STATE OF CONNECTICUT

SUPREME COURT

S.C. 20195

STATE OF CONNECTICUT

vs.

BRUCE JOHN BEMER

DEFENDANT-APPELLANT'S BRIEF ON FINALITY

TO BE ARGUED BY:

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FILED: NOVEMBER 6, 2018

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STATEMENT OF ISSUE

May the Defendant bring an immediate appeal following a testing order pursuant to Conn. Gen. Stat. §54-102a, when the record discloses no claim or evidence that the testing may assist in determining his guilt or innocence? [pp.1-4]

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ARGUMENT

Where the record discloses no claim or evidence that a testing order pursuant to Conn. Gen. Stat. §54-102a may assist in determining the guilt or innocence of the Defendant, he may bring an immediate appeal of such an order.

Standard of Review: Plenary.

State v. Curcio, 191 Conn. 27 (1983), provides that an aggrieved party may bring an interlocutory appeal in two situations: either "the order or action terminates a separate and distinct proceeding . . . [or] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *Id.* at 31. This order fits within both prongs, although the analysis for both prongs is basically the same: the order has nothing to do with guilt or innocence, thus it is essentially a separate proceeding; for the same reason the Defendant's rights cannot be vindicated after the conclusion of the criminal trial.

As the Defendant explains on page 1 of his main brief, the State's motion for venereal disease and HIV testing under Conn. Gen. Stat. §54-102a (A006) and the alleged victims' similar requests (A025 to A030) are silent on whether the results of such testing may be relevant to the State's criminal case. Nor does anything in the Defendant's opposition (A009 to A025), the oral argument on the motion, the trial court's decision (A007), or even the arrest warrant application (A036 to A045) show that the testing would assist in determining the guilt or innocence of the Defendant.

That the record is silent is consistent with the statute serving a regulatory rather than a punitive purpose. The purpose is to address the health of the accused and the public health and welfare (see §54-102a(c)), as well as the health and welfare of the alleged victims (see §54-102c, which refers to a §54-102a testing order). This Court held the DNA testing statute (§54-102g) to be regulatory in *State v. Banks*, 321 Conn. 821 (2016); there is no reason to treat §54-102a differently.

This preliminary discussion matters because of *State v. Grotton*, 180 Conn. 290 (1980), and *State v. Acquin*, 177 Conn. 352 (1979). *Grotton* holds that a blood test order in

a criminal case generally is not a final judgment. *Grotton* limited *Acquin*, which had permitted such an appeal, to its facts. The distinguishing facts in *Acquin* were that the trial court had no basis in the record to determine that the testing order would assist in determining the guilt or innocence of the Defendant. *Acquin* is this case.

The Defendant's reading of *Acquin* comports with a footnote in *State v. Grant*, 286 Conn. 499, 515 n.9 (2008). *Grant* explains that *Acquin* did not impose a heightened standard for procuring a blood draw from criminal defendants. Rather, because there was no evidence in *Acquin* that the perpetrator's blood had been found on the murder weapons, there was simply no basis to conclude that the defendant's blood would be of material aid in determining whether the defendant committed the offense charged. Here the State does not even claim that the results of a test would be of any similar material aid. This case mirrors the situation alluded to in the *Grant* footnote.

This distinction between *Acquin* and *Grotton* makes sense. If the testing is for relevance to guilt or innocence, the Defendant will likely have a later remedy in either scenario: if convicted he can appeal the order and may be able to claim harmful error on the ground that the test results were incriminating; if acquitted he may have won because the test results were exonerating. But if the testing is not for relevance to guilt or innocence, the Defendant will have no later remedy: on appeal from a conviction, any error on the testing order is likely to be harmless; on acquittal the testing results likely would not have freed him. The testing order thus in effect terminates a separate and distinct proceeding because it has nothing to do with the criminal case.

