SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF DANBURY

S.C. 20195

STATE OF CONNECTICUT

V.

BRUCE JOHN BEMER

BRIEF OF THE STATE OF CONNECTICUT-APPELLEE
WITH ATTACHED APPENDIX

To Be Argued By:

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NATURE OF THE PROCEEDINGS

On March 28, 2017, the defendant, Bruce Bemer, was arrested by warrant. Defendant's Appendix, ("D.App."), A002 (Docket Entries), A036 (Arrest Warrant Application). Thereafter, the state charged the defendant with patronizing a prostitute who was the victim of human trafficking, in violation of General Statutes § 53a-83(c)(2)(A), and of conspiracy to commit human trafficking, in violation of General Statutes §§ 53a-48 and 53a-192a. D.App., A003 (Docket Entries). The defendant entered not guilty pleas and elected a jury trial. D.App., A003 (Docket Entries).

On October 18, 2017, the state, on behalf of the victims, filed a Motion for Venereal Examination and HIV testing pursuant to General Statutes § 54-102a. D.App., A0006. On January 16, 2018, victims represented by Attorney Joel T. Faxon filed a Request to Obtain HIV/STD/Venereal Information Relating to Defendant Bemer pursuant to General Statutes §§ 54-102a(a) and (b). D.App., A025. On January 28, 2018, victims represented by Attorney Kevin C. Ferry, filed an almost identical Request. D.App., A028. As set forth further below, on March 2, 2018 the trial court, Shaban, J., granted the foregoing motion and requests.

On March 20, 2018, the defendant commenced this appeal. The defendant filed his brief with the Appellate Court on August 10, 2018 and raised three claims, all pertaining to General Statutes § 54-102a. The defendant also filed a motion to transfer this matter from the Appellate to the Supreme Court, which this Court granted on August 25, 2018. This Court further ordered the parties to address whether the trial court's order for VD/HIV testing constitutes an appealable final judgment.[1] The defendant filed his supplemental brief in response to this Court's order on November 6, 2018. As set forth further, below,

[1] This Order also provided that the state could use up to ten additional pages devoted solely to the final judgment issue. The state has devoted 2 pages to this argument, pp. 9 - 10.

there is no dispute that the trial court's order constitutes an appealable final judgment and that this appeal is properly before this Court.

COUNTERSTATEMENT OF THE FACTS

The facts, as set forth in the arrest warrant affidavit upon which the trial court, Ozalis, J., determined that probable cause to arrest the defendant existed, reveal the following. In January 2016, the Danbury police, in conjunction with the Federal Bureau of Investigations ("FBI"), began an investigation into a prostitution ring involving the sexual exploitation of mentally disabled persons in the area of Danbury, CT. Arrest Warrant Affidavit, ¶ 2.[2] The prostitution ring was operated by Robert King and involved himself, William Trefzger, the defendant and others. Arrest Warrant Affidavit, ¶¶ 2, 5. King would identify young males with apparent mental health needs and disorders, befriend them with promises of work, money and necessities, and provide them with drugs resulting in the young males becoming indebted to King. King would then introduce these young men to the defendant and Trefzger for the purpose of engaging in sexual activity in exchange for money. King would collect the drug debt from a portion of the money the defendant provided for the sex act. Arrest Warrant Affidavit, ¶¶ 5, 30. The investigators identified approximately fifteen of these young males, whom they refer to as "victim" followed by a roman numeral. Arrest Warrant Affidavit, ¶¶ 3, 21.

In his interview with the investigators, King acknowledged knowing victims #1, #2, #3 and #4. Arrest Warrant Affidavit, ¶ 7. In addition, he knew that these males, and most of the other young men identified in the investigation, had mental or psychiatric disabilities and that they were involved in prostitution. Arrest Warrant Affidavit, ¶¶ 7, 27. He informed the investigators that "he 'only' brought the 'boys' to the 'clients," and identified two of the clients as the defendant and Trefzger. Arrest Warrant Affidavit, ¶¶ 7, 27. With regard to the

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[2] A copy of the arrest warrant affidavit is located in the defendant's appendix at A036.

defendant, King specified that he had brought victims #1, #2, #3 and #4 to him and that they had received money in exchange for sexual acts. Arrest Warrant Affidavit, ¶¶ 7, 27. After his arrest, King did not dispute the defendant's statement that King had delivered fifteen to twenty different "boys" to him and that he had been delivering "boys" to him for approximately twenty-five years. Arrest Warrant Affidavit, ¶ 27. King further admitted that the defendant had met all of the victims identified in this investigation through King. Arrest Warrant Affidavit, ¶ 27. King explained that he was "just a gay guy trying to help people." Arrest Warrant Affidavit, ¶ 27.

In his interview with the investigators on August 5, 2016, the defendant stated that he had known King for twenty to twenty-five years and that during that time, King had arranged for younger adult males to have sex with the defendant for money. Arrest Warrant Affidavit, ¶ 8. During the interview, the defendant referred to these young males as "kids" and "boys". Arrest Warrant Affidavit, ¶ 8. He further acknowledged having had sex with eight or ten boys, the last time being approximately four months earlier, during the winter of 2015/2016, and that the last "boy" was victim #3. Arrest Warrant Affidavit, ¶ 8.

