STATE OF CONNECTICUT

SUPREME COURT

S.C. 20195

STATE OF CONNECTICUT

vs.

BRUCE JOHN BEMER

DEFENDANT-APPELLANT'S BRIEF

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NATURE OF PROCEEDINGS AND FACTS OF CASE

The Defendant was charged in March 2017 with patronizing a prostitute who was the victim of trafficking in violation of General Statutes § 53a-83(c)(2)(A) (rev. to 1/1/17), and was further charged in June 2017 with conspiracy to commit trafficking in persons in violation of General Statutes § 53a-48 and 53a-192a (rev. to 1/1/17). (App. A001, A003.) The State alleges that he performed sex on the male victims over several years but not later than January 2016. (App. A037-45.)

On October 18, 2017, the State filed a Motion seeking a court order requiring the Defendant be tested for any venereal disease pursuant to § 54-102a(a) and for HIV pursuant to § 54-102a(b). (App. A006.[1]) The Motion does not allege probable cause that the Defendant has such diseases or that the results of such testing would advance the State's criminal case. In December the Defendant filed a Memorandum of Law in Opposition to Request for HIV Testing, claiming the Motion served no legitimate purpose in this case and, as applied to the Defendant, the statute violates the search and seizure clauses of the U.S. and Connecticut constitutions. (App. A009.) In addition to the State's motion, in January 2018 the Victims[2] filed Requests through two separate counsel for similar testing. (App. A025, A028.) Neither the Information nor the Motion nor the two Requests allege any HIV/STD/venereal disease information about the Victims or the Defendant, or state what purpose testing the Defendant would serve.

The trial court, Shaban, J., heard argument on February 16, 2018. No medical or scientific information was offered by anyone, although counsel for some of the Victims

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[1] The first paragraph of the Order on the State's Motion states: "Given the context of the motion, the court shall treat it as a request for testing under General Statutes § 54-102a and the reference to General Statutes § 54-102 in the body of the motion as a scrivener's error." (App. A007.)

[2] To avoid a constant repetition of the word "alleged," the Defendant uses the word "Victims" as an allegation.

indicated that they needed the test information "so that they can make informed health decisions on their own." (Tr. 27.) During the hearing the Defendant also asserted the applicability of the requirements in § 19a-582(d)(8) (rev. to 1/1/17) for HIV testing.

On March 2, 2018, the trial court ordered:

> The defendant shall, within thirty (30) days, provide to the court current medical documentation as to whether he is suffering from any venereal disease. If the defendant is unable to supply such documentation, he is ordered to submit to an examination for such purposes pursuant to General Statutes § 54-102a (a).
>
> The defendant is further ordered, pursuant to General Statutes § 54-102a (b) and (c), to submit to testing for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus. The results of such test may be disclosed to the victim at the discretion of the court consistent with the provisions of that section.
>
> It is further ordered that no treatment provider conducting the test is to interrogate or inquire of the defendant, in any fashion, of any matter relating to the pending case.

(App. A007, A026, A029.)

The Defendant timely filed an appeal from this Order. (App. A031.)

ARGUMENT

I. Where the Defendant has been Accused but not Convicted of a Crime, the Trial Court Abused its Discretion on this Record in Ordering that the Defendant Submit to a Venereal Examination and HIV Testing.

Standard of Review: Abuse of Discretion.

The Defendant is presumed innocent and his privacy is entitled to great weight. The record discloses no evidence that testing the Defendant will assist the State's criminal case, will assist the Victims concerning their health, or will advance the public health. In the absence of anything to the contrary in the record, the trial court abused its discretion in ordering testing pursuant to § 54-102a.

Section 54-102a states:

> (a) *The court* before which is pending any case involving a violation of any provision of sections 53a-65 to 53a-89, inclusive, *may*, before final disposition of such case, *order the examination of the accused person . . . to determine whether or not the accused person* or child *is suffering from any venereal disease*, ...
>
> (b) Notwithstanding the provisions of section 19a-582, *the court* before which is pending any case involving a violation of section 53-21 or any provision of sections 53a-65 to 53a-89, inclusive, that involved a sexual act, as defined in section 54-102b, *may*, before final disposition of such case, *order the testing of the accused person . . . for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus, ... The provisions of sections 19a-581 to 19a-585*, inclusive, and section 19a-590, except any provision requiring the subject of an HIV-related test to provide informed consent prior to the performance of such test and any provision that would prohibit or limit the disclosure of the results of such test to the victim under this subsection, *shall apply to a test ordered under this subsection and the disclosure of the results of such test.*

(Emphasis added.) Section 54-102b(c) defines "sexual act" broadly and includes the claims in the Information. Because the Defendant has been charged with a violation of § 53a-83(c), § 54-102a applies.

