STATE OF CONNECTICUT

SUPREME COURT

S.C. 20195

STATE OF CONNECTICUT

vs.

BRUCE JOHN BEMER

DEFENDANT-APPELLANT'S REPLY BRIEF

TO BE ARGUED BY:

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ARGUMENT

I. The Trial Court Abused Its Discretion.

This case involves the applicability of C.G.S. § 19a-582(d)(8) to a court order under C.G.S. § 54-102a(b). The relevant language from the two statutes is as follows:

> **§ 19a-582. General consent required for HIV-related testing. Counseling requirements. Exceptions.**
>
> . . .
>
> (d) The provisions of this section 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 . . . .
>
> **§ 54-102a. Examination for sexually transmitted disease and HIV testing of persons charged with certain sexual offenses**
>
> . . .
>
> (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 or, in a delinquency proceeding, the accused child for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus . . . . If the victim of the offense requests that the accused person or child be tested, the court may order the testing of the accused person or child in accordance with this subsection and the results of such test may be disclosed to the victim. 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.

The State argues that the "clear and imminent danger" and "compelling need" requirements of C.G.S. § 19a-582(d)(8) do not apply to a court order under C.G.S. § 54-102a(b) because (b) starts out with the phrase "Notwithstanding the provisions of section 19a-582 . . . ." Its construction of that phrase makes the first sentence contradict the second and third sentences. The second sentence states that when the victim asks that the accused be tested, it may be done "in accordance with this subsection," i.e., (b). The third sentence states that §§ 19a-581 to 19-585, inclusive, which obviously includes § 19a-582, and § 19a-590 "shall apply to a test ordered under this subsection and the disclosure of the results of such test" except for 1. a requirement for "informed consent" and 2. any prohibition or limitation on disclosure of the results to the victim. When the three sentences are read together, the "notwithstanding" phrase must have a more modest role than the State argues.

The key is that § 54-102a(b) concerns court orders, whereas § 19a-582, as the title indicates, concerns requiring (in addition to counseling) "general consent" for HIV testing in most cases. The "notwithstanding" phrase is thus most logically read to overrule the general consent requirement for court orders. But if, as the second sentence states, the victim requests that the accused person be tested, which eventually occurred here, the court may order a test in accordance with this subsection, which includes all three sentences in (b). Furthermore, whether or not the victim requests the test, the third sentence makes this subsection subject to § 19a-582 but for the two exceptions mentioned above.

Section 19a-582 itself does not require general consent for various situations under (d), but it does carefully regulate court orders under (d)(8). These requirements are without question modified by the exception clauses in the third sentence of § 54-102a(b), but otherwise they are not affected by the "notwithstanding" phrase. This result follows because the State's reading of "notwithstanding" to eliminate the "danger" and "compelling need" requirements of § 19a-582(d)(8) for a § 54-102a(b) order ignores the subsequent language in (b) and makes the three sentences of (b) inconsistent.

Seeming to realize this awkward implication of its argument, the State concedes, as

the trial court held, that the "notwithstanding" phrase does not entirely trump § 19a-582. The State says on page 8: "The confidentiality provisions of § 19a-582, however, are relevant to the test performed as a result of the trial court's order." But neither the exception clauses nor any other language in §54-102a(b) restricts the relevance of § 19a-582 to its confidentiality provisions. The State further says on page 20:

> Although the last sentence of paragraph (b) incorporates the provisions and protections set forth in §§ 19a-581 to 19a-585 and § 19a-590, the legislature reinforced that § 19a-582 was not applicable by including the word "except" followed by a description of § 19a-582, i.e., the phrase "any provision requiring the subject of an HIV-related test to provide informed consent prior to the performance of such test."

But the language the State quotes from one of the exception clauses eliminates only the informed consent requirements of § 19a-582, not the "danger" and "compelling need" requirements of (d)(8).

In any event the "notwithstanding" phrase should be construed narrowly to avoid the constitutional questions discussed in Issues II and III. *Feehan v. Marcone*, SC 20216, SC 20217, SC 20218, slip op. at 19 (Conn. Jan. 30, 2019).

In conclusion, the requirements of § 19a-582(d)(8) apply to a court order under § 54-102a(b).

The State's sole claim about § 19a-582(d)(8) is that its "danger" and "compelling need" requirements do not apply here. The State does not alternatively claim that, if the statute *does* apply, there is sufficient evidence for the trial court to find compliance with the stringent requirements of (d)(8). In fact there is no evidence in the record of a clear and imminent danger to anyone or of a compelling need for an HIV test that cannot be accommodated by other measures.

Even if (d)(8) is not applicable, the trial court abused its discretion. The State rarely descends from generalizations about HIV to the facts of this case. It contests none of the following assertions in the Defendant's opening brief (pp. 1, 5-8):

1. The last sexual contact alleged is no later than early 2016;
2. The Defendant was not arrested until March 2017;
3. The State waited 7 months to file its testing motion;
4. The alleged victims waited 3 more months to file their own motions;
5. None of the victims claim that they have submitted themselves to testing, much less that they have tested positive for HIV;
6. The Defendant does not lack the information or means to provide for his own medical treatment; and
7. Testing a defendant for HIV after 6 months from the last sexual contact serves little or no medical purpose.

In addition, the police investigation began in January 2016, 14 months before the Defendant was arrested. (Def. App. A036.)

The order was issued in March 2018. Ordering the Defendant to be tested on the sparse facts and unexpeditious proceedings in this case is an abuse of 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.

The State relies at pp. 26-27 on 12 cases for the proposition that HIV testing is permitted in this case under the federal special needs exception to the warrant requirement. Significantly, 10 of the cases were decided in the 1990s, at the height of the AIDS crisis. The most recent and most persuasive case, *State v. Handy*, 191 Vt. 311 (2012), discusses only the Vermont Constitution's warrant clause, but in doing so it undermines the reasoning of the other 11 decisions.[1] Moreover, 6 of the 12, including *Handy*, concern testing only after conviction. None of them are binding on this Court.

The 10 cases from the 1990s rely on outdated medical knowledge when addressing the ability to stem the spread of HIV and to protect the rights of victims. As the State's brief

[1] The remaining case cited by the State, *State v. Houey*, 375 S.C. 106 (2007), relies on two of the 1990s cases.

notes at pp. 28-29, "the potentially inconclusive nature of HIV tests" did not override these concerns in the 1990s cases. But *Handy* shows that the medical consensus in 2012 is quite different: after six months, testing will not be just "potentially inconclusive"; it will be of little or no medical use at all. 191 Vt. at 322. The State does not suggest that this consensus has changed since 2012.

As *Handy* properly concludes, the medical consensus leaves only two bases to apply the special needs exception: (1) the test will give victims peace of mind even though they do not think about the issue in the logical way non-victims would, and (2) the victims would feel further violated if their attacker could avoid being tested. The problem with these two reasons is that they apply only after conviction, because they assume the Defendant's guilt.

The only persuasive precedent among the 12 cases cited by the State is *Handy*. In light of *Handy's* reasoning as applied to this case, the testing order violates the Fourth and Fourteenth Amendments to the U.S. Constitution.

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

When reviewing cases from other jurisdictions to decide a state constitutional question, the issue is not the weight of federal and state precedents but the weight of *persuasive* federal and state precedents. *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 230-31, 240 (2008); *Feehan*, slip op. at 6-7. Given, as the State properly notes at pp. 31-32, this Court's preference for warrants, if this Court nevertheless accepts the State's "special needs" exception in this type of case, only under exceptional circumstances should it abandon the probable cause and warrant requirements, which is what the Vermont Supreme Court requires. *Handy*, 191 Vt. at 316. Indeed, to a large extent, adopting such a standard would be following the language of C.G.S. § 19a-582(d)(8).

Handy adopted the "special needs" standard from Justice Blackmun's dissent in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In *O'Connor*, Blackmun advocated for a two-step analysis, first considering if "exceptional circumstances in which special needs, beyond the

normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.* at 741. And next, "'balancing' the privacy interests of the employee against the public employer's interests justifying the intrusion." *Id.*

In *O'Connor*, Justice Blackmun cites to *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), a case in which he concurred in the result. The Court there held the Fourth Amendment applied to searches of students by school officials and that the search in the case was reasonable. He would have analyzed the legality of the search under the "special needs" exception.

Assuming, under Justice Blackmun's envisioned test, that this Court agrees the State's interest is adequate to fit within the "special needs" exception, the particular public interests of this case would be balanced against the defendant's important private interests. In this balancing, the State's interests fall short.

Justice Blackmun states that proper interest balancing considers a case's particular facts. *O'Connor*, 480 U.S. at 743 (criticizing the plurality for focusing on "assumed" facts, rather than actual facts, in balancing). Further, he notes that the appropriate balancing standard adopted should prove suitable to the relevant circumstances—e.g., compelled HIV/AIDs testing. *Id.* at 744 n.8. Thus, in a case where important privacy interests are present, the government's interest must exceed those interests.

Given the significant privacy interests at stake in this case—compelled puncturing of defendant's skin and blood drawing for HIV/AIDs testing—an appropriate balancing standard requires a compelling State interest. It is the aim of § 19-582(d)(8) that such analysis be performed prior to a court ordering testing. Indeed, without incorporating § 19-582(d)(8), § 54-102a could not pass constitutional muster because courts would lack guidance on how to weigh the parties' interests properly.

Cases decided at the height of the AIDS crisis with now obsolete medical knowledge are not persuasive authority. *Handy* states that "neither a negative nor a positive result from the offender's testing would appear to have any value for the victim." *Handy*, 191 Vt. at 322. "Indeed, even those who testified in support of testing offenders acknowledged that such

testing provided little or no medically useful information for victims of crime." *Id.* Nothing in the materials from state and federal agencies that the State cites in its brief at pp. 36-37 contradicts these statements from *Handy*.

Perhaps during and in the immediate aftermath to the HIV/AIDs epidemic the government's public health interest could be considered significant enough to overcome defendant's privacy interests. Many of the cases cited to by the State reflect that conclusion. However, given what is known today about the efficacy of testing, that interest has been greatly diminished. That is the logic of *Handy*, a case decided after the height of the HIV/AIDs epidemic when advancements were made in science and cooler heads could prevail. Add to this the presumed innocence of the Defendant and the State's motion cannot pass constitutional muster.

Handy went on to validate the testing statute under Vermont's exceptional circumstances test for the reasons stated above in Issue II, reasons that applied in *Handy* because the defendant had been convicted. But the idea that an *alleged* victim's thought process that is contrary to the current state of medical knowledge should be a justification for intruding on the privacy and bodily integrity of someone else who is presumed innocent is hardly consistent with this Court's constitutional preference for warrants. *Handy* is the persuasive out-of-state precedent, and it seems likely that, had the defendant there not been convicted, he would have prevailed under *Handy*'s reasoning.

This Court should follow the persuasive reasoning of *Handy* as it applies to a defendant who is charged but not convicted of a crime and hold that the testing order violates Article First, § 7 of the Connecticut Constitution.

CONCLUSION

The testing order 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 February 13, 2019, 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 February 13, 2019; (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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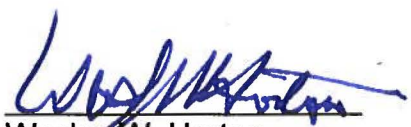

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