There is some tension between *Grotton* and *State v. Garcia*, 233 Conn. 44, 62-66 (1995). In *Garcia*, this Court held that an order for involuntary medication was appealable under the second prong of *Curcio*. The U.S. Supreme Court reached the same result in *Sell v. United States*, 539 U.S. 166, 176-77 (2003). The defendants in both cases claimed that the order violated their constitutional rights, just as the Defendant here is claiming. Puncturing

the Defendant's skin is no different in principle from involuntarily medicating him. In any event, the tension can be avoided by applying *Acquin* here.

Another reason to distinguish *Grotton* was mentioned but implicitly abandoned on appeal in *Acquin*: that the evidence could practicably have been obtained from other sources. *Id.* at 353 and n.2. Here the evidence sought can be obtained from other sources. As explained in the Defendant's main brief on pages 6-7, the victims can obtain peace of mind by testing themselves and, indeed, there is a six-month window after exposure during which testing an assailant is medically useful to a victim. While this is a merits argument, it supports a generous *Curcio* reading. Not only will the Defendant have no remedy later, but the alleged victims have an alternate remedy now.

Erisoty's Appeal from Probate, 216 Conn. 514 (1990), further shows why *Acquin* should be given a generous *Curcio* reading. While finality was not an issue because it was a probate appeal; *Erisoty* at 518 and n.3; this Court's discussion of aggrievement in an appeal from a blood grouping test order is relevant here.

> The first legally protected interest that the Plaintiff seeks to vindicate is the right to resist an intrusion into his body.

Id. at 521. *Erisoty* then quotes from *Grotton* concerning the intrusiveness of a blood test; *id.* at 522; and concludes:

> This first strand of an adverse effect on a legally protected interest is to be found in the very act of puncturing the plaintiff's skin and drawing blood from his body.

Id. at 522-23.

When the finality of this act is balanced against avoiding piecemeal review, the balance tips in favor of review now as the effectiveness of review later diminishes. Here the effectiveness of review after the State has intruded into the Defendant's body diminishes to zero. Since further proceedings cannot affect the Defendant's rights, he is entitled under *Curcio* to review now.

The Defendant cannot find any out-of-state cases specifically discussing the right to pretrial review of an HIV testing order. However, on page 14 of his main brief, he discusses HIV testing under cases from five states. In three of them, *State v. Houey*, 375 S.C. 106 (2007), *Adams v. State*, 269 Ga. 405 (1998), and *State in interest of J.G.*, 151 N.J. 565 (1997), the appellant appealed the order pretrial. (The other two cases involve post-conviction orders.) Nothing was said about appealability, and all three state supreme courts reached the merits. These courts likely would have commented on their subject matter jurisdiction if they had had any doubts about it. In *United States v. Mitchell*, 652 F.3d 387, 392-98 (3d Cir. 2011), the court permitted the government to appeal the denial of an order for a DNA test. There was no claim that the result of the test would be relevant to the criminal prosecution. *Mitchell* applied the federal equivalent of *Curcio* on both prongs.

The Pennsylvania Supreme Court, while acknowledging contrary authority elsewhere, ruled in *Jones v. Trojak*, 535 Pa. 95, 100-03 & nn.5 & 6 (1993), that court-ordered tests to determine paternity are appealable because of concern for the best interests of the child. Once the test is taken, the psychological damage to the family unit will have been done. *Id.* at 103. *Jones*, involving a married woman, was extended to an unmarried woman in *Freedman v. McCandless*, 539 Pa. 584 (1995). As in *Jones* and *Freedman*, in this case the effectiveness of the appellate remedy will be greatly diminished or even destroyed if it is not exercised at once.

The order in this case infringes on a constitutional right the Defendant presently has not to have his skin punctured when there is no claim that the order is relevant to the criminal case. Any later appeal will be ineffective to protect his rights. Finally, the testing order is as a practical matter a separate proceeding. The order is appealable under both prongs of *Curcio*.

CONCLUSION

This Court has subject matter jurisdiction over the appeal.

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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 November 6, 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 November 6, 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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