

No. 17-850

**In The
Supreme Court Of The United
States**

RICHARD HOUGHTALING,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. Did the Connecticut Supreme Court properly apply Fourth Amendment law when it concluded that the petitioner had not carried his burden of proving that he had “exhibited an actual (subjective) expectation of privacy”; *Katz v. United States*, 389 U.S. 347 (1967) (*Harlan, J.* concurring); and that he therefore lacked standing to challenge a search of residential property that he owned, but was leasing to a tenant?
- II. Did the Connecticut Supreme Court properly refuse, in accordance with state case law and rules of procedure, to permit the petitioner to raise for the first time in that court an alternate theory of standing under the principles of *United States v. Jeffers*, 342 U.S. 48 (1951)?

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INTRODUCTION

This Court should deny the petitioner's petition for a writ of certiorari. The first question presented – whether the Connecticut Supreme Court properly determined that the petitioner did not prove that he had exhibited a subjective expectation of privacy in residential property that he owned, but had leased to another – does not merit this Court's review for at least four reasons. First, this question involves an inherently fact-bound determination by the lower courts, and it alleges no more than “a misapplication of a properly stated rule of law,” for which “a writ of certiorari is rarely granted.” S. Ct. R. 10. Second, the petitioner fails to show any conflict between the opinion below and relevant decisions of this Court, those of the United States courts of appeal, or those of other states. Third, the state supreme court's decision affirming both the trial court and the intermediate appellate court is correct on the merits. Fourth, any decision by this Court in favor of the petitioner would essentially be advisory. On remand the petitioner would still need to prove that his privacy expectation was one that society would deem reasonable, a task that even he admits would be “arduous”; Pet. 26; and the lower courts may well find that the tenant's consent rendered the challenged search reasonable.

The second question does not present a federal question at all, much less an “important federal question.” S. Ct. R. 10(b). Relying entirely on a state rule and case law, the Connecticut Supreme Court

declined discretionary review of a claim under *United States v. Jeffers*, 342 U.S. 48 (1951), that the petitioner had *not* previously raised. This Court is without jurisdiction to review that question.

STATEMENT OF THE CASE

A. The Search And The Petitioner's Arrest

On August 9, 2010, a task force composed of federal, state, and local law enforcement officers conducted a marijuana eradication operation in northeastern Connecticut. Pet. App. 88a.¹ The task force had two spotters in a helicopter and a ground team of several members. *Id.* That afternoon, “the helicopter team notified the ground team of a suspected large crop of marijuana at 41 Raymond Schoolhouse Road in ... Canterbury (property).” *Id.* From the helicopter “hovering between 500 and 1000 feet”; Pet. App. 2a; the spotters saw “dozens of marijuana plants within a fenced-in pool area behind the house” and more “along the outside of the fence.” Pet. App. 88a-89a. Approximately thirty minutes later, the ground team arrived at the property in separate, unmarked vehicles. Pet. App. 89a.

“The property consisted of 5.6 acres and was largely surrounded by dense forest. The only means

¹ Citations to the petitioner’s appendix at pages 1a-24a are to the trial court’s opinion; those at pages 25a-67a are to the Connecticut Appellate Court opinion; and those at pages 84a-115a are to the Connecticut Supreme Court opinion.

of ingress and egress was a narrow dirt driveway more than 100 feet long and lined with trees,” at least one of which bore a “No Trespassing” sign.² Pet. App. 89a. About halfway down the driveway stood a metal gate that was open. *Id.* The ground team officers “parked their vehicles in front of the gate, donned protective vests, which identified them as police officers,” and walked to the front door of the house. *Id.* As they “approached the home, they saw no occupant vehicles or persons, smelled nothing, and heard nothing.” Pet. App. 89a. The officers “knocked on the front door but received no answer,” and then “left the front door and proceeded toward the back door.” *Id.*

On their way to the back door, the officers observed dozens of marijuana plants both inside of and surrounding a pool area. *Id.* They next approached a greenhouse that was still under construction and located near the rear of the property. *Id.* The ends of the structure had no walls, and piles of lumber were on the ground nearby. *Id.* The police were able to see numerous marijuana plants and two men inside the greenhouse, one of