Sections 54-102a(a) and 54-102a(b) provide that a court "may" order testing. The use of the word "may" indicates that the decision to order testing lies within the court's discretion. *Weems v. Citigroup, Inc.*, 289 Conn. 769, 790 n.22 (2008) (the word "may" "generally imports permissive conduct and the conferral of discretion") (citation and internal quotations omitted). That "may" means "may" is confirmed by the language of § 54-102b(a), providing that where a defendant is convicted of sexual assault the court "shall" order testing of the defendant if the victim requests.

Section 54-102a(b) states that the provisions of § 19a-582, which concern HIV-related testing, apply to § 54-102a(b). The relevant portion of § 19a-582 states:

> **General consent required for HIV-related testing. Counseling requirements. Exceptions.**
>
> ...
>
> (d) The provisions of this section [requiring general consent for HIV-related testing] shall not apply to the performance of an HIV-related test: . . .
>
> (8) Under a court order that is issued in compliance with the following provisions: (A) No court of this state shall issue such order unless the court finds a clear and imminent danger to the public health or the health of a person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for a test result against the privacy interests of the test subject and the public interest that may be disserved by involuntary testing. . . .

The trial court made the following comment during the hearing:

> My cursory reading of the statute is such that, as Attorney Hodge [the prosecutor] seems to argue, there is sort of a timeline here, is there not? I mean, 19a-582 comes into play when the Court is in the position to disclose testing results, no? Isn't that what we're talking about? Not the preliminary order of testing, but when the tests come back and then the issue becomes

> whether they should be disclosed or not anonymously or otherwise.
>
> ATTY. SPINELLA: Well, and -- and that's why I'm arguing that it's -- it's -- I mean, it's chronologically, it's actually the first thing that's set in 54-102a, 19a-582 is referenced before they even get to the results of the test.

(Tr. 22-23; see also tr. 8-11, 13, 16-17, 28-30, 34-41, where the applicability of § 19a-582 (d)(8) is discussed on the merits by various counsel.)

Defense counsel's response was correct: the last sentence of § 54-102a(b) states that the provisions of § 19a-581 to 19a-585 "shall apply to a test ordered under this subsection *and* the disclosure of the results of such test." (Emphasis added.) So § 19a-582 applies to both the test itself as well as the disclosure of the results of the test.

The trial court gave no definitive ruling whether it considered the testing requirements of § 19a-582(d)(8) applicable to § 54-102a(b), and gave no basis for its exercise of discretion under either § 54-102a(a) or § 54-102a(b). But articulation is unnecessary because, whether the trial court considered § 19a-582(d)(8) or not, on this record there is no proper basis that it could have given for the Order, under either § 54-102a(a) or § 54-102a(b).

Section 54-102a says nothing about proving or disproving the criminal case. Subsection (c) reveals that two purposes of the statute are to address the health of the accused and the public health and welfare:

> A report of the result of such examination or test shall be filed with the Department of Public Health on a form supplied by it. If such examination discloses the presence of venereal disease or if such test discloses the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus, the court may make such order with reference to the continuance of the case or treatment or other disposition of such person as the public health and welfare require. . . .

Thus, if an accused person tests STD-positive, the court can continue the trial if necessary and refer the individual to the health department for treatment. The need for such action may arise where accused persons lack the information or means to address STD issues. In this

case, paragraph 8 of the Information indicates that the Defendant is a businessman. He posted a $500,000 bond when he was arrested in March 2017. (App. A001.) Nothing in the record suggests that he lacks the means to address any health issues without the trial court's intervention. So any potential medical benefit to the Defendant himself cannot justify the order. Nor is there anything in the record to show that he poses any danger, let alone a clear and present one, to the public in 2018. There are no allegations concerning his conduct since January 2016 at the latest.

As for the Victims, § 54-102c provides:

> When a court orders a test pursuant to section 54-102a or 54-102b, the court shall provide the victim with (1) the educational materials about human immunodeficiency virus and acquired immune deficiency syndrome developed by the Department of Public Health pursuant to section 19a-112c, (2) information about and referral to HIV testing and counseling for victims of sexual acts provided through sites funded by such department pursuant to section 19a-112b, and (3) referrals and information regarding rape crisis centers. The court shall also inform the victim and the victim may designate a health care provider chosen by the victim or an HIV testing and counseling site funded by the department to receive the results of such test on behalf of the victim. The test results shall be disclosed to the victim by the designated health care provider or by a professional trained to provide counseling about HIV and acquired immune deficiency syndrome at the department-funded site designated by the victim.

The obvious purpose of § 54-102c is to provide information to the Victims to address the possibility that they might contract HIV from the sexual contact.

Here, however, neither the Information nor the Motion nor the Victims' Requests nor the hearing transcripts indicate that there is any danger, let alone a clear and present one, to the Victims. None of the Victims claim that they have tested positive for HIV. As the Vermont Supreme Court explained six years ago in *State v. Handy*, 44 A.3d 776, 783 (Vt. 2012), the modern scientific consensus is that testing a defendant for HIV after six months from the last sexual contact would serve no medical purpose. Relevant preventative treatment for HIV must begin within 72 hours of exposure to be effective. *Id.* And the latency

period during which a victim's own testing might not yet reveal the presence of HIV antibodies lasts only six weeks to six months. *Id.* There is thus a six-month window after exposure during which testing an assailant may be medically useful to a victim. No one suggests that this scientific consensus has changed since 2012.

More than two years have passed since the most recent conduct alleged against the Defendant. Testing the Defendant would reveal nothing about the Victims' medical status, and would not affect treatment options. Neither the State nor the Victims offered anything to contradict this conclusion. Nor would testing the Defendant serve any penological purpose, since whether he tests positive now has nothing to do with whether he would have tested positive over two years ago. Nor does providing peace of mind to the Victims justify the order; they can obtain peace of mind by testing themselves, a point highlighting the language of § 19a-582(d)(8) that such a testing order can be ordered only if the compelling need for it "cannot be accommodated by other means."

In *State v. Acquin*, 177 Conn. 352, 355 (1979), the Supreme Court reversed an order that the presumed innocent Defendant submit before trial to a blood test because, as also explained in *Erisoty's Appeal from Probate*, 216 Conn. 514, 518 n.3 (1990), the nexus between the taking of blood and the alleged criminal behavior was not established and thus there was no probable cause to order the test. *Acquin* was limited to its facts in *State v. Grotton*, 180 Conn. 290, 293 (1980), for finality purposes, but the facts in *Acquin* are the same facts here: no probable cause exists for either criminal or civil purposes to issue the Order.[3]

The passage of time should dispose of this issue, but there is an additional reason that the Order is an abuse of discretion. In this case the allegations could not include vaginal sex. That leaves anal and oral sex. In his December 2017 memorandum the Defendant

[3] *Grotton* is irrelevant in any event. Because the Order here appears to be based on a regulatory rather than a punitive statute; see *State v. Banks*, 321 Conn. 821 (2016), concerning DNA testing of felons; any appeal relating to the Order filed after acquittal or conviction would undoubtedly be either moot or harmless.

claimed that the "only specific allegations are that the Defendant performed fellatio on the victims." (App. A022.) When defense counsel followed up at the hearing by asserting that "the allegations involve oral sex," no one contradicted him. (Tr. 33.)

According to the CDC, "The chance that an HIV-negative person will get HIV from oral sex with an HIV-positive partner is extremely low." Centers for Disease Control & Prevention, *HIV Transmission*, www.cdc.gov/hiv/basics/transmission.html (last visited August 9, 2018). This citation and others were included in the Defendant's opposition memorandum, pp. 14-15 (App. A022-23), so the State and the Victims had a fair opportunity to dispute not only the assertion that only oral sex was involved but also the medical significance of that assertion. None of them did so.

Lacking any proper basis for its Order, the trial court abused its discretion.

II. The § 54-102a Testing Order Based on this Record Violates the Defendant's Rights under the 4th and 14th Amendments to the U.S. Constitution.

Standard of Review: Plenary.

Applying § 54-102a to the Defendant violates the Fourth and Fourteenth Amendments of the United States Constitution as applied to Defendant. The Fourth Amendment states:

> 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 Order is a search for Fourth Amendment purposes. *Schmerber v. California*, 384 U.S. 757 (1966); *Erisoty's Appeal*, 216 Conn. at 521-22; *State v. Benefield*, 153 Conn. App. 691, 703 (2014), cert. denied, 315 Conn. 913 (2015). The Fourth Amendment is incorporated against the States through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). Neither the State nor the Victims claim there is probable cause that the Defendant has HIV/STD/Venereal disease or that forcing him to be tested will assist the State in any way in the criminal case or do anything to advance the health of the public or the Victims.

Federal law usually requires a warrant and probable cause before the State may search someone. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). "The long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law in the community's protection." *Maryland v. Pringle*, 540

U.S. 366, 370 (2003) (internal quotation marks omitted). No exception to that general rule excuses the State's failure to obtain a warrant and to establish probable cause here.

While no case is directly on point, four categories of exceptions merit discussion – the "special needs" category of exceptions, and three satellite categories that have been analyzed separately from the "special needs" category.

The "special needs" category of exceptions does not apply. This category sometimes permits suspicionless searches of individuals in sensitive positions, for whom the government is responsible. E.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002) (students on extracurricular teams); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (U.S. Customs drug agents); but see *Chandler v. Miller*, 520 U.S. 305 (1997) (drug test of candidates for state office was unconstitutional). The Defendant is not in such a sensitive position.

As to the first satellite category, neither the booking nor inventory exception applies. Under the Fourth Amendment, police may fingerprint/photograph/DNA test an arrestee during booking to identify him. *Maryland v. King*, 569 U.S. 435 (2013). The booking exception permits such searches for the sole purpose of identification. *Id.* at 1979. By contrast, tests "to determine, for instance, an arrestee's predisposition for a particular disease or other hereditary factors not relevant to identity . . . would present additional privacy concerns not present here." *Id.* Testing the Defendant for STDs would do exactly that, and so does not fall within the booking exception. Similarly, the inventory exception lets police inventory the belongings/contents of a person/vehicle taken into custody for the limited purpose of preventing and insuring against claims of theft and guarding police from danger.

Colorado v. Bertine, 479 U.S. 367, 372 (1987); see also *South Dakota v. Opperman*, 428 U.S. 364 (1976) (same). Testing the Defendant for STDs would serve neither purpose.

As to the second satellite category, although the Fourth Amendment provides less protection for prisoners in government custody; *Bell v. Wolfish*, 441 U.S. 520, 556–57 (1979); the Defendant is not such a prisoner.

As to the third satellite category, the checkpoint category of exceptions does not apply. The Fourth Amendment permits police to conduct warrantless searches at checkpoints for border control; *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); to prevent DUIs; *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); and to gather information about a hit-and-run that had just occurred at the location; *Illinois v. Lidster*, 540 U.S. 419 (2004); due to the compelling nature of such concerns. Checkpoints are not, however, permitted to search for drugs; *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); or on an ad hoc basis; *Delaware v. Prouse*, 440 U.S. 648 (1979). Testing Defendant for STDs furthers none of these permitted purposes, and the reasons for it are not supportable, as discussed in factor (6) of Issue III.

As for other possible "special needs" exceptions, they also lack merit, as discussed in factor (4) of Issue III.

In sum, federal jurisprudence under the Fourth Amendment does not authorize testing the Defendant for STDs in this case.

III. The § 54-102a Testing Order Based on this Record Violates the Defendant's Rights under Article First, § 7 of the Connecticut Constitution.

Standard of Review: Plenary.

Applying § 54-102a to the Defendant violates Article First, § 7 of the Connecticut Constitution, because it serves no penal, public policy or medical purpose and is not grounded in any "special needs" exception to the ordinary warrant and probable cause requirements. Although mandatory STD testing statutes were quickly passed and uncritically upheld during the initial HIV panic days, more recent decisions have recognized the tenuous basis on which they rest. Because testing the Defendant serves no "special need" sufficient to excuse compliance with the warrant and probable cause requirements of § 7, applying the statute to the Defendant solely due to his arrest would be unconstitutional.

To determine the meaning of the State Constitution as applied to the facts of this case, this Court must examine six factors: (1) the text of the operative constitutional provisions; (2) related Connecticut precedents; (3) persuasive relevant federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forebears; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. *State v. Geisler*, 222 Conn. 672, 685 (1992).

(1) The Text of § 7 Expressly Sets Forth the Warrant and Probable Cause Requirements.

The text of § 7 expressly sets forth the warrant and probable cause requirements:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no **warrant** to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without **probable cause** supported by oath or affirmation.

(Emphasis added.) These two requirements are not a judicial gloss; they are the essence of what the state constitution requires and what makes a search reasonable. Any deviation from these bedrock requirements must be jealously guarded against in the absence of

compelling circumstances. In this respect, "the text of article first, § 7, is similar to the text of the fourth amendment." *State v. Miller*, 227 Conn. 363, 381 (1993).

(2) Other Connecticut Cases Recognize the Greater Protection Against Unreasonable Searches and Seizures that § 7 Affords.

The Supreme Court has in various contexts held that, notwithstanding similar texts, § 7 confers greater protection against searches than its federal counterpart. *Miller*, 227 Conn. at 379 (holding, contrary to U.S. Supreme Court that police may not search impounded vehicle without warrant); *State v. Oquendo*, 223 Conn. 635, 646 (1992) (holding, contrary to U.S. Supreme Court, that chasing someone down is seizure of their person); *Geisler*, 222 Conn. at 690 (holding, contrary to U.S. Supreme Court, that evidence obtained from defendant outside home, after police removed him from home without warrant, was inadmissible); *State v. Marsala*, 216 Conn. 150, 171 (1990) (holding, contrary to U.S. Supreme Court, that there is no good faith exception to exclusionary rule); *State v. Dukes*, 209 Conn. 98, 120 (1988) (holding, contrary to U.S. Supreme Court, that police cannot conduct unlimited search of driver incident to arrest for traffic offense).

Connecticut "precedents involving the state constitution's warrant requirement express a strong policy in favor of warrants"; *Miller*, 227 Conn. at 382; and militate in favor of enforcing that basic requirement here, where there is no urgency, nor any compelling reason to perform the medical testing at all. Medical testing of the Defendant goes considerably beyond the ordinary booking and inventory process and is analogous to but more egregious than the warrantless search of a defendant's impounded vehicle held unconstitutional in *Miller*, 227 Conn. at 386–87.

In any event, warrant or not, the cases cited above show that the Supreme Court has interpreted individual rights under § 7 broadly when considering exceptions to the probable cause requirement.

(3) Federal Law Recognizes Only Limited Exceptions to the Warrant and Probable Cause Requirements.

Although the U.S. Supreme Court has not directly addressed the issue, federal law does not appear to authorize the testing of Defendant, as discussed in Issue II.

(4) Sister State Decisions Highlight the Constitutional Infirmity of General Statutes § 54-102a.

Other state courts have upheld similar statutes primarily under the special needs exception. The purported "special needs" are (1) to aid in the victim's medical treatment, and (2) to stem the HIV outbreak. *State v. Houey*, 651 S.E.2d 314, 316–17 (S.C. 2007) (upholding statute under special needs exception); *Adams v. State*, 498 S.E.2d 268, 271-72 (Ga. 1998) (same); *State in Interest of J.G.*, 701 A.2d 1260, 1265–71 (N.J. 1997) (same).

On the other hand, states that have looked more closely at the rationale for testing have been more hesitant to uphold it. In *State v. Farmer*, 805 P.2d 200, 208–209, *amend. on denial of recons.*, 812 P.2d 858 (Wash. 1991), the Washington Supreme Court held that its HIV testing statute could not be applied to a convicted person in the absence of a compelling interest, and therefore could not be applied where a prosecutor sought to use it to gather evidence that a convicted defendant was HIV-positive when he patronized two child prostitutes years earlier, and so deserved a longer sentence. In reversing, the court noted that "the results of the test could not be related back in time" and so testing "was of no use" for that purpose. *Id.* at 209.

And in *State v. Handy*, discussed in Issue I, the Vermont Supreme Court expressed concern at the rationale for testing, noting that the modern medical consensus is that testing a perpetrator years after sexual contact "provided little or no medically useful information for victims of sexual crimes," and that "the principal driving force behind [the HIV testing statute]" appeared to be that, without such testing, "the State of Vermont would not be eligible to receive roughly $175,000 per year in federal grants," which was likely not a permissible basis for invading a defendant's rights. 44 A.3d at 783. The court ultimately upheld the statute

anyway, on the grounds that even if testing the defendant was medically useless, (1) "sexual assault victims do not necessarily consider the issue . . . in a logical way" so testing would give them "peace of mind," and (2) victims would "feel further violated if their attacker refuses to submit to the testing of bodily fluids forced upon them during a sexual assault." *Id.* at 784.

As discussed in factor (6), these alternative rationales do not withstand scrutiny either.

(5) Without a Compelling Reason, Our Constitutional Forebears Would Not Have Tolerated Invasive Medical Testing Without a Warrant and Probable Cause.

It is unlikely that Connecticut conducted invasive medical tests of arrestees in the time of our constitutional forebears, and it is unlikely that such tests would have been tolerated without a compelling reason. See *King*, 569 U.S. at 482 (Scalia, J., dissenting) ("Perhaps [suspicionless medical testing of arrestees] is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.") There is no suggestion in the history of § 7 that such tests were considered an ordinary part of the arrestee booking process in 1818, or in 1965.

(6) The Contemporary Understanding of HIV and other such STDs Undercuts the Basis for § 54-102a.

There is no proper basis for testing the Defendant for STDs years after the last alleged sexual contact between him and the Victims, never mind a compelling one. The privacy interest invaded is substantial. "[T]he information obtained as the result of a positive HIV test may have a devastating impact on individuals who would prefer not to know their true status and . . . persons with AIDS are often stigmatized and subject to social disapproval. Mandatory testing and disclosure of HIV status thus threaten privacy interests beyond the taking of the blood sample, particularly because of the social stigma, harassment, and

discrimination often suffered by individuals who have AIDS or who are HIV-positive." *Handy*, 44 A.3d at 781 (citation omitted) (internal quotation marks omitted).

The Legislature recognized the risk of having one's HIV status disclosed when it passed § 54-102a. Representative Tulisano opined that, although HIV status would not become a public record, the victim "could disclose for example to a spouse" or "family members" and that, to the extent the victim wished to do so, "Frankly, we couldn't stop it anyway. It's not enforceable." H.R. Debate on P.A. 94-6, May 25, 1994, at pp. 341–42 (009017–009018). (App. A052-53.)

No important much less compelling government interest justifies that intrusion as to the Defendant. *Handy*, discussed in Issue I, took the defendant's privacy interests very seriously even though he had been convicted. As *Handy* said, 44 A.3d at 783, the modern scientific consensus is that testing someone for HIV after six months would serve no medical purpose. That the Victims nonetheless may believe the test serves a medical purpose cannot justify § 54-102a. The argument that "sexual assault victims do not necessarily consider the issue . . . in a logical way," so testing would give them "peace of mind"; *Handy*, 44 A.3d at 784; is unsupportable. A constitutional right cannot be brushed aside so easily. Testing the Defendant is of no medical benefit to the Victims, and their belief to the contrary would not make it so.

The argument that victims would "feel further violated if their attacker refuses to submit to the testing of bodily fluids forced upon them during a sexual assault"; *Handy*, 44 A.3d at 784; is unsupportable. That sort of tit-for-tat reasoning cannot justify performing such a test *pre-conviction*, when the accused is presumed innocent of any such offense. "It is antithetical to our criminal justice system to presume anything but innocence at the outset of a trial. It is not until the defendant has been convicted that the presumption of innocence disappears." *State v. Skipper*, 228 Conn. 610, 621 (1994). Although the Vermont Supreme Court relied on such tit-for-tat reasoning, the statute there permitted testing only *post*-conviction. *Handy*, 44 A.3d at 780.

Any potential medical benefit to the Defendant *himself* cannot justify the test. He objects to such a test and has the resources to get tested if he so desires. Nor does the public health justify the Order in a case where no allegations are made concerning the Defendant's actions since January 2016 at the latest.

Finally, much as in Vermont, Representative Tulisano stressed that "this amendment before us will allow the State of Connecticut to qualify for certain federal grants approximately $600,000 in total." H.R. Debate on P.A. 94-6, May 25, 1994, at p. 337 (009013). (App. A048.) The receipt of federal money is no basis to invade a citizen's constitutional rights.

Summary of Factors

The six factors all support the Defendant's argument that the Order based on § 54-102a cannot stand. It is a search with no record evidence that the Defendant has an STD, no probable cause that the result of such a test will assist the State in its criminal case, and no basis on this record that the result of testing will impact public health or the health of the Victims.

Applying § 54-102a to the Defendant on this record is unconstitutional under Article First, § 7.

CONCLUSION

The Order granting the State's Motion for Venereal Examination and HIV Testing and granting the Victims' similar Requests should be reversed.

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CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) the electronically submitted brief and appendix were emailed on August 10, 2018, to counsel of record listed below; and (2) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted.

Pursuant to Practice Book § 67-2(i), I hereby certify that: (1) in compliance with Practice Book § 62-7, a copy of the foregoing brief and appendix were mailed, postage prepaid, to the counsel of record listed below on August 10, 2018; (2) that the brief and appendix are true copies of the brief and appendix filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief and appendix do not contain any names or personally identifiable information that is prohibited from disclosure or that any such information has been redacted; (4) and that the brief complies with all provisions of Practice Book § 67-2(i).

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