Victim #1 told the investigators that he had known King for approximately two to two-and-one-half years and his description of the course of their relationship detailed how King befriended him, offered him a place to "hang around," gave him an opportunity to make money and further provided him with cocaine resulting in him becoming indebted to King, and leading to King introducing him to the defendant and Trefzger. Arrest Warrant Affidavit, ¶¶ 10, 12, 13. Although he denied having had sex with the defendant because he defined sex as being between a man and a woman, victim #1 stated that "others would call the activity he engaged in with [the defendant] and Trefzger sex." Arrest Warrant Affidavit, ¶ 10. Victim #1 acknowledged that the defendant had obtained sexual gratification with him. Arrest Warrant Affidavit, ¶ 14. Victim #1 stated that he met the defendant fifteen to twenty times, that the defendant would pay him $200.00 after each sexual encounter and that he

would then give King $50.00. Arrest Warrant Affidavit, ¶¶ 13, 14.

With regard to victim #2, the investigators received information that he engaged in prostitution with King, that he paid King for narcotics, that he had sex with "business men and older men" at King's mobile home, and that he sometimes would "not use protection while he had sex." Arrest Warrant Affidavit, ¶ 16. Victim #2 admitted knowing King, and stated that after providing drugs to the point that the young men at issue became indebted to him, King then offered them a way to pay off the debt by arranging for them to exchange sexual encounters for money with older men, including the defendant and Trefzger. Arrest Warrant Affidavit, ¶ 19. With regard to the defendant, victim #2 stated that King would give him cocaine and then bring him to have sex with the defendant in the defendant's office, that the defendant would pay him $200.00, and that he would then give King half of that amount. Arrest Warrant Affidavit, ¶ 20. Victim #2 stated that King had brought him to the defendant "twice for sex for money." Arrest Warrant Affidavit, ¶ 20.

Victim #3 described how King befriended him, "got him using drugs, specifically heroin," he then became indebted to King and as a result, King suggested that he could make money to repay the debt by allowing King to deliver him to the defendant for sex. Arrest Warrant Affidavit, ¶ 22. The defendant would pay victim #3, who would then give a portion of that to King. Arrest Warrant Affidavit, ¶ 22. Victim #3 stated that King had delivered him to the defendant at least twenty times. Arrest Warrant Affidavit, ¶ 22.

Victim #4 has known King since 2002 and detailed the course of their relationship consistent with that of the other victims. Arrest Warrant Affidavit, ¶ 23. Victim #4 explicitly referred to having injected narcotics while with King. Arrest Warrant Affidavit, ¶ 24. Victim #4 stated that he had been working as a prostitute for King until 2014 and identified approximately six clients, including the defendant and Trefzger. Arrest Warrant Affidavit, ¶ 23. He specified that he allowed the defendant to perform fellatio on him in exchange for money. Arrest Warrant Affidavit, ¶ 23. Victim #4 would give King approximately one-third of

the money he was paid for the sexual encounter. Arrest Warrant Affidavit, ¶ 23.

Victim #5 has known King for approximately twenty years and detailed the course of their relationship consistent with that of the other victims. Arrest Warrant Affidavit, ¶ 25. The first time he made money for sex was with the defendant and victim #5 stated that King had arranged for him to "see" the defendant fifty to one-hundred times. Arrest Warrant Affidavit, ¶ 25. The defendant would pay him $250.00 and victim #5 in turn would give King $50.00. Arrest Warrant Affidavit, ¶25. Victim #5 further named several other men to whom King introduced him for the purpose of exchanging sex for money. Arrest Warrant Affidavit, ¶ 25.

ARGUMENT

General Statutes § 54-102a, entitled "Venereal Examination and HIV Testing of Persons Charged With Certain Sexual Offenses," provides, in pertinent part, that

> *(b) Notwithstanding the provisions of section 19a-582, the court before which is pending any case involving a violation of . . . any provision of sections 53a-65 to 53a-89, inclusive, that involved a sexual act, as defined in section 54-102b,[3] may, before final disposition of such case, order the testing of the accused person. . . . If the victim of the offense requests that the accused person . . . be tested, the court may order the testing of the accused person . . . 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.

Pursuant to General Statutes § 54-102a the trial court ordered that the defendant either provide current medical documentation pertaining to whether he is suffering from a venereal disease or submit to an examination and, further, ordered that the defendant submit to AIDS/HIV testing and that the results may be provided to the victims at the court's

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[3] General Statutes § 54-102b(c) defines "sexual act" as "contact between the penis and the vulva or the penis and the anus, where such contact involving the penis occurs upon penetration, however slight, or contact between the mouth and the penis, the mouth and the vulva or the mouth and the anus."

discretion. There is no dispute that the trial court's order constitutes an appealable final judgment. See, Argument, § II, p. 9; Defendant's Supplemental Brief ("D.Supp.Br."), pp. 1, 4. There is no dispute that a blood test constitutes a search under both the federal and state constitutions. Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826 (1966); State v. Grotton, 180 Conn. 290, 293, 429 A.2d 871 (1980). In addition, the plain language of General Statutes § 54-102a(b) reveals that the test is not for evidentiary purposes relating to the charged crime, and there is no dispute that the test at issue here will not be used or admitted to determine the defendant's guilt or innocence. See D.Supp.Br., p. 1.

What is in dispute is the legality of the trial court's order. First, the defendant argues that General Statutes § 54-102a(b) requires that a trial court follow General Statutes § 19a-582(d)(8) in ordering AIDS/HIV testing and that because the trial court did not do so, its order is an abuse of discretion. The defendant cannot prevail on this claim because the plain language of General Statutes § 54-102a(b) specifies otherwise and the facts and circumstances of this case support the trial court's exercise of its discretