolo contendere to one count of possession of marijuana with intent to sell in violation of Gen. Stat. § 21a-277(b), and one count of possession of more than four ounces of marijuana in violation of Gen. Stat. § 21a-279(b). On May 24, 2013, the defendant was sentenced to five years, execution suspended after four years, and five years probation.

The defendant appealed, and on March 17, 2015, the Appellate Court affirmed the trial court's suppression ruling. *State v. Houghtaling*, supra. The Appellate Court held, inter alia, that the defendant had no standing to challenge the warrantless search of the premises; that the *Terry* "stop" and warrantless arrest were lawful; and that his confession was properly obtained.

On May 29, 2015, the defendant filed a petition for certification pursuant to Gen. Stat. § 51-197f and Practice Book § 84-1 et seq. In an Order issued on July 15, 2015, this Court granted the petition, limited to the following issues:

1. “Did the Appellate Court properly determine that the defendant did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search?”
2. “If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant’s confession—the fruits of one or more preceding illegalities?”
3. “If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and that the resulting confession was lawfully obtained?”

II. SPECIFIC FACTS RELIED UPON

As noted earlier, the defendant is seeking permission to raise two issues. The first, discussed below in section A, is technically not a new issue, but rather a request for permission to argue an alternative theory of standing. The second issue, discussed in section B, does seek to add an entirely new issue.

A. An Alternative Theory of “Standing”

The preeminent issue in this case, as reflected in the first certified question, is whether the Appellate Court properly determined that the defendant lacked standing to challenge the search of the premises that he had leased to another individual. The defendant is asking for permission to raise an alternative theory of standing, pursuant to *United States v. Jeffers*, 342 U.S. 48 (1951). *Jeffers* stands for the proposition that a person may be able to establish standing based on a property interest in contraband that is stored or kept, with permission, at another person’s premises. See 6 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3(c) (5th ed. 2012) (noting that “the [Supreme] Court’s more recent standing decisions indicate that the *Jeffers* rule has not lost its vitality”). *Jeffers* was cited twice in the motion to suppress evidence filed by trial defense counsel in this case. See Appellate Court Record, at 19 and 41.² However, the trial court’s memorandum of decision, denying the motion to suppress, did not discuss or cite *Jeffers*, and the defendant did not cite *Jeffers* in his brief or reply brief in the Appellate Court. Consequently, to the extent, if any, that the *Jeffers* theory of standing is not properly within the purview of the first certified question, the defendant respectfully asks permission to raise it as an alternative theory of standing. It represents a legal question that does not require additional factfinding.

² The first citation to *Jeffers* was simply for the proposition that the Fourth Amendment “requires adherence to judicial processes.” Defendant’s Motion to Suppress Evidence, p. 13, at R. 19. The second *Jeffers* citation was for the proposition that standing may be acquired “by virtue of a ‘property interest’ in the items which are seized.” *Id.*, p. 35, at R. 41.

The defendant recognizes that Practice Book § 84-9 limits the issues that may be presented in a certified appeal “to those raised in the petition for certification, except where the issues are further limited by the order granting certification.” There is, however, precedent for the defendant’s request. On several occasions, the Court has addressed claims which, while not “squarely raised” in a petition for certification, were deemed reviewable because they were “sufficiently related to the principle issue” on which certification was granted. See, e.g., *Olson v. Accessory Controls and Equipment Corporation et al.*, 254 Conn. 145, 169 n. 10 (2000) (“we view the issue of an exception to the attorney-client privilege as sufficiently related to the principle issue of whether the privilege applies”). Cf., *State v. Fielding*, 296 Conn. 26, 35 (2010) (“Because the defendant did not seek certification to appeal from the Appellate Court’s dismissal of his appeal and resolution of his claim is *not intertwined with the state’s certified issue*, we decline to consider this issue.”) (Emphasis added.) On other occasions, the Court has considered issues that were not “squarely raised” in the petition, in the interest of judicial efficiency. See *State v. Padua*, 273 Conn. 138, 171 n. 37 (2005) (“We recognize that the double jeopardy claim is outside the scope of the certified question, but we review the claim in the interest of judicial efficiency.”); *Carpenter v. Commissioner of Correction*, 274 Conn. 834, 842 n. 6 (2005) (reviewing claim that was “outside the scope of the certified question” “in the interest of judicial efficiency”); *State v. Brown*, 242 Conn. 445, 447 (1997) (“In the interests of judicial economy, however, we also address the defendant’s related claims that were not decided by the Appellate Court . . .”).

Furthermore, in *State v. Torrence*, 196 Conn. 430 (1985), the Court recognized that it “may, of course, suspend the limitation of Practice Book § 3154 [now § 84-9] for good cause shown.” *Id.*, 434 n. 5. “In addition, under extraordinary circumstances . . . [this Court] may review matters not raised before the Appellate Court and resolve issues not determined by the Appellate Court.” *Id.* See *Nardini v. Manson*, 207 Conn. 118, 119 n. 1 (1988) (this court “may, of course, suspend the limitation of § 4138 [now § 84-9] when the dictates of justice require a more expansive analysis”); *State v. Hodge*, 201 Conn. 379, 382 (1986) (“The two grounds relied upon by this court in affirming the judgment were raised by the court sua sponte during oral argument.”); *Greenwood v. Greenwood*, 191 Conn. 309, 315 (1983) (“ . . . this court is not limited in its disposition of a case to claims raised by the parties and has frequently acted sua sponte upon grounds of which the parties were not previously apprised. We may, of course, where there is good reason, permit additional argument where we believe a case should be decided upon different issues from those presented”); *State v. Nguyen*, 253 Conn. 639, 648 n. 6 (2000) (although “[t]he defendant did not seek certification to appeal” certain issues that had been raised in the Appellate Court, the Court considered the issues since they were “integral to the trial court’s analysis and ultimate decision, and to the Appellate Court’s assessment of whether a sua sponte hearing was required”). See also *McCann Real Equities Series XXII, LLC v. David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 521 n. 30 (“Although the [trial] court did not address that question and neither of the parties sought an articulation, we will review the claim pursuant to the supervisory powers granted us by our rules of practice

in order that justice may be done.”), cert. denied, 277 Conn. 928 (2006).

Here, there is “good cause” for the Court to consider the alternative theory of standing under *United States v. Jeffers*, supra, because that theory is “sufficiently related to” and “intertwined” with the ultimate issue in the first certified question. The defendant also relies on Practice Book § 60-1 (“The design of these rules being to facilitate business and advance justice, they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice.”); Practice Book § 60-2 (“The supervision and control of the proceedings shall be in the court having appellate jurisdiction”); and this Court’s “inherent supervisory authority over the administration of justice.” *State v. Valdeon*, 261 Conn. 381, 386 (2002).

B. A New State Constitutional Claim: The
Police Should be Required to Obtain a War-
rant Before Conducting Aerial Surveillance

The defendant also requests permission to brief a claim that was not raised below: whether, under art. I, §§ 7, 8, and 9 of the Connecticut Constitution, law enforcement officers are required to obtain a warrant (unless a recognized exception to the warrant requirement is applicable) *prior to* conducting aerial surveillance over private residential property.

This is not a fanciful claim. Preliminary research reveals that in 2014, the Court of Appeals of New Mexico adopted such a rule pursuant to its state constitution. In *State v. Davis*, 321 P.3d 955 (N. Mex. App. 2014), the court stated, inter alia:

- “we conclude that police flying over a residence strictly in order to discover evidence of crime, without a warrant, ‘does not comport with the distinctive New Mexico protection against unreasonable searches and seizures” (Citation omitted.) *id.*, 960;
- the privacy interest protected by the state constitution “also includes an interest in freedom from visual intrusion from targeted, warrantless police aerial surveillance, no matter how quietly or cleanly the intrusion is performed”; *id.*, 961;
- “we adopt the view that if law enforcement personnel, via targeted aerial surveillance, have the purpose to intrude and attempt to obtain information from a protected area, such as the home or its curtilage, that could not otherwise be obtained without physical intrusion into that area, that aerial surveillance constitutes a search for purposes of [the state constitution]”; *id.*, 961;
- “it follows that police should be required to secure a warrant before attempting to obtain, through flight, information from a home or its curtilage that they would not otherwise be able to obtain without physical intrusion”; *id.*, 962;
- “such [aerial] surveillance constitutes a search under [the New Mexico constitution] if (1) the government agent(s) involved intend to obtain information from a target or targets through aerial surveillance, and

(2) if the information to be obtained through aerial surveillance could not otherwise be obtained without physical intrusion into the target's home or curtilage. If the surveillance constitutes a search, then the government agent(s) must obtain a search warrant before conducting the surveillance, absent an exception to the warrant requirement, such as exigent circumstances"; *id.*, 962.

On March 14, 2014, the Supreme Court of New Mexico granted certification in *Davis*; see *State v. Davis*, 324 P.3d 376 (2014) (decision without published opinion); and that appeal is pending.

Obviously, aerial surveillance implicates significant constitutional privacy interests. In addition, aerial surveillance is a very timely subject. On June 2, 2015, our state Senate voted 36 to 0 in favor of legislation that would have required police officials (with certain exceptions) to obtain a search warrant before using "unmanned aerial vehicles" (commonly referred to as "drones") for investigative purposes. See Substitute Senate Bill No. 974, § 8(c).³ As reported in the press, "the bill never came to a vote in the state House of

³ Section 8(c) provides in relevant part that "[a] law enforcement officer may operate an unmanned aerial vehicle provided: (1) A judge of the Superior Court or judge trial referee has issued a warrant in accordance with section 54-33a of the general statutes authorizing the use of an unmanned aerial vehicle; . . . [or] (4) The law enforcement officer has probable cause to believe that a criminal offense has been, is being or will be committed and exigent circumstances exist that make it unreasonable for the law enforcement officer to obtain a warrant authorizing the use of an unmanned aerial vehicle; [or] (5) The law enforcement officer reasonably believes that there is an imminent threat to the life or safety of an individual;"

Representatives as time ran out in the legislative session.” Christopher Keating, “Drone Stunt’s Strong Backlash,” *Hartford Courant*, July 26, 2015, p. 1. Apparently, drone legislation is expected to be “a top priority when the new legislative session begins in February.” *Id.*

Whether conducted by small, unmanned drones, or by police operating out of helicopters, aerial surveillance presents privacy issues that potentially affect all Connecticut residents. This case presents an opportunity for the Court to consider whether our state constitution affords greater privacy protection, against aerial surveillance, than is currently available under the Fourth Amendment. As argued in section A, this Court has the authority to allow the defendant to raise this issue, and the defendant respectfully requests that the Court exercise that authority.

III. LEGAL GROUNDS RELIED UPON

The defendant relies upon Practice Book §§ 60-1, 60-2, 60-3, 84-9 and 84-12.

Respectfully Submitted,

RICHARD HOUGHTALING
Defendant-Appellant

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CERTIFICATION OF SERVICE

Pursuant to Practice Book § 62-7, undersigned counsel certifies that on August 5, 2015, a copy of this motion was mailed, first class postage prepaid, to all counsel of record, to wit: Nancy L. Walker, Special Deputy Assistant State's Attorney, Office of the Chief State's Attorney, Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067 (Tel. (860) 2568-5807; Fax (860) 258-5828).

/s/ Richard Emanuel
RICHARD EMANUEL

Certificate of Compliance: Undersigned counsel certifies that this motion complies with the requirements of Practice Book §§ 62-7 and 66-3.

/s/ Richard Emanuel
RICHARD EMANUEL

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APPENDIX E

SUPREME COURT
STATE OF CONNECTICUT

SC 19510

STATE OF CONNECTICUT

v.

RICHARD HOUGHTALING

October 7, 2015

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED AUGUST 6, 2015, TO SUSPEND THE RULES TO PERMIT CONSIDERATION OF ADDITIONAL ISSUES, HAVING BEEN FURTHER CONSIDERED BY THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT

/s/ Rene L. Robertson

RENE L. ROBERTSON

ASSISTANT CLERK-APPELLATE

NOTICE SENT: October 7, 2015

RICHARD EMANUEL

DAVID V. DEROSA

NANCY L. WALKER, SPECIAL DEPUTY ASSISTANT
STATE'S ATTORNEY

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APPENDIX F

326 Conn. 330

SC 19510

STATE OF CONNECTICUT

v.

RICHARD A. HOUGHTALING

July 25, 2017

Rogers, C. J., and Palmer, Eveleigh,
Espinosa, Robinson and D'Auria, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of the crimes of possession of marijuana with the intent to sell and possession of more than four ounces of marijuana, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his motion to suppress certain evidence that the police seized from property he owned but leased to another individual, P, and his subsequent statement to the police. While conducting a marijuana eradication operation, the police observed numerous marijuana plants located on the property. During their search of the property, the police noticed two men, including P, inside a partially constructed greenhouse. After being administered *Miranda* warnings, P indicated to the police that he was leasing the property

and gave the police consent to search it. Thereafter, the defendant, who was driving a van with another occupant, pulled into the driveway on the property, where unmarked police vehicles were parked, and then backed out very quickly and departed. After pursuing the van, the police questioned the defendant, handcuffed him, brought him and the other occupant back to the property, and gave them *Miranda* warnings. The defendant gave a statement to the police indicating that he had purchased the home the prior year, that he leased it to P and that he started helping P cultivate marijuana four to five months beforehand. The Appellate Court affirmed the judgment of conviction, concluding that the trial court properly denied the defendant's motion to suppress because he lacked a reasonable expectation of privacy in the property, the police were justified in stopping the defendant and conducting an inquiry as they had a reasonable and articulable suspicion that he had engaged in criminal conduct, and the police had probable cause to arrest him after they observed certain materials in the van similar to the materials being used to construct the greenhouse. On the granting of certification, the defendant appealed to this court. *Held:*

1. The Appellate Court correctly concluded that the defendant lacked standing to challenge the warrantless search of the property because he lacked a subjective expectation of privacy therein: the defendant presented no evidence establishing the frequency and nature of his visits to the property or whether he retained the right to exclude others from all or part of the property, or any evidence indicating that he stayed at the property or otherwise continually used the property after leasing it to P, and the only evidence that may have connected the defendant to the property was a few pieces of mail and one personal item on

the property, which did not establish how often the defendant visited the property or the nature of his relationship therewith; moreover, the defendant could not prevail on his claim that he maintained a connection with the property by participating in P's marijuana grow operation, the defendant having failed to present sufficient evidence to establish the extent of his involvement with that operation.

2. The defendant could not prevail on his claim that his confession to the police was the fruit of the unlawful stop of the defendant in his van and his subsequent warrantless arrest: the police were justified in detaining the defendant to further inquire about his relationship to the property because they had a reasonable and articulable suspicion that the defendant was connected with the marijuana grow operation, as the police could have reasonably inferred from their experience and knowledge of the grow operation, and from the defendant's actions in light of the circumstances, that he was at least aware of, if not directly connected to, the activities occurring on the property; moreover, the defendant's interaction with the police after their stop of the van and the fact that the van contained, in the plain view of the police officers, materials resembling those used to build the greenhouse, which the officers had previously observed was under construction, were sufficient to establish probable cause to believe that the defendant was involved with P's marijuana grow operation and, thus, provided a basis on which to arrest the defendant.

State v. Boyd (57 Conn. App. 176), to the extent that it requires a defendant, in order to establish a subjective expectation of privacy in property, to show facts sufficient to create the impression that his relationship with the location was personal in nature, and was

more than sporadic, irregular or inconsequential, and that he maintained the location and items within it in a private manner at the time of the search, overruled.

Argued March 29—officially released July 25, 2017

Procedural History

Substitute information charging the defendant with the crimes of possession of marijuana with the intent to sell and possession of more than four ounces of marijuana, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, where the court, *Riley, 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; judgment of guilty, from which the defendant appealed to the Appellate Court, *Gruendel, Beach* and *Alvord, Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Richard Emanuel, with whom, on the brief, was *David V. DeRosa*, for the appellant (defendant).

Nancy L. Walker, deputy assistant state's attorney, with whom, on the brief, were *Anne Mahoney*, state's attorney, and *Matthew Crockett*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The primary issue in this certified appeal is whether the defendant, Richard Houghtaling, presented evidence sufficient to establish his subjective expectation of privacy in a residence he had leased to a third party. After the police found numerous marijuana plants during a search at the residence, the officers located and stopped the defendant and later

arrested him. After his arrest, the defendant admitted he was aware of, and had provided some unspecified assistance with, the grow operation. The state later charged the defendant with certain drug related offenses. The defendant moved to suppress evidence gathered during the search and his subsequent statements to the police as the fruits of a warrantless and illegal search of the property, which he owned but had leased to a third party, Thomas Phravixay. He also claimed that the police had illegally stopped and arrested him. The trial court denied the defendant's motion, and he subsequently entered a conditional plea of nolo contendere. The Appellate Court affirmed the defendant's conviction; see *State v. Houghtaling*, 155 Conn. App. 794, 830, 111 A.3d 931 (2015); and we granted certification to appeal. *State v. Houghtaling*, 317 Conn. 919, 919-20, 118 A.3d 62 (2015). Because we agree with the Appellate Court that the defendant lacked standing to challenge the search, and that his detention and subsequent arrest were lawful, we affirm the judgment of the Appellate Court.

The record reveals the following facts relevant to this appeal. On August 9, 2010, the Statewide Narcotics Task Force (task force)—comprised of federal, state, and local law enforcement officers—was conducting a marijuana eradication operation in the northeast corner of the state. The operation was comprised of two spotters who were patrolling the area in a helicopter and a ground team consisting of several members. The task force had performed marijuana eradication missions earlier in the day, and, shortly after noon, the helicopter team notified the ground team of a suspected large crop of marijuana at 41 Raymond Schoolhouse Road in the town of Canterbury (property). From the air, the spotters were able to see dozens of marijuana plants within a fenced-in pool

area behind the house, as well as several plants along the outside of the fence. The ground team arrived at the property approximately thirty minutes later in separate, undercover and unmarked vehicles, which bore no resemblance to police vehicles.

The property consisted of 5.6 acres and was largely surrounded by dense forest. The only means of ingress and egress was a narrow dirt driveway more than 100 feet long and lined with trees on both sides. There were signs marked "No Trespassing" posted on trees along the driveway, and, about halfway down the driveway, there was a metal gate that could block the driveway but that was not closed. The ground team parked their vehicles in front of the gate, donned protective vests, which identified them as police officers, and proceeded to the front door of the house on foot. As the members of the ground team approached the home, they saw no occupant vehicles or persons, smelled nothing, and heard nothing. The officers knocked on the front door but received no answer.

The ground team then left the front door and proceeded toward the back door. The air team had told the ground team that, if they continued around the side of the house, they would see "a whole lot of marijuana right out in the open." Before reaching the back door, the officers saw a pool area with dozens of marijuana plants inside and additional plants surrounding the area. The officers then continued to search the property, including a greenhouse located behind the pool, near the rear of the property. As the police approached the greenhouse, they noticed it was still under construction. The ends of the structure had no side walls, and there were piles of lumber on the ground nearby. Inside the greenhouse, the police were able to see

numerous marijuana plants and two men, one of whom was later identified as Phravixay.

Both of the men were given *Miranda*¹ warnings and agreed to answer questions. Phravixay told the officers he was renting the home and later gave the officers written consent to search the property. The search ultimately revealed more than 1000 marijuana plants.

While two members of the ground crew were returning to their vehicles to obtain an evidence kit, they noticed a white van pull into the driveway of the property, where the unmarked police vehicles were parked, and then reverse back into the street and depart “[v]ery quickly.” The helicopter team also spotted the van enter the driveway and radioed the ground team to alert all of the officers concerning the van’s presence. The officers were suspicious of the van, believing that its occupants might be involved in the marijuana grow operation, and decided to pursue the van. By the time the police got into a car, headed up the driveway after the van, and arrived out on the road, the van was already parked at the side of the road, approximately one tenth of one mile away, facing back toward the driveway.

The officers drove to the location where the van was parked, exited their vehicle, and approached the van. The officers had drawn their weapons for their safety because, as the trial court noted, those involved in drug dealing often possess firearms. The van was occupied by two males—the defendant was in the driver’s seat and another person sat in the passenger seat. Upon determining that the occupants of the van posed no threat, the officers holstered their weapons

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and asked the defendant for identification. When the officers asked the defendant why he had pulled into the driveway and then left abruptly, he stated that he was going to visit a friend but left when he saw that the driveway was full of cars he did not recognize. As the trial court found, the defendant's answers to the officers' questions were evasive, and, although he claimed to be visiting a friend, he would not name the friend. While the police were questioning the defendant, they were able to observe from outside the van that it contained lumber and irrigation piping similar to that which was used to construct the greenhouse. The officers then handcuffed the defendant and the passenger, and brought them back to the property.

Upon arriving back at the property, the police advised the defendant of his *Miranda* rights. The defendant at first refused to speak with the police but then agreed to once the officers told him that Phravixay had consented to their search of the property, that they had found mail with the defendant's name on it in the house and in the mailbox, and that Phravixay had identified the defendant as the homeowner and the person who leased the property to him. The defendant told the officers he had purchased the home in the prior year but could not afford the mortgage payments, so, to help cover his expenses, he leased the property to Phravixay, whom he had known for several years. The defendant said Phravixay had paid rent only periodically, and the defendant had been helping Phravixay cultivate marijuana for the previous four or five months to "recoup some of [his] money." Although the defendant said he was helping with the cultivation, he stated that, "up until [that day, he] didn't realize the extent of the grow operation. I own my own business and didn't really think much of what was going on at the house"

The defendant initially was charged with numerous drug related offenses,² and he moved to suppress “(1) all evidence seized by law enforcement officers in connection with the warrantless search and seizure conducted at [the] property on August 9, 2010; (2) all statements made by [the defendant] and others, including . . . Phravixay, as a result of the illegal search and seizure; and (3) the fruits of any and all other evidence obtained, derived or developed as a result of the illegal search and seizure and illegally obtained statements” The defendant claimed that the court must suppress this evidence because the police had violated his fourth amendment rights when they failed to obtain a warrant before searching the property and when they detained him in his van, which he claims was done without reasonable suspicion that he had engaged in criminal activity.

At the hearing on the motion to suppress, the state called three police officers to testify about their actions and observations during the search and seizure. The defendant called one witness, another police officer. After the witnesses testified, the state argued that the defendant had failed to establish his subjective expectation of privacy because all of his personal property was in the city of Danbury, where he lived with his wife and family, and the defendant had failed by any other conduct to demonstrate a subjective expectation of privacy in the property where the search occurred. Defense counsel responded by arguing that the defendant’s ownership of the property alone was sufficient to establish standing. He argued that the

² The defendant initially was charged with the production and preparation of a controlled substance without a license, possession of more than four ounces of marijuana, the sale of illegal drugs, and the operation of a drug factory.

state was trying to get around this fact by making a “hyper-technical argument on standing”

The trial court agreed with the state and denied the defendant’s motion to suppress the evidence seized from the search of the property and the defendant’s statements to the police. The trial court concluded that the defendant had failed to establish that he had a subjective expectation of privacy in the property. The court also found that the police possessed a reasonable and articulable suspicion sufficient to justify stopping the defendant’s van after he entered and quickly exited the driveway. Lastly, the trial court concluded that the officers had probable cause to arrest the defendant. The defendant then entered a conditional plea of *nolo contendere*.³

The defendant appealed to the Appellate Court from the judgment of conviction, claiming that the trial court’s denial of his motion to suppress was improper because “(1) he had a reasonable expectation of privacy in the area searched, including the home and the area surrounding it, (2) his fourth amendment rights were violated by the warrantless search conducted by the . . . task force, [and] (3) the police lacked a reasonable and articulable suspicion to conduct a motor vehicle stop of the van operated by the defendant, and his resulting arrest was unsupported by probable cause” (Footnote omitted.) *State v. Houghtaling*, *supra*, 155 Conn. App. 797. The Appellate Court rejected all of these claims. *Id.*, 800, 808, 818, 823.

Specifically, the Appellate Court concluded that the defendant’s first two claims failed because he lacked a

³ The defendant pleaded guilty to possession of marijuana with the intent to sell, and possession of more than four ounces of marijuana.

reasonable expectation of privacy.⁴ *Id.*, 808. The Appellate Court determined that the defendant failed to establish his subjective expectation of privacy because he did not sufficiently develop his personal relationship with the property at the suppression hearing. See *id.*, 803. The defendant argued that he was a cooccupant of the property and cited three facts to support this contention: (1) he leased the property to Phravixay for less than his monthly mortgage payment; (2) he received and stored items on the premises; and (3) he received some mail at the property. *Id.*

The Appellate Court determined that the fact that Phravixay's rent was less than the defendant's mortgage established nothing about the manner in which he retained rights to use the property, or if he retained them at all. *Id.* Moreover, although the defendant claimed that he received and stored property on the premises, he identified only a single item of his at the property—an aeration system addressed to him at his Danbury residence. *Id.*, 804. The court did not find that the presence of a single piece of property established that the defendant was a cotenant. See *id.* Finally, the Appellate Court concluded that the presence of “some mail”; *id.*; did not establish that the defendant lived at the property or otherwise was there frequently. See *id.*

⁴ The Appellate Court relied on the three part test set forth in *State v. Boyd*, 57 Conn. App. 176, 185, 749 A.2d 637, cert denied, 253 Conn. 912, 754 A.2d 162 (2000). See *State v. Houghtaling*, *supra*, 155 Conn. App. 802-808. Although we agree with the Appellate Court's ultimate conclusion, we conclude that the factors the court in *Boyd* considered do not properly measure a defendant's subjective expectation of privacy. See part I B of this opinion.

The Appellate Court also concluded that the police possessed a reasonable and articulable suspicion that the defendant had engaged in criminal conduct. *Id.*, 818. The Appellate Court determined that, on the basis of the totality of the circumstances, including the spatial and temporal link between the *Terry*⁵ stop and the investigation of the felony in progress (the marijuana grow operation), as well as the defendant's act of entering and quickly leaving the property, the police were justified in stopping the defendant. *Id.*, 813-16, 818. The Appellate Court also determined that the police had probable cause to arrest the defendant after they observed lumber and irrigation piping in the van similar to the materials being used to construct the greenhouse, demonstrating a probable connection between the defendant and the marijuana operation at the property. *Id.*, 821-23.

The defendant appealed to this court from the judgment of the Appellate Court, and we granted certification on the following issues: (1) "Did the Appellate Court properly determine that the defendant did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search?" *State v. Houghtaling*, *supra*, 317 Conn. 920. (2) "If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant's confession—the fruits of one or more preceding illegalities?" *Id.* (3) "If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and that the resulting

⁵ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

confession was lawfully obtained?” Id. We answer the first question in the affirmative, do not reach the second question, and answer the third question in the affirmative. We thus affirm the judgment of the Appellate Court.

When reviewing a trial court’s denial of a motion to suppress, “[a] finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant’s constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court’s factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court’s factual findings are supported by substantial evidence [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the [trial court’s] memorandum of decision” (Internal quotation marks omitted.) *State v. Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Accordingly, although we must defer to the trial court’s factual findings, determining whether those findings establish standing is a question of law, over which we exercise plenary review. See, e.g., *State v. Gonzalez*, 278 Conn. 341, 348, 898 A.2d 149 (2006).

I

The defendant first claims that the Appellate Court incorrectly determined that he lacked standing to challenge the warrantless search of the property because he lacked a subjective expectation of privacy therein. We disagree.

The fourth amendment to the United States constitution protects individuals from unreasonable searches and seizures.⁶ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const., amend. IV. The rights guaranteed by the fourth amendment are personal rights, and, therefore, only one “whose own protection was infringed by a search and seizure” may enforce those rights. *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). To challenge a search as unreasonable, a defendant must have standing. To establish standing, a defendant must show that he possesses a reasonable expectation of privacy in the area searched. See, e.g., *State v. Boyd*, 295 Conn. 707, 718, 992 A.2d 1071 (2010), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011).

To determine whether a person has a reasonable expectation of privacy in an invaded place or seized effect, that person must satisfy the *Katz* test. See *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). The *Katz* test has both a subjective and an objective prong:

⁶ “The fourth amendment’s protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).” *State v. Kelly*, 313 Conn. 1, 8 n.3, 95 A.3d 1081 (2014).

“(1) whether the [person contesting the search] manifested a subjective expectation of privacy with respect to [the invaded premises or seized property]; and (2) whether that expectation [is] one that society would consider reasonable This 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. Jackson*, 304 Conn. 383, 395, 40 A.3d 290 (2012).

In analyzing the subjective prong of the *Katz* test, we look for actions or conduct demonstrating that the defendant sought to preserve the property or location as private. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); see also *State v. Boyd*, 57 Conn. App. 176, 185, 749 A.2d 637 (“a subjective expectation of privacy rests on finding conduct [through which a defendant] has demonstrated an intention to keep activities or things private and free from knowing exposure to others’ view”), cert. denied, 253 Conn. 912, 754 A.2d 162 (2000). Although this prong is the “subjective” portion of the test, it does not rest solely on the defendant’s actual beliefs. See *Smith v. Maryland*, *supra*, 741 n.5 (stating that, in some cases, normative inquiry rather than subjective expectations inquiry is proper); O. Kerr, “*Katz* Has Only One Step: The Irrelevance of Subjective Expectations,” 82 U. Chi. L. Rev. 113, 114-15 (2015) (the subjective prong of *Katz* test was originally more akin to question of waiver—meant to summarize precedents on exposure to third parties—rather than question regarding defendant’s actual belief). “The first part of the *Katz* test requires only . . . [a person’s] conduct [to] have demonstrated an intention to keep activities and [property] . . . private, and that he did not knowingly expose [it] to the open view of the

public.” (Internal quotation marks omitted.) 1 W. LaFave, *Search and Seizure* (5th Ed. 2012) § 2.1 (c), p. 585; see also *United States v. Taborda*, 635 F.2d 131, 137 (2d Cir. 1980).

The trial court found that the defendant had failed to establish a subjective expectation of privacy in the property but also concluded that, even if he did, it was not one that society would recognize as reasonable. The Appellate Court determined that the defendant lacked a subjective expectation of privacy and therefore did not examine the objective prong of the *Katz* test. See *State v. Houghtaling*, *supra*, 155 Conn. App. 807-808.

To evaluate whether the defendant met his burden of establishing a subjective expectation of privacy, the Appellate Court relied on the three factor test set in *Boyd*. See *id.*, 802-808. Specifically, the court in *Boyd* declared that a defendant “must show facts sufficient to create the impression that (1) his relationship with the location was personal in nature, (2) his relationship with the location was more than sporadic, irregular or inconsequential, and (3) he maintained the location and the items within it in a private manner at the time of the search.” *State v. Boyd*, *supra*, 57 Conn. App. 185.

We have not recently had occasion to review a decision that turns solely on the first, subjective prong of the *Katz* test, and specifically have not had occasion to consider whether the factors discussed in *Boyd* appropriately measure a particular defendant’s subjective expectation of privacy. Although we agree with the Appellate Court’s ultimate conclusion, upon reviewing these factors, and understanding that the Appellate Court panel appropriately considered itself bound by its own precedent in *Boyd*, we disagree with

Boyd's three factor test as articulated and thus overrule *Boyd* to the extent that it requires a defendant to meet its three factor test to establish his or her subjective expectation of privacy. We take this occasion to clarify the proper method of evaluating a defendant's subjective expectation of privacy.⁷

This court has not previously adopted a rigid test for determining a subjective expectation of privacy, and we decline to do so now. See, e.g., *State v. Davis*, 283 Conn. 280, 324, 929 A.2d 278 (2007) ("the [reasonable expectation of privacy] test offers no exact template that can be mechanically imposed upon a set of facts to determine whether . . . standing is warranted" [internal quotation marks omitted]); cf. O. Kerr, "Four Models of Fourth Amendment Protection," 60 *Stan. L. Rev.* 503, 506 (2007) ("[t]he [United States] Supreme Court has not and cannot adopt a single test for when an expectation is 'reasonable' because no one test effectively and consistently distinguishes the more trouble-

⁷ We note that *Boyd*'s three factor test has been employed in only five Connecticut cases. In fact, only this case was decided solely on the basis of the subjective prong of the *Katz* test. See *State v. Houghtaling*, supra, 155 Conn. App. 802-808. The courts in all of the other cases either relied on the objective prong only, or on both the subjective and objective prongs of the *Katz* test, to reject the defendants' claims. See *State v. Braswell*, 145 Conn. App. 617, 642, 76 A.3d 231 (2013) (no objectively reasonable expectation of privacy), aff'd, 318 Conn. 815, 123 A.3d 835 (2015); *State v. Pierre*, 139 Conn. App. 116, 128 and n.7, 54 A.3d 1060 (2012) (same), aff'd, 311 Conn. 507, 88 A.3d 489 (2014); *State v. Lester*, Superior Court, judicial district of Litchfield, Docket No. CR-09-131899 (January 19, 2011) (no subjective or objective expectation of privacy); *State v. Kelly*, Superior Court, judicial district of Ansonia-Milford, Docket No. CR-06-61742 (January 8, 2009) (same).

some police practices that require [f]ourth [a]mendment scrutiny from the less troublesome practices that do not “).

Our continuing decision not to adopt a rigid test for determining a defendant’s subjective expectation of privacy stems from the fact that the *Boyd* factors are unsupported by relevant precedent. The court in *Boyd* cited *United States v. Gerena*, 662 F. Supp. 1218, 1235 (D. Conn. 1987), as support for its three factor test.⁸ *State v. Boyd*, supra, 57 Conn. App. 185. In *Gerena*, the District Court began by articulating a generalized requirement for establishing a subjective expectation of privacy: “The defendant must show that he or she personally sought to preserve the particular location, and its contents, as private.” *United States v. Gerena*, supra, 1234. The District Court then went on to describe what would become the *Boyd* factors: “A defendant satisfies [the subjective] prong of the test by alleging facts sufficient to create the impression that his or her relationship with the location was personal in nature; was more than sporadic, irregular, or inconsequential; and that the defendant maintained the location and the items within it in a private manner at the time of the search.” *Id.*, 1235. The District Court cited no precedent to support the use of these factors, let alone a reason why they would apply in every case. See generally *id.* Rather, that court appears to have been articulating a series of factors

⁸ The court also cited *State v. Mooney*, 218 Conn. 85, 96-97, 588 A.2d 145, cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991), in support of its three factor test. *State v. Boyd*, supra, 57 Conn. App. 185. *Mooney*, however, dealt with the objective prong of the *Katz* test, not the subjective prong, and specifically disavowed mechanistic tests to determine whether a defendant had a legitimate expectation of privacy. See *State v. Mooney*, supra, 97.

that were relevant in that particular case, providing no reason to apply these factors outside of *Gerena*.⁹

In addition to not truly reflecting an analysis grounded in United States Supreme Court precedent, we note several problems with the *Boyd* test. First, it is written in the conjunctive, requiring that a defendant satisfy all three prongs of the test to establish standing. A defendant might fail to satisfy one of the prongs of the test, even though he possesses a subjective expectation of privacy that is well recognized as reasonable. Also, the first two prongs of the *Boyd* test are particularly problematic.

For example, the first *Boyd* factor requires the defendant to establish that “his relationship with the location was personal in nature” *State v. Boyd*, supra, 57 Conn. App. 185. Although fourth amendment rights are personal in nature; see, e.g., *Rakas v. Illinois*, supra, 439 U.S. 138; because the word “personal” is susceptible to multiple meanings, *Boyd*’s requirement that the defendant’s relationship with the location be personal in nature is problematic. For example, Black’s Law Dictionary defines personal as “[o]f or affecting a person,” and “[o]f or constituting personal property” Black’s Law Dictionary (10th Ed. 2014) p. 1325. The first definition is overinclusive because defendants would likely not seek to exclude evidence that has no bearing on their case, and, therefore, any evidence sought to be suppressed would be “affecting a person” *Id.* The second definition is underinclusive because an illegal search need not have involved the defendant’s personal property for the

⁹ Only two cases cite to this standard, namely, *United States v. Abreu*, 730 F. Supp. 1018, 1026 (D. Colo. 1990), *aff’d*, 935 F.2d 1130 (10th Cir.), *cert. denied*, 502 U.S. 897, 112 S. Ct. 271, 116 L. Ed. 2d 224 (1991), and *Boyd*.

defendant to possess a privacy interest. “[P]roperty rights are neither the beginning nor the end of [the] [c]ourt’s inquiry into whether a defendant’s [reasonable expectation of privacy has] been violated by an illegal search.” (Internal quotation marks omitted.) *State v. Davis*, supra, 283 Conn. 309.¹⁰ Additionally, this definition could exclude commercial property, even though this court has held that a defendant can have a reasonable expectation of privacy in such property. See *State v. Zindros*, 189 Conn. 228, 229, 240-42, 456 A.2d 288 (1983) (holding that commercial tenant possessed reasonable expectation of privacy in space he had leased to use as restaurant), cert. denied, 465 U.S. 1012, 104 S. Ct. 1014, 79 L. Ed. 2d 244 (1984).

The second prong of the *Boyd* test also presents problems. That prong requires a defendant to show that “his relationship with the location was more than sporadic, irregular or inconsequential” *State v. Boyd*, supra, 57 Conn. App. 185. The case law of this state—as well as multiple federal cases—recognizes several situations in which a defendant possesses a reasonable expectation of privacy but in which that same defendant would fail the subjective expectation of privacy test under this second prong of *Boyd*. For example, under *Boyd*, a person who travels to a new city, rents a hotel room, drops off her bag in the room and leaves for several days on an excursion could be said to have a relationship with that room that is

¹⁰ We note that property rights may be the beginning and the end of a fourth amendment analysis when the police have physically intruded on a person’s residence. See *Florida v. Jardines*, U.S. , 133 S. Ct. 1409, 1417, 185 L. Ed. 2d 495 (2013). In the present case, however, the defendant has presented no evidence that he resided at the property where the search occurred.

sporadic and irregular. Concluding that this relationship was insufficient under *Boyd*, however, would be clearly contrary to our case law establishing that a person who rents a hotel room generally has a reasonable expectation of privacy in that room, as long as he or she intends to return to it. Cf. *State v. Jackson*, supra, 304 Conn. 396-98 (defendant had no expectation of privacy in hotel room or in personal effects therein when he left room with no intent to return). The *Boyd* test could also fail to recognize an overnight guest's subjective expectation of privacy; see *Minnesota v. Carter*, 525 U.S. 83, 89, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998); because that guest's presence might be sporadic, irregular, and inconsequential.

The third prong of *Boyd* also suffers from deficiencies. It requires that the defendant have "maintained the location and the items within it in a private manner at the time of the search." *State v. Boyd*, supra, 57 Conn. App. 185. Although less problematic than the other two prongs, the third prong can also fail to recognize a reasonable expectation of privacy when one exists. For example, in *United States v. Vega*, 221 F.3d 789 (5th Cir. 2000), cert. denied sub nom. *Ramon Vega v. United States*, 531 U.S. 1155, 121 S. Ct. 1105, 148 L. Ed. 2d 975 (2001), the police surrounded a home looking for evidence of drug trafficking. See *id.*, '794. When the defendants noticed the police, one defendant ran out through the back door, leaving it open. See *id.* The government argued that, because the door was left open, the house was exposed to public view and lost its fourth amendment protection. See *id.*, 796. Although the court rejected the government's contention; *id.*; if it had applied the third factor of *Boyd*, its fourth amendment analysis could have led to the opposite result.

For these reasons, we decline to adopt the *Boyd* test. Although the factors enumerated in *Boyd* might, in a particular case, be relevant to a court's analysis, they should not serve as an inflexible yardstick by which the privacy interests of all criminal defendants are measured. Instead, we reaffirm that courts should properly test a defendant's subjective expectations by looking for conduct demonstrating an intent "to preserve [something] as private," and free from knowing exposure to the view of others. *Bond v. United States*, 529 U.S. 334, 338, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000).¹¹

B

At the hearing on the motion to suppress, the defendant failed to adduce sufficient evidence to establish his intent to keep the property private and free from knowing exposure to the view of others. Although the defendant did establish that he owned the property, he told the police he could not afford the payments and had leased the house to Phravixay for months. At the suppression hearing, the defendant did not present a written lease or offer any testimony regarding the provisions of the lease. Nor did he present sufficient evidence that he maintained frequent contact with

¹¹ We note that, before announcing the three pronged test, the court in *Boyd* identified the proper standard for evaluating a defendant's subjective expectation of privacy: "A subjective expectation of privacy rests on finding conduct that has demonstrated an intention to keep activities or things private and free from knowing exposure to others' view." *State v. Boyd*, supra, 57 Conn. App. 185. Additionally, the trial court in the present case did not rely on *Boyd's* three factor test but, instead, used a test substantially similar to the one we reaffirm today. Applying the latter test, the trial court concluded at the suppression hearing that the defendant did not present evidence establishing his subjective expectation of privacy.

the property, retained the right to exclude others or engaged in other significant contact with the property.

When, as in the present case, a property owner has leased that property to another person, the owner generally loses any expectation of privacy in the property. A landlord is generally much less likely to possess a reasonable expectation of privacy than an owner-occupant. This is because, upon leasing the property, he generally cedes control to the tenant, who can invite others onto the property, potentially exposing his activities or contraband to them. See, e.g., *United States v. Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (holding that defendant's "bare legal ownership" would not suffice to establish standing absent "any indication that he used the . . . home in such a way as to raise a legitimate expectation of privacy"). "[I]f the owner of certain premises has leased them to another *without reserving any right of possession* to himself, then it cannot be said that a police intrusion into those premises encroaches upon his expectation of privacy." (Emphasis added.) 6 W. LaFave, *supra*, § 11.3 (a), p. 170.

If, however, the owner maintains a regular presence at the property, retains the right to exclude others from the property or otherwise exercises significant control over the property, the owner might still possess a reasonable expectation of privacy. For example, in *State v. Suco*, 521 So. 2d 1100 (Fla. 1988), the Florida Supreme Court held that a landlord who leased a single family dwelling had standing when he retained a key to enter for purposes of collecting rent, maintaining the premises, and making repairs, and regularly went to the house, let himself in without announcing his presence, and watched television with the tenant's family. *Id.*, 1101-1102. Similarly, in *State v. Casas*,

900 A.2d 1120 (R.I. 2006), a defendant had a reasonable expectation of privacy in the basement of an apartment building owned by his wife because he collected rents, made repairs and prohibited tenants from entering the basement area, over which he retained control. *Id.*, 1130.

In the present case, although it might have been possible for the defendant to establish standing, he presented no evidence establishing the frequency and nature of his visits to the property, or whether he retained a right to exclude others from any or all of the property. Nor did he produce any evidence indicating that he stayed at the property or otherwise continuously used the property after leasing it to Phravixay. He established nothing but bare legal ownership. See *United States v. Rios*, *supra*, 611 F.2d 1345.

The only other evidence perhaps connecting the defendant to the property consisted of a few pieces of mail and an aeration system addressed to the defendant at his Danbury residence. None of these items, however, established how often the defendant visited the property or the nature of his relationship to the property, and thus did not sufficiently establish his subjective expectation of privacy. The defendant did not submit the mail into evidence or even identify what type of mail it was. As anyone who has ever changed residences knows, a previous occupant's mail might continue to arrive for months, if not years, after that person has moved. Without knowing the nature or the volume of the correspondence, we cannot assume that it was significant or anything other than junk mail. Additionally, no evidence was offered about whether or how often the defendant went to the property to retrieve the mail. Similarly, the mere presence of a single piece of property addressed to the

defendant tells us nothing meaningful about how the defendant used the property. The defendant offered no evidence about how the aeration system ended up at the property, or whether it was ever used. Phravixay or a confederate could have driven to the defendant's home in Danbury to pick up the item and deliver it to the property in Canterbury. Without any testimony to establish how much property the defendant purchased, or how it made its way from Danbury to Canterbury, the presence of a single aeration system cannot establish the defendant's subjective expectation of privacy in the property. Furthermore, leaving a single piece of personal property establishes nothing about the frequency of the defendant's visits to the property or the level of his involvement in the grow operation.

The defendant argues that he nevertheless had a reasonable expectation of privacy because he maintained a connection with the property by participating in the marijuana grow operation. We disagree. Even if a defendant could establish a subjective expectation of privacy through his participation in a criminal conspiracy,¹² the defendant still has not met his burden.¹³ The defendant did not present sufficient evidence at the hearing to establish what his involvement

¹² Because the defendant has not presented any facts establishing the extent of his participation in the marijuana grow operation, we leave this question for another day.

¹³ The defendant cites numerous cases, including *United States v. Vega*, supra, 221 F.3d 789, and *United States v. Washington*, 573 F.3d 279 (6th Cir. 2009), to support his contention that his use of the property to cultivate marijuana established standing. The defendant misreads these cases. In *Vega*, the Fifth Circuit Court of Appeals concluded that the defendant possessed an expectation of privacy in the property where he resided *despite* his use of the property for illegal purposes, not *because* he used

with the marijuana cultivation actually was. Although he cites his statement to the police that, “about [four] to [five] months ago I began to help [Phravixay] cultivate the marijuana,” the defendant offers no evidence of what his “help” entailed or how that “help” manifested a privacy interest in the property.

Also, the defendant’s own statements to the police suggest that his presence at the property was more limited than he would now have us believe. When he was arrested, the defendant told the police: “[u]p until today I didn’t realize the extent of the grow operation.” This statement indicates that the defendant’s involvement with the grow operation could not have been extensive, further diminishing any significance of the mail and aeration system, because even a brief visit and cursory view of the property would have revealed an extremely large grow operation containing more than 1000 plants, hundreds of which were inside the house.

Thus, the defendant has simply failed to establish a subjective expectation of privacy. At the suppression hearing, the defendant challenged the constitutionality of the warrantless search solely on the basis of his ownership of the property. As a result, the defendant

the property for illegal activities. See *United States v. Vega*, supra, 797. Likewise, in *Washington*, the court held that the defendant’s criminal activity did not eliminate his reasonable expectation of privacy, which derived from his status as an overnight guest in the apartment. See *United States v. Washington*, supra, 283-84. In both of these cases, therefore, independent bases supported the defendant’s standing; it did not derive from the criminal activity itself. The defendant in the present case has not established an independent basis for his claim of standing.

did not present sufficient evidence detailing his connection to the property or the grow operation that took place there, if such evidence existed at all. Because the defendant has failed to adduce any evidence that he maintained a regular presence, was an overnight guest, retained the right to exclude others, or had any other significant connection to the property, he has failed to establish a reasonable expectation of privacy. Under the facts presented, the defendant “could not legitimately expect that the [property] . . . would remain secure from prying eyes, irrespective of whether those eyes were private or governmental.” *United States v. Rama-puram*, 632 F.2d 1149, 1156 (4th Cir. 1980), cert. denied, 450 U.S. 1030, 101 S. Ct. 1739, 68 L. Ed. 2d 225 (1981). As such, we have no occasion to address the defendant’s claim that the officers were not justified in entering the property without a warrant.

II

The defendant next claims that, even if he lacked standing to challenge the warrantless search of the property, his confession to the police was the unlawful fruit of the *Terry* stop and warrantless arrest. We disagree and uphold the trial court’s conclusion that the police possessed a reasonable and articulable suspicion to stop the defendant and, later, had probable cause to arrest him.

A

The law in this area is well settled. “A stop pursuant to *Terry v. Ohio*, [392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], is legal if three conditions are met: (1) the officer must have a reasonable suspicion that a crime has occurred, is occurring, or is about to occur; (2) the purpose of the stop must be reasonable;

and (3) the scope and character of the detention must be reasonable when considered in light of its purpose The United States Supreme Court has further defined reasonable suspicion for a traffic stop as requiring some minimal level of objective justification for making the stop. . . . Because a reasonable and articulable suspicion is an objective standard, we focus not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion.” (Citations omitted; internal quotation marks omitted.) *State v. Cyrus*, 297 Conn. 829, 837, 1 A.3d 59 (2010). What constitutes a reasonable and articulable suspicion depends on the totality of the circumstances. See, e.g., *State v. Lipscomb*, 258 Conn. 68, 77, 779 A.2d 88 (2001). “Moreover, [w]e do not consider whether the defendant’s conduct possibly was consistent with innocent activity” (Internal quotation marks omitted.) *State v. Peterson*, 320 Conn. 720, 733, 135 A.3d 686 (2016).

“On appeal, [t]he determination of whether a reasonable and articulable suspicion exists rests on a two part analysis: (1) whether the underlying factual findings of the trial court are clearly erroneous; and (2) whether the conclusion that those facts gave rise to such a suspicion is legally correct.” (Internal quotation marks omitted.) *State v. Cyrus*, *supra*, 297 Conn. 837-38.

Several facts known to the officers establish that they were justified in detaining the defendant to further investigate his presence on and rapid departure from the property. First, the trial court credited the officers’ testimony that someone entering the property might be involved in the grow operation. “While it is

well settled that an individual's mere presence at a location known for criminal activity is not sufficient, without more, to support a reasonable suspicion . . . the individual's presence in such a location can be a relevant articulable fact in the *Terry* reasonable suspicion calculus." (Citations omitted.) *State v. Peterson*, supra, 320 Conn. 734. In the present case, the record demonstrates that the defendant was not stopped simply because he was in the wrong place at the wrong time. The defendant was not just passing through a high crime area. Rather, he entered a remote property containing a very large and sophisticated marijuana grow operation and rapidly exited the driveway—an action that the police could have reasonably inferred the defendant took in response to seeing an unfamiliar and unexpected sight. He then drove a short distance down the road and turned around, parking the van facing back toward the property. The officers' experience and their knowledge of the ongoing grow operation could have reasonably led them to infer that the defendant was at least aware of, if not directly connected to, the activities occurring on the property. This gave the officers a reasonable and articulable suspicion sufficient for them to briefly detain the defendant and inquire about his relationship to the property.

The defendant contends that the only reason he was stopped was that he pulled his van into the driveway and quickly exited.¹⁴ The defendant, however, overlooks several of the trial court's findings. First, the

¹⁴ The defendant challenges only one of the trial court's factual findings. Specifically, he claims that it was unreasonable for the trial court to conclude that the defendant was fleeing from the police because there is no evidence to support an inference that the defendant ever saw the police or was otherwise aware that the vehicles on the property belonged to law enforcement. We need not resolve this issue because we find that, even if the

defendant did not simply enter an empty driveway and turn around; he entered a driveway that led to a huge marijuana grow operation. That driveway was filled with cars he could not have recognized.¹⁵ Upon arriving on the scene and pulling in behind vehicles unfamiliar to him, the defendant rapidly exited the driveway. The defendant concedes that the property is rural and isolated. This makes it less likely that the defendant coincidentally pulled into this particular driveway to turn around, particularly when considering that he drove down the road approximately one tenth of one mile before *turning around* and parking the van on the side of the road, facing toward the property. We agree with the trial court that these facts provided the officers with a reasonable and articulable suspicion that the defendant was somehow connected to the grow operation.

B

The defendant also claims that his arrest following the *Terry* stop was not supported by probable cause. We conclude that it was. “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.” (Internal quotation marks omitted.) *State v. Johnson*, 286 Conn. 427, 435, 944 A.2d 297, cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008). “The quantum of evidence necessary to establish probable cause exceeds mere

defendant was not fleeing from the police, the police possessed a reasonable and articulable suspicion and thus were justified in stopping the defendant.

¹⁵ Sergeant Douglas Hall of the task force testified that the officers were driving undercover vehicles with “no resemblance to police vehicles.”

suspicion, but is substantially less than that required for conviction. Our cases have made clear that [t]here is often a fine line between mere suspicion and probable cause, and [t]hat line necessarily must be drawn by an act of judgment formed in light of the particular situation and with account taken of all the circumstances Furthermore, when we test the quantum of evidence supporting probable cause, it is not the personal knowledge of the arresting officer but the collective knowledge of the law enforcement organization at the time of the arrest [that] must be considered.” (Citations omitted; internal quotation marks omitted.) *State v. Dennis*, 189 Conn. 429, 431-32, 456 A.2d 333 (1983).

Applying these principles to the present case, we conclude that the facts known to the officers gave them probable cause to arrest the defendant. When the officers had initially approached the defendant, they asked him for his license and registration, and the reason for his presence at the home. The officers later testified that the defendant’s answers were evasive and that he would not name the friend he was allegedly there to visit; the trial court credited this testimony. This interaction occurred immediately after the defendant had driven the van directly to, but departed “[v]ery quickly” from, the property, which was the site of a massive marijuana grow operation. Additionally, the trial court credited an officer’s testimony that the van contained, in plain view of the officers, lumber and irrigation piping resembling the materials used in the greenhouse, which task force members observed was under construction. The presence of these materials and the attendant circumstances were sufficient to establish probable cause to believe that the defendant

was involved with the grow operation, giving them grounds to arrest the defendant.¹⁶

The judgment of the Appellate Court is affirmed. In this opinion the other justices concurred.

¹⁶ The defendant also argues that his statement to the police, made subsequent to his arrest, should be suppressed. His arguments are all premised on his contention that the search of the property and the *Terry* stop were illegal, and that the officers lacked probable cause to arrest him. Because we conclude that (1) the defendant is without standing to challenge the search, (2) the *Terry* stop was legal, and (3) the officers had probable cause to arrest him, we are left with no other circumstances that would support a finding that his statement was involuntary.

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille. Although Justices Palmer and Espinosa were not present when the case was argued before the court, they have read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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APPENDIX G

IN THE CONNECTICUT SUPREME COURT

S.C. 19510

STATE OF CONNECTICUT

v.

RICHARD A. HOUGHTALING

August 15, 2017

MOTION FOR RECONSIDERATION

Pursuant to Practice Book §§ 66-1 et seq. and 71-5, the defendant-appellant in the above entitled action respectfully moves for reconsideration of the decision in *State v. Richard A. Houghtaling*, 326 Conn. 330 (July 25, 2017).

I. BRIEF HISTORY OF THE CASE

The defendant was arrested on August 9, 2010, and was charged with various drug offenses. He subsequently moved to suppress physical evidence that had been seized during a search of residential property, and also moved to suppress certain statements that he had made to the police. An evidentiary suppression hearing was held before Judge Michael E. Riley on January 31, 2013. On March 6, 2013, Judge Riley issued a memorandum of decision denying the motion to suppress.

Pursuant to Gen. Stat. § 54-94a, the defendant thereafter entered a conditional plea of nolo contendere to one count of possession of marijuana with intent to sell in violation of Gen. Stat. § 21a-277(b), and one count of possession of more than four ounces of marijuana in violation of Gen. Stat. § 21a-279(b). On May 24, 2013, the defendant was sentenced to five years, execution suspended after four years, and five years probation.

The defendant appealed, and on March 17, 2015, the Appellate Court affirmed the trial court's suppression ruling. *State v. Houghtaling*, 155 Conn. App. 794 (2015).

On May 29, 2015, the defendant filed a petition for certification, and that petition was granted by this court on July 15, 2015, limited to the following issues:

- “1. Did the Appellate Court properly determine that the defendant did not have standing (a reasonable expectation of privacy) to challenge a search of residential premises that he owned but had leased at the time of the search?
- “2. If the answer to the first question is in the negative, were all subsequent actions of the police—the *Terry* stop of the vehicle, the warrantless arrest, and the defendant's confession—the fruits of one or more preceding illegalities?
- “3. If the answer to the first question is in the affirmative, did the Appellate Court properly determine that the *Terry* stop and warrantless arrest of the defendant were lawful, and that the resulting confession was lawfully

obtained?” *State v. Houghtaling*, 317 Conn. 919-20 (July 15, 2015).

The defendant’s appeal was argued in this court on March 29, 2017. On July 25, 2017, the court issued an opinion affirming the judgment of the Appellate Court. *State v. Houghtaling*, 326 Conn. 330 (2017).

On August 2, 2017, counsel filed a motion for extension of time, until August 15, 2017, in which to file a motion for reconsideration. That motion has been granted.

II. SPECIFIC FACTS RELIED UPON

The defendant seeks reconsideration of the first certified question, which involves the issue of Fourth Amendment standing.

Prior to the issuance of this court’s opinion in *State v. Houghtaling*, *supra*, the governing standard for evaluating a defendant’s subjective expectation of privacy under *Katz*¹, was the three part test announced by the Appellate Court in *State v. Boyd*, 57 Conn. App. 176, cert. denied, 253 Conn. 912 (2000).

In *Houghtaling*, this court expressly “overrule[d] *Boyd* to the extent it requires a defendant to meet its three factor test to establish his or her subjective expectation of privacy.” *Houghtaling*, *supra*, 343. In rejecting the *Boyd* test, this court noted its “continuing decision *not* to adopt a *rigid test* for determining a defendant’s subjective expectation of privacy[.]” (Emphasis added.) *Id.*, 344. Thus, in lieu of *Boyd*’s “inflexible yardstick”; *id.*, 347-48; the court has reiterated and endorsed the proposition that “[t]he first part of the *Katz* test requires only . . . [a person’s]

¹ *Katz v. United States*, 389 U.S. 347 (1967).

conduct [to] have demonstrated an intention to keep activities and [property] . . . private, and that he did not knowingly expose [it] to the open view of the public.” *Houghtaling*, supra, 342 (quoting 1 W. LaFave, *Search and Seizure* (5th Ed. 2012 § 2.1(c), p. 585 (quoting Note, 60 N.Y.U.L. Rev. 725, 753-54 (1985))).

See also *Houghtaling*, 348 (“Instead [of the *Boyd* test], we reaffirm that courts should properly test a defendant’s subjective expectations by looking for conduct demonstrating an intent “to preserve [something] as private,” and free from knowing exposure to the view of others.”).

Despite the rejection of *Boyd*’s mandatory factors, this court’s affirmance of the Appellate Court’s judgment appears to be predicated almost exclusively on the defendant’s failure to have satisfied the *Boyd* factors. For example, the opinion discusses the lack of evidence regarding: the “frequency and nature of [the defendant’s] visits to the property”; whether “he stayed at the property or otherwise continuously used the property after leasing it to [Thomas] Phravixay”; and whether his presence at the property was only “limited” or whether he “maintained a regular presence.” *Houghtaling*, 349-52. All of these considerations fall squarely within the second *Boyd* factor (which asks whether the defendant’s “relationship with the location was more than sporadic, irregular, or inconsequential”)—a factor that the court *now recognizes* as extremely problematic. See *id.*, 346-47.

As for the mail that was addressed to the defendant at the Canterbury address, this court makes unwarranted assumptions: “Without knowing the nature or the volume of the correspondence, we cannot assume that it was significant or anything other than junk

mail.” *Id.*, 350. This assumption is particularly unwarranted because the police located the mail both in the mailbox and in the kitchen of the residence, yet *they* failed to seize it or even take note of the type of correspondence. In discussing the topic of mail, the court again placed too much emphasis on *Boyd’s* first two factors.

Under the newly-adopted standard for evaluating a defendant’s subjective expectation of privacy, the critical elements are “conduct” demonstrating an “intention” to preserve activities as private and keep them free from “knowing exposure” to others. *Houghtaling*, 342, 348. The defendant submits that he satisfied this test. Some of the supporting factors include: the location of the “remote property,” which is “rural and isolated,” and which consisted of more than five acres that were “largely surrounded by dense forest”; the configuration of the buildings on the property; the fact that “[t]he only means of ingress and egress was a narrow dirt driveway more than 100 feet² long and lined with trees on both sides”; and the fact that “No Trespassing” signs were “posted on trees along the driveway,” and there was “a metal gate that could block the driveway.” See *Houghtaling*, 333, 354-55; St. Ex. 1, at A238-A247.

More important, the contraband was situated in such a manner that it was not knowingly exposed to the view of others. No contraband was visible from the road or from the front of the residence. In fact, any

² Although the driveway was clearly “more than 100 feet long,” it is not clear if the court’s opinion meant to say “100 yards.” At the suppression hearing, Sgt. Patrick Torneo “guessed” that the house is set back from the road “100 yards, maybe less.” Tr. 124. The photographic exhibits also reveal a long driveway. See St. Ex. 1, at A238.

citizen, even a police officer, standing at the end of the driveway closest to the house, or even standing part way into the backyard, would not have been able to see any marijuana. This is due to the fact that the marijuana inside the house, barn, or greenhouse³ was not visible to passersby. Furthermore, the marijuana *within* the gated pool area was behind a solid white fence; see A255 and A257; thus shielding it from the view of anyone standing in the backyard. As for the marijuana that was *outside* the perimeter of the pool enclosure, the marijuana alongside the slotted pool fence was on the side of the pool that adjoined the dense forest; see A239, A241, A243-247, A254, A256-57; and the other marijuana was behind the pool house shown in A243-47, A257. See St. Ex. 3 at A179. In short, the defendant (and his tenant) had exhibited a subjective expectation of privacy by undertaking normal and reasonable human efforts designed to shield the marijuana grow operation⁴ from ground-level public view. For purposes of satisfying the

³ The court's opinion states that "[t]he ends of the [greenhouse] structure had no side walls[.]" *Houghtaling*, supra, 334. The photographic exhibits show that one end was open, but the other end was partially constructed. See St. Ex. 1, at A250-53.

⁴ The court's opinion states that "the defendant offer[ed] no evidence of what his 'help' [in the marijuana grow operation] entailed or how that 'help' manifested a privacy interest in the property." *Houghtaling*, 351. That observation overlooks the fact that on the day of the search, the defendant was bringing building supplies *to help complete construction of the greenhouse*, which was being used to house, and hide from view, potted marijuana plants. See St. Ex. 1, at A249-A252. See also *Houghtaling*, 335, 356 (the defendant's van contained "lumber and irrigation piping similar to that which was used to construct the greenhouse," which "was under construction"). The defendant's conduct in conveying those building materials to the property site clearly manifested his privacy interest.

subjective prong of *Katz*, this court's newly-adopted *Houghtaling* standard requires no more.

III. LEGAL GROUNDS RELIED UPON

This motion for reconsideration is being filed pursuant to P. B. § 71-5.

Respectfully Submitted,

RICHARD A. HOUGHTALING
Defendant-Appellant

BY: /s/ Richard Emanuel

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CERTIFICATION OF SERVICE

Pursuant to Practice Book §§ 62-7 and 66-1 et seq., undersigned counsel certifies that on August 15, 2017, a copy of the foregoing motion for reconsideration was sent electronically to all counsel of record, to wit, Nancy L. Walker, Special Deputy Assistant State's Attorney, Office of the Chief State's Attorney, Appellate Bureau, 300 Corporate Place, Rocky Hill, CT 06067 (Email: dcj.ocsa.appellate@ct.gov; Tel. (860) 258-5807;

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Fax (860) 258-5828), and to co-counsel David DeRosa, 42 Terrace Avenue, P.O. Box 992, Naugatuck, CT 06770 (Email: dderosa@attorneyderosa.com; Tel. (203) 729-4246; Fax (203) 729-4249).

/s/ Richard Emanuel
RICHARD EMANUEL

Certificate of Compliance: Undersigned counsel further certifies that: (1) this document does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and (2) that this motion complies with all applicable rules of appellate procedure.

/s/ Richard Emanuel
RICHARD EMANUEL

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APPENDIX H

SUPREME COURT
STATE OF CONNECTICUT

SC 19510

STATE OF CONNECTICUT

v.

RICHARD A. HOUGHTALING

September 13, 2017

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED AUGUST 15, 2017, FOR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

*MCDONALD AND VERTEFEUILLE, Js, DID NOT PARTICIPATE IN THE CONSIDERATION OF OR DECISION ON THIS MOTION.

BY THE COURT,

/s/ Rene L. Robertson

RENE L. ROBERTSON

ASSISTANT CLERK-APPELLATE

NOTICE SENT: September 13, 2017

HON. MICHAEL E. RILEY

COUNSEL OF RECORD

CLERK, SUPERIOR COURT, W11D CR10-0142603-T
REPORTER OF JUDICIAL DECISIONS