STATE OF CONNECTICUT

SUPREME COURT

S.C. 20195

STATE OF CONNECTICUT

vs.

BRUCE JOHN BEMER

DEFENDANT-APPELLANT'S BRIEF ON MOOTNESS

TO BE ARGUED BY:

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OR

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FILED: AUGUST 9, 2019

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STATEMENT OF ISSUE

Does the Defendant's conviction have an effect on the Supreme Court's jurisdiction over the appeal?

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I. The Defendant's conviction does not affect the Supreme Court's jurisdiction over the appeal.

Standard of Review: Plenary.

Before this Court is the validity of the pretrial order by Shaban J. granting the State's motion for venereal disease and HIV testing under Conn. Gen. Stat. § 54-102a. The State has not pressed for the order to be carried out while the appeal is pending. Although the statute is inapplicable after final disposition, this appeal is not moot for three reasons:

(1) This Court can afford the Defendant practical relief in the event that he prevails on the appeal from his conviction.

(2) The collateral consequences doctrine is applicable here.

(3) The important statutory construction and constitutional issues are capable of repetition, yet evading review.

(1)

The Defendant has appealed from his conviction. A.C. 43174. If he prevails on that appeal, the case will be remanded to the trial court for either a new trial or a directed judgment of acquittal. If the former, § 54-102a will once again be applicable; if the latter, the § 54-102a order will fall with the conviction. In either event, this Court can afford the Defendant practical relief.

In *State v. Evans,* 329 Conn. 770 (2018), this Court reiterated the general test for mootness:

> When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot.

Id. at 789 (citation omitted).

While the facts of *Evans* are not relevant to the present case, *Evans* relied on *State v. T.D.*, 286 Conn. 353 (2008), for the mootness test, and the facts of *T.D. are* relevant here. The question in *T.D.* was whether an appeal from a probation revocation order becomes moot when the defendant is convicted — by either a plea or a verdict — of the offense on which the revocation order is based. This Court concluded that the key to mootness is whether the defendant was challenging the validity of the conviction. Since the defendant in *T.D.* was doing so, his appeal from the revocation order was not moot. *T.D.* states:

> When, however, the defendant has pursued a timely appeal from a conviction for criminal conduct and that appeal remains unresolved, there exists a live controversy over whether the defendant engaged in the criminal conduct, and an appeal challenging a finding of violation of probation stemming from that conduct is not moot.

Id. at 366-67.

This reasoning applies here. While both appeals in *T.D.* directly concerned the criminal conduct, the important point is that the controversy in *T.D.* was live because a successful appeal of the conviction would affect the revocation appeal. Likewise here, the controversy in the present appeal is live because a successful appeal of the conviction would affect this appeal. So as long as the appeal from the underlying conviction is alive, the controversy in this appeal remains live. If this Court is concerned with deciding a revocation or testing appeal before a conviction appeal is decided, that concern can be addressed by postponing the mootness and merits decisions in the first appeal, not by dismissing it now.

(2)

The collateral consequences doctrine, where applicable, prevents a case from being moot.

> To invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur.

Wallingford v. Dept. of Public Health, 262 Conn. 758, 767-68 (2003). In that case the Town, in considering what to do with a particular property, asked the Department of Public Health to determine whether it was a water company, which would subject it to the Department's jurisdiction. The Department said yes; during the Town's appeal the case was resolved as to that property. The appeal was held not to be moot because the Department's determination that the Town was a water company could affect other town-owned land. *Id.*

In *State v. McElveen,* 261 Conn. 198 (2002), the defendant's probation was revoked and he was incarcerated for six months. While the appeal from the revocation order was pending, he completed service of the six months incarceration and the State claimed the appeal was moot. This Court, relying on numerous Connecticut cases and distinguishing federal precedent; *id.* at 205-12; held that the appeal was not moot because revocation of a probation order will be relevant in release decisions if the defendant has future involvement with the criminal justice system. In a similar fact situation in *State v. Smith*, 207 Conn. 152 (1988), this Court also found the appeal not moot. *Id.* at 161 (collateral consequences threshold colorably present).

In this case, the collateral consequences of testing the Defendant are even more readily apparent than in *Wallingford*, *McElveen*, and *Smith.* The results of the testing are likely to be disclosed under Conn. Gen. Stat. §54-102c. This Court can take judicial notice of the civil cases pending against the Defendant (DBD-CV19-6032151-S, FBT-CV17-5032881-S, FBT-CV17-6068382-S) and can easily foresee the likely effect of disclosure on those cases if the results are positive.

(3)

In any event, this issue is capable of repetition, yet evading review. *State v. Patel,* 327 Conn. 932 (2017). This Court has a three-part test. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect a reasonably identifiable group for whom the defendant can be said to act as a surrogate. Third, the question must have some public importance. *Patel,* 327 Conn. at 936-37; *Loisel v. Rowe,* 233 Conn. 370, 382 (1995). This case satisfies all three parts.

An order in a criminal case that applies only until the final disposition is by its nature of limited duration. While the parties could have asked for expedited review pursuant to Conn. Gen. Stat. § 52-265a or by motion, that point is not dispositive. *Patel,* 327 Conn. at 937-38. It is especially not dispositive because the first-impression issues merited unrushed consideration by counsel and merit unrushed consideration by this Court. No dam was or is about to burst.

The issues in this case are reasonably likely to arise again, as the increased attention by society today to the issues of both sexual conduct and privacy attests. The Defendant has vigorously briefed the issues and is an appropriate proxy for anyone else in a similar situation.

Finally, the proper construction of the testing statutes and the circumstances under which they can be constitutionally applied are not merely of "some public importance"; they

are of considerable public importance. In the first place, the parties disagree about whether the "clear and imminent danger" and "compelling need" requirements of Conn. Gen. Stat. § 19a-582(d)(8) apply to a court order for testing under § 54-102a(b). This is an issue of first impression and involves the balancing of the need to protect the public health with rights of privacy. In the second place, the cases on balancing these two interests constitutionality come largely from the 1990s and rely on outdated medical knowledge about the ability to stem the spread of HIV and protect the rights of victims. These points show the public importance of this appeal.

CONCLUSION

The appeal is not moot. It should be decided on the merits.

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CERTIFICATION

Pursuant to Practice Book § 67-2(g), I hereby certify that: (1) the electronically submitted brief was emailed on August 9, 2019, to counsel of record listed below; and (2) that the brief does 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 was mailed, postage prepaid, to the counsel of record listed below on August 9, 2019; (2) that the brief is a true copy of the brief filed electronically pursuant to Practice Book § 67-2(g); (3) that the brief does 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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