² Although the trial court noted that “[t]he trees on either side of the road contained ‘no trespassing’ signs”; Pet. App. 2a (emphasis added); evidence at the suppression hearing established the existence of only a single such sign. Suppression Hearing Transcript, Jan. 31, 2013, (“Supp. Tr.”) 29, 57, 73; *see also* Pet. App. 30a, 40a. Thus, the record does not support the petitioner’s claim that the driveway had “multiple ‘No Trespassing’ signs.” Pet. Br. 22-23 (emphasis added).

whom was later identified as Thomas Phravixay. Pet. App. 89a-90a. When asked what they were doing, one of the two men answered “something to the effect of: tending to my marijuana.” Suppression Hearing Transcript, Jan. 31, 2013 (“Supp. Tr.”) 9. The police gave both men warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966), and the men agreed to answer questions. Pet. App. 90a. “Phravixay told the officers he was renting the home and later gave the officers written consent to search the property....” *Id.*

As two members of the ground crew returned to their cars to obtain an evidence kit for the search, “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.” Pet. App. 90a. One of the two officers alerted the rest of the ground team that the van had entered the driveway and was “hightailing it out of there.” Supp. Tr. 15, 49-41, 101. Believing that the van’s “occupants might be involved in the marijuana grow operation,” the two officers pursued the van. Pet. App. 90a. They found it parked at the side of the road, approximately one tenth of a mile away, facing back toward the driveway. Pet. App. 90a.

The officers parked in front of the van and approached it with their weapons drawn for their safety. *Id.* The petitioner “was in the driver's seat, and another man sat in the passenger seat. Upon

determining that the van's occupants posed no threat, the officers holstered their weapons and asked the [petitioner] for identification." Pet. App. 90a-91a. When asked why he had pulled into the driveway and then left abruptly, the petitioner answered that he was going to visit a friend and left when he saw the driveway filled with cars he did not recognize, but evasively, the petitioner would not name the friend. Pet. App. 91a. During the questioning, the officers observed that the van contained lumber and irrigation piping similar to that being used to construct the greenhouse. *Id.* "The officers then handcuffed the petitioner and the passenger, and brought them back to the property." *Id.*

After being advised of his *Miranda* rights, the petitioner initially "refused to speak with the police but then agreed to [talk] 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 ... mailbox, and that Phravixay had identified the petitioner as the homeowner ... who leased the property to him." Pet. App. 91a. In a written statement, the petitioner

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 [petitioner] said Phravixay had

paid rent only periodically, and the [petitioner] had been helping Phravixay cultivate marijuana for the previous four or five months to “recoup some of [his] money.”

Id. Despite claiming that he had helped with the marijuana cultivation, the petitioner “stated that ‘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’”. *Id.* In addition to giving a statement, the petitioner signed a form consenting to a search of the Canterbury property. Pet. App. 23a.

The police searched the property and seized more than 1,000 marijuana plants, fertilizers, grow lights, an aeration system, and other material used in what one officer described as “an extremely sophisticated” grow operation, among “the largest ... in Connecticut history.” Supp. Tr. 21-22; *see also* Pet. App. 4a, 90a. The police later obtained a warrant to search the petitioner’s house in Danbury, approximately two hours away from Canterbury. Supp. Tr. 71. At the Danbury residence, the police found the petitioner’s personal belongings, which indicated that he lived there. *Id.*

B. Trial Court Proceedings

The state initially charged the petitioner 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. Pet. App. 92a & n.2. The petitioner moved to suppress all evidence seized by the officers at the Canterbury property and all statements made by the petitioner and Phravixay, claiming that “the police had violated his fourth amendment rights when they failed to obtain a warrant before searching the property....” Pet. App. 92a.³

At the January 2013 hearing on the motion to suppress, the state called three of the task force officers to testify “about their actions and observations during the search and seizure,” and the petitioner “called one witness, another police officer.” Pet. App. 93a. After the witnesses testified, the state argued that the petitioner had failed to prove that he had a reasonable expectation of privacy in the Canterbury property, where the search occurred, emphasizing that the petitioner had leased that property to Phravixay while living in Danbury with his wife and family. *Id.*; Supp. Tr. 137-42. The state further argued that even if the petitioner had standing to contest the search, “the consent provided by the tenant, Thomas Phrvixay, [gave] the police the authority to search throughout the residence.” Supp. Tr. 138. The state also noted that the

³ The petitioner also claimed that the police improperly detained him in his van without reasonable suspicion and arrested him without probable cause. The courts below rejected those claims. As the petitioner does not seek certiorari with respect to those claims, the state will not discuss the lower courts’ rulings regarding them.

petitioner “gave consent as well.” *Id.* Defense counsel asserted “that the petitioner’s ownership of the property alone was sufficient to establish standing.” Pet. App. 93a.

“The trial court agreed with the state and denied the petitioner’s motion to suppress....” Pet. App. 93a. In its written decision of March 6, 2013, the trial court recognized that to establish “standing” to contest the search of the property, the petitioner was required to show, under *Katz v. United States*, 389 U.S. 347 (1967), that he had an “actual expectation of privacy” in the property searched and that “his expectation was one that society would recognize as reasonable.” Pet. App. 6a. Concluding that the petitioner had failed to establish both prongs of the *Katz* test; Pet. App. at 6a-13a; and, therefore, could not challenge the search, the trial court did not address the question of whether the consent given by both Phravixay and the petitioner justified the search. Thereafter, the petitioner entered a conditional plea of nolo contendere to possession of marijuana with intent to sell, in violation of Conn. Gen. Stat. (Rev. 2009) § 21a-277 (b); and possession of more than four ounces of marijuana in violation of Conn. Gen. Stat. (Rev. 2009) § 21a-279 (b). Pet. App. 93a & n.3

C. Appellate Court Proceedings

The petitioner appealed to the Connecticut Appellate Court, claiming that “he had a reasonable expectation of privacy in the ... [Canterbury] home

and the area surrounding it” and that “his fourth amendment rights were violated by the warrantless search conducted by the [police]....” Pet. App. 93a. The Appellate Court employed the three-factor test set forth in *State v. Boyd*, 57 Conn. App. 176, *cert. denied*, 253 Conn 912 (2000), *overruled by State v. Houghtaling*, 326 Conn. 300 (2017), to determine whether, pursuant to the first prong of *Katz*, the petitioner had proven that he had exhibited a subjective expectation of privacy in the property. Pet. App. 35a-42a. The Appellate Court concluded that he had not done so because he did not show facts at the suppression hearing sufficient to “create the impression” that his relationship with the location (1) “was personal in nature,” (2) “was more than sporadic, irregular or inconsequential,” and (3) was such that he “maintained the location and the items within it in a private manner at the time of the search.” Pet. App. 35a, 42a. Because of its conclusion that the petitioner had not established a subjective expectation of privacy under the first prong of the *Katz* test, the Appellate Court did not consider under the second prong whether society would deem his privacy interest reasonable.

D. Supreme Court Proceedings

The Connecticut Supreme Court granted the petitioner’s ensuing petition for certification to appeal from the Appellate Court, limited to three issues, only the first of which is relevant here: “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?”⁴ Pet. App. 68a (internal quotation marks omitted). The petitioner later moved for, but was denied, permission to raise two additional issues, including the claim under *Jeffers*, which is the subject of his second question presented. Pet. App. 70a-85a.

In its decision, the Connecticut Supreme Court agreed with the Appellate Court “that the [petitioner] lacked standing to challenge the search” because he had not shown under the subjective prong of the *Katz* test that he had “manifested a subjective expectation of privacy with respect to [the invaded premises or seized property].”⁵ Pet. App. 88a, 97a, 110a. The court partially rejected the

⁴ The other two issues were: “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”; and “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?” Pet App. 68a-69a.

⁵ The court noted that *Katz* has “both a subjective and an objective prong: (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....” Pet. App. 97a.

Appellate Court’s legal analysis, however, and it overruled *Boyd* to the extent that it created “a rigid test” for determining whether a defendant had exhibited a subjective expectation of privacy in searched property. Pet. App. 105a. The court held instead 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.” *Id.* (internal quotation marks omitted). It acknowledged that some of the factors identified in *Boyd* “might, in a particular case, be relevant to a court’s analysis.” *Id.*

Applying this more flexible standard to the facts the trial court found at the suppression hearing, the court concluded that “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.” Pet. App. 105a. Agreeing with the lower courts that the petitioner had established nothing but bare legal ownership of the property, the court noted the absence of evidence: (1) regarding the provisions of his lease of the property to Phravixay; (2) 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”; or (3) “indicating that he stayed at the property or otherwise continuously used the property after leasing it to Phravixay.” Pet. App. 105a-107a.

The court rejected the petitioner's arguments that he had established his subjective expectation of privacy in the searched premises by: (1) evidence that the police found at the Canterbury house mail addressed to him and an aeration system addressed to him at his Danbury residence; and (2) his admissions that he participated in the marijuana grow operation. Pet. App. 107a-109a. The court noted that no evidence described either "the nature or quantity of the mail," or "whether or how often the [petitioner] went to the property to retrieve the mail." Pet. App. 107a. As to the aeration system, the court reasoned that "the mere presence of a single piece of property addressed to the [petitioner] tells us nothing meaningful about how [he] used the property," if at all; "how the aeration system ended up at the property"; "the frequency of [his] visits to the property"; or "the level of his involvement in the grow operation." Pet. App. 107a-108a.

With respect to the petitioner's claims that he helped with the marijuana cultivation, the court concluded:

Even if a defendant could establish a subjective expectation of privacy through his participation in a criminal conspiracy, the [petitioner] still has not met his burden. [He] did not present sufficient evidence at the hearing to establish what his involvement with the marijuana cultivation actually was.... The [petitioner] offers no evidence of what his

“help” entailed or how that “help” manifested a privacy interest in the property.

Pet. App. 108a-109a. The court emphasized that the petitioner’s own statements to the police – that he did not “realize the extent of the grow operation” until the day of the search – indicate that “his involvement with the grow operation could not have been extensive, ... 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.” Pet. App. 109a.

Without considering the objective prong of the *Katz* test, the court agreed with the lower courts that “[b]ecause the [petitioner] 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....” Pet. App. 110a.

REASONS FOR DENYING THE PETITION

I. THE FIRST QUESTION PRESENTED IS NOT WORTHY OF THIS COURT'S REVIEW.

A. The Petition Complains Of Nothing More Than A Purported Misanalysis Of Facts Under A Properly Stated Rule Of Law.

“A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” S. Ct. R. 10. This Court is “not, and for well over a century [has] not been, a court of error correction.” *City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015) (*Scalia, J.*, dissenting from Court’s consideration of fact-laden question). It does “not grant a [writ of] certiorari to review evidence and discuss specific facts.” *United States v. Johnston*, 268 U.S. 220, 227 (1925).

As the petitioner himself acknowledges, issues regarding an individual’s reasonable expectations of privacy are “fact-bound.” Pet. 26; *see also, e.g., Rakas v. Illinois*, 439 U.S. 128, 152 (1978) (*Powell, J.* concurring) (ultimate question is whether “one’s claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances.... [N]o single factor invariably will be determinative”); *United States v. Mitchell*, 64 F.3d 1105, 1109 (7th Cir. 1995) (enumerating factors relevant to establishing reasonable expectation of privacy in apartment searched), *cert. denied sub*

nom. Johnson v. United States, 517 U.S. 1158 (1996). This is particularly true when those issues turn on the subjective prong of the *Katz* test. *See, e.g., United States v. Cardoza-Hinojosa*, 140 F.3d 610, 616 (5th Cir.) (detailing facts relevant to conclusion that defendant did not possess a subjective expectation of privacy in shed where police found contraband), *cert. denied*, 525 U.S. 973 (1998); *United States v. Bearden*, 780 F.3d 887, 892-93 (8th Cir. 2015) (whether defendant showed subjective expectation of privacy in place searched is question of fact); *United States v. Wells*, 739 F.3d 511, 522 (10th Cir.) (same), *cert. denied*, 135 S.Ct. 73 (2014).

Here, the petitioner does not quarrel with the legal standard the Connecticut Supreme Court used to analyze the subjective prong of the *Katz* test, i.e., looking “for actions or conduct demonstrating that the defendant sought to preserve the property or location as private.” Pet. App. 98a (*citing Smith v. Maryland*, 442 U.S. 735, 740 (1979)). *See* Pet. 22. Rather, the petitioner claims that he “satisfied this test, by a preponderance of the evidence.” Pet. 22. He then asks this Court to review how the Connecticut Supreme Court applied the sparse evidence of his connection to the property and the facts and inferences found by the trial court to conclude that the petitioner had not proven that he had exhibited a subjective expectation of privacy in the Canterbury property. Pet. 22-26.

For example, the petitioner invites this Court to weigh in on whether the Connecticut Supreme Court was “fair” in declining to assume that the mail found at the Canterbury premises “was significant or anything other than junk mail” due to the lack of evidence concerning “the nature or the volume of the correspondence.” Pet. 23-24; Pet. App. 107a. Although he acknowledges that it was his burden to prove his expectation of privacy claims by a preponderance of the evidence, the petitioner asks this Court to draw a negative inference from the *police’s* failure “to seize that mail or make note of its nature.” Pet. 22, 24. He then urges this Court to presume that the mail showed that he had a “recent and continuing personal relationship with the property.” Pet. 23-24. This Court should not insert itself in such a factual imbroglio.

Because the petitioner asks this Court to review only the Connecticut Supreme Court’s application of facts found by the trial court to a properly stated rule of law, this Court should deny the petition.

B. The Petitioner Has Not Shown A Conflict.

The petitioner does not claim that the Connecticut Supreme Court’s opinion clashes with those of the federal courts of appeal or of the highest courts of other states on an “important federal question” of Fourth Amendment jurisprudence. S. Ct. R. 10(c)) He identifies only one allegedly “inherent conflict,” asserting that “in material

respects, *Houghtaling* is sufficiently similar to [*California v.*] *Ciraolo*, [476 U.S. 207 (1986)⁶] for this Court to conclude that *Houghtaling* is inconsistent with, and conflicts with, *Ciraolo*—insofar as *Katz*’s subjective test is concerned.” Pet. 26. The petitioner is wrong for at least two reasons.

First, the portion of *Ciraolo* on which the petitioner relies is *dicta*. Immediately after commenting, “Clearly – and understandably – respondent has met the test of manifesting his own subjective intent and desire to maintain privacy as to his unlawful agricultural pursuits,” the Court clarified that it “need not address that issue, for the State has not challenged the finding of the California Court of Appeal that respondent had such an expectation.” 476 U.S. at 209. The Court then questioned whether the respondent manifested “a subjective expectation of privacy from *all* observations of his backyard, or whether instead he manifested merely a hope that no one would observe

⁶ In *Ciraolo*, the respondent was cultivating marijuana on a 15 by 25 foot plot in his backyard. 476 U.S. at 209. His yard was surrounded by a six-foot outer fence and a ten-foot inner fence. *Id.* Police officers secured an airplane and flew over the respondent’s house in navigable airspace, from which they were able to observe and identify the marijuana plants. *Id.* Based on those observations, the officers obtained a search warrant and seized the plants. *Id.* at 210.

his unlawful gardening pursuits....” *Id.* Thus, the opinion below conflicts, if at all, with *Ciraolo’s dicta*.⁷

Second, contrary to the petitioner’s suggestion, *Ciraolo’s dicta* cannot be read as broadly endorsing a subjective expectation of privacy in one’s “unlawful agricultural pursuits,” wherever those pursuits may occur. In *Ciraolo*, police discovered marijuana plants in the *respondent’s* garden, within the curtilage of the *respondent’s* residence. *Ciraolo*, 476 U.S. at 209-10. Thus, the Court “reasonably ... assumed that the 10-foot fence was placed to conceal the [respondent’s] marijuana crop from at least street-level view” and that the *respondent* “took normal precautions to maintain his privacy.” *Id.* at 211 (internal quotation marks omitted).

In this case, by contrast, police discovered large amounts of marijuana on property that the petitioner leased to a tenant who grew the

⁷ *Ciraolo’s* holding focused on the objective prong of *Katz*. The Court held that because private and commercial flight in the public airways is routine, “it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet” by police officers “traveling in the public airways....” *Ciraolo*, 476 U.S. at 215. Paradoxically, while claiming that *Ciraolo’s dicta* renders this case “certworthy”; Pet. 26; the petitioner asks this Court to overrule *Ciraolo’s* holding. Pet. 26-27 & n.14. This case does not provide a vehicle for reevaluating *Ciraolo’s* holding. Neither the Connecticut Supreme Court nor the Appellate Court reached the second prong of the *Katz* test.

marijuana, while the petitioner lived two hours away in Danbury. Although the petitioner asserts that both *he* and his tenant took “normal and reasonable human efforts designed to prevent the marijuana grow operation from being exposed to ground-level public view”; Pet. 24-25 (emphasis omitted); the petitioner presented no evidence at the suppression hearing as to *his* involvement in those efforts, other than transporting building materials “similar to that which was used to construct the greenhouse.” Pet. App. 91a. Thus, it is unclear who took the reasonable precautions to shield the marijuana grow operation from street-level view and whether those efforts reflect the petitioner’s subjective expectation of privacy or that of Phravixay. See Pet. App. 40a (Appellate Court’s observation that it was unclear whether gate and “No Trespassing” sign in driveway “were indicative of [the petitioner’s] own expectation of privacy, rather than the expectation of Phravixay, the resident of the leased premises”).

The factual distinctions between *Ciraolo* and this case explain why the respondent in *Ciraolo* had shown a subjective expectation of privacy in the searched property while the present petitioner had not. Thus, there is no actual conflict for this Court to resolve.

C. The Decision Below Is Correct On The Merits

The first question presented is not worthy of certification because the Connecticut Supreme Court

correctly resolved that question. Consistent with state and federal law, the court recognized that “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.) Pet. App. 98a. Considering the scant evidence produced at the suppression hearing regarding such conduct, the court properly concluded – as had the trial court and the state appellate court – that the defendant “simply failed to establish a subjective expectation of privacy” in the property searched. Pet. App. 109a; *see also* Pet. App. 11a-13a, 35a-42a.

The petitioner claims that the following facts established his subjective expectation of privacy in the Canterbury property: (1) the property was isolated and remote, with a gate and a “No Trespassing” sign in the driveway; Pet. 22; (2) “the contraband was situated on the property in such a manner so that it was not knowingly exposed to the view of others.” Pet. 24-26; (3) the police found mail addressed to him at the property; and (4) he appeared on the day of the search with building supplies, purportedly to help complete construction of the greenhouse.” Pet. 23-24.

As to the first and second facts, the lower courts properly rejected claims that the remoteness of the property and any efforts made to hide the contraband from view were sufficient to demonstrate

the *petitioner's* (as opposed to his tenant's) subjective expectation of privacy. Pet. App. 11a-13a; 40a-41a. As the Connecticut Supreme Court emphasized, the petitioner had leased the Canterbury property to Thomas Phravixay, and in doing so “cede[d] control to the tenant, who can invite others onto the property, potentially exposing his activities or contraband to them.” Pet. App. 106a. Indeed, when police officers approached the greenhouse behind the residence, they encountered not only the tenant, Thomas Phravixay, who said he was tending *his* marijuana, but also his companion, Sisouk Phravixay. Pet. App. 3a; Supp. Tr. at 9.

Moreover, the defendant presented no evidence at the suppression hearing that he maintained any regular presence at the property, retained the right to exclude others, “or otherwise exercise[d] significant control over the property.” Pet. App. 105a-106a. The lack of such evidence defeats claims of privacy in searched property. *See, e.g., United States v. Mankani*, 738 F.2d 538, 545 (2d Cir. 1984) (defendants who rented and lived in farmhouse had no expectation of privacy in barn, where they neither resided, nor kept personal effects; only connection with barn involved periodic visits); *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 545 (6th Cir. 2003) (plaintiff in § 1983 action had no expectation of privacy in basement apartment; although he owned it, he leased it to tenants and lacked right to exclude others), *cert. denied*, 541 U.S. 1041 (2004); *United States v. Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979)

(defendant's ownership of mobile home occupied by another with exclusive possession did not show legitimate expectation of privacy).

Regarding the third and fourth facts, the Connecticut Supreme Court correctly affirmed that the mail addressed to him at the residence and the building supplies in the back of the petitioner's van were insufficient to establish his subjective expectation of privacy. Pet. App. 107a-109a. The petitioner had presented no evidence as to the nature or volume of the mail or how often he came to pick it up, and thus he failed to link its presence to his subjective privacy interest in the property. *Id.* Similarly, the petitioner offered no evidence as to why he conveyed the building supplies to the property. Even assuming that he brought them to help complete the marijuana greenhouse, as the petitioner posits; Pet. 23; that activity alone is insufficient to confer a subjective expectation of privacy in the property. *See, e.g., Minnesota v. Carter*, 525 U.S. 83, 86-90 (1986) (defendants' use of apartment to bag cocaine did not give them expectation of privacy in property).

Although the petitioner told police that he had begun "to help [Phravixay] cultivate the marijuana," he offered "no evidence of what his 'help' entailed or how that 'help' manifested a

privacy interest in the property.”⁸ Pet. App. 109a. Moreover, as the Connecticut Supreme Court noted,

[T]he [petitioner's] own statements to the police suggest that his presence at the property was more limited than he would now have [the court] 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 ... 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.

Id. The petitioner's disavowal of significant involvement in the Canterbury property is yet another circumstance negating his claim of a subjective expectation of privacy in it. *See, e.g.,*

⁸ Due to the lack of evidence establishing the “extent of the [petitioner's] participation in the marijuana grow operation, the court below did not reach the question of whether he “could establish a subjective expectation of privacy through his participation in a criminal conspiracy....” Pet. App. 108a & n.12. This Court, however, has rejected the “co-conspirator/joint venture” theory of standing and has held that roles of various co-conspirators have no “bearing on their respective Fourth Amendment rights” in searched property. *United States v. Padilla*, 508 U.S. 77, 81-82 (1993).

United States v. Monie, 907 F.2d 793 (8th Cir. 1990) (defendant could not contest search of suitcases in car he was driving; had no subjective privacy interest in them because he stated they were not his).

Because the Connecticut Supreme Court correctly concluded that the petitioner did not prove that he had a subjective expectation of privacy in the property searched, there is no need for this Court to review that issue.

D. The Ultimate Outcome Of This Case Does Not Turn On The Question Presented.

This Court's purpose "is to correct wrong judgments, not to revise opinions. [It is] not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [the Court's] review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945). Here, even if this Court decided the first question presented in the petitioner's favor, that decision would likely be rendered inconsequential – and essentially advisory – after the Connecticut courts, on remand, decided: (1) whether any actual expectation of privacy the petitioner had is one that society would deem reasonable, as required under the second prong of the *Katz* test; and (2) if so, whether the consent given by the tenant, and later, the petitioner, authorized the search.

Neither of the Connecticut appellate courts addressed “*Katz*’s second, objective test,” but the petitioner himself recognizes that meeting that test will be “an arduous task.” Pet. 26. Clearly, the petitioner had no *reasonable* expectation that the marijuana plants behind the house would be free from aerial observation. *Florida v. Riley*, 488 U.S. 445, 448-50 (1989) (resident of mobile home on secluded rural property could not reasonably expect that marijuana contained in partially open greenhouse could not be seen from helicopter); *Ciraolo*, 476 U.S. at 212-15 (homeowner has no reasonable expectation that backyard marijuana crop will be protected from aerial observation).

Although the petitioner contends that *Riley* and *Ciraolo* would not authorize the ground team’s warrantless intrusion on the Canterbury property; Pet. 26; that assertion would likely fail on remand. Significantly, the trial court found that the greenhouse, which housed “numerous marijuana plants” and where police officers discovered Phravixay, was not within the curtilage of the house. Pet. App. 3a, 20a-21a. “[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields,” i.e., not within the curtilage of a home. *Oliver v. United States*, 466 U.S. 170, 178-83 (1984). Intrusion by police officers to view activities in open fields, even if their path passes through curtilage, would not infringe on “personal and societal values protected by the Fourth Amendment.” *Id.*; see also 1 W. LaFave, Search &

Seizure (5th Ed. 2012) & supp. (2017-18) § 2.3 (f) & nn. 247-248.30; §2.4(a) & n. 22a.

Even if the petitioner on remand manages to convince the Connecticut appellate courts that his privacy interests were ones that society would deem reasonable, the case would still need to be remanded to the trial court for determination of the factual and legal issues surrounding Phravixay's consent to search the property. If validly obtained, that consent would render the warrantless search reasonable. *Fernandez v. California*, 134 S.Ct. 1126, 1136-37 (2014).

As Phravixay was the sole occupant of the premises present when police arrived, his consent alone would have justified the search, even if the petitioner could show that he shared common authority over the premises. *See United States v. Matlock*, 415 U.S. 164, 170 (1974); *Fernandez v. California*, 134 S.Ct. at 1136-37; *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990) (search valid based on consent of woman police reasonably believed was resident of house). And if on remand the court determined that the petitioner's consent were necessary; see *Georgia v. Randolph*, 547 U.S. 103 (2006); the trial court found at the suppression hearing that he gave it. Pet. App. 23a.

Thus, however this Court resolves the fact-bound issue of the petitioner's purported subjective expectation of privacy, the ultimate judgment in this

case will likely remain the same, rendering this Court's opinion essentially advisory. The petition for certiorari should, therefore, be denied.

II. THE SECOND QUESTION PRESENTED DOES NOT RAISE A MATTER OF FEDERAL LAW.

This Court should not consider the second question presented because it concerns only a matter of state law. *Herb*, 324 U.S. at 125-26 (Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights").

After the Connecticut Supreme Court granted certification to review the Appellate Court's decision, the petitioner sought to add a new claim: that he had standing to contest the search because of his "property interest" in the seized marijuana. Pet. App. 75a; *Jeffers*, 342 U.S. at 52-54 (respondent had standing to contest seizure of narcotics because it was "his property, for purposes of the exclusionary rule...").⁹ As the petitioner had not raised this claim in either the trial court or the Connecticut Appellate Court, the Connecticut Supreme Court declined to review it pursuant to state rules of practice and established case law. *See, e.g.*, Practice Book § 84-9

⁹ The state disagrees that *Jeffers* still provides a viable theory of standing based on the petitioner's possession of contraband. *See, e.g., Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (any interest in possessing contraband cannot be deemed legitimate).

(“The 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”); *State v. Saucier*, 283 Conn. 207, 221 (2007) (only questions that Connecticut Supreme Court “need consider are those squarely raised by the petition for certification, and [it] will ordinarily consider these issues in the form in which they have been framed in the Appellate Court”); *State v. Nunes*, 260 Conn. 649, 658 (2002) (on certified appeal, focus of Connecticut Supreme Court “is on the judgment of the Appellate Court,” and it ordinarily does “not review claims not raised therein”).

Although the state rules described above are discretionary; Pet. 30 (citing *State v. Torrence*, 196 Conn. 430 (1985))¹⁰; they are firmly established and regularly followed. *See Saucier*, 283 at 221 (collecting cases); *id.* at 222-23 (declining to consider claim that, although properly preserved at trial, was neither raised before Appellate Court nor mentioned in petition for certification); *see also, e.g., Gleason v. Smolinski*, 319 Conn. 394, 421 n.21 (2015) (chiding dissent for ignoring rule that court focuses its review on Appellate Court’s actions and considers issues “in

¹⁰ Although it noted that that it *could* “suspend the limitation of Practice Book § [84-9] for good cause,” the *Torrence* court did not do so. *Torrence*, 196 Conn. at 434 n.5. Instead, it refused to consider an issue that the state had conceded in the Appellate Court and did not raise in its petition for certification. *Id.* at 434.

the form in which they have been framed in the Appellate Court”); *State v. Fausel*, 295 Conn. 785, 793 (2010) (applying rule); *State v. Morelli*, 293 Conn. 147, 153 (2009) (same). Thus, the Connecticut Supreme Court’s adherence to these rules in this case constitutes an adequate and independent state ground for its refusal to consider the *Jeffers* claim. See *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (holding that “discretionary state procedural rule can serve as an adequate ground to bar federal habeas review”). Accordingly, this Court lacks jurisdiction to review this question. *Berry v. Mississippi*, 552 U.S. 1007 (2007) (Court has no jurisdiction over claim based on adequate state ground); *Parker v. North Carolina*, 397 U.S. 790, 798 (1970) (state’s refusal to review federal question based on state rule of practice is adequate state ground precluding this Court’s review).

The petitioner attempts to state a federal question by claiming that the Connecticut Supreme Court’s refusal to consider his belated *Jeffers* claim violated his “Due Process rights by depriving him of a full and fair opportunity to litigate his Fourth Amendment challenge to the warrantless search.” Pet. 31. If such a claim were cognizable, it would swallow the “adequate state ground” doctrine and give this Court jurisdiction to compel states to review all unpreserved claims that arguably affect constitutional rights. Tellingly, the petitioner cites no authority for such a proposition. Moreover, he raises this claim for the first time in this Court; he

never argued to the Connecticut Supreme Court that refusing to consider his *Jeffers* claim would violate due process. *See* Pet. App. 70a-81a. “With very rare exceptions,” this Court adheres “to the rule in reviewing state court judgments ... that we will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision” that the petitioner has asked the Court to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (citing cases). Thus, this Court should not review the second question presented.

CONCLUSION

For all of the foregoing reasons, the petitioner’s petition for a writ of certiorari should be denied.

Respectfully submitted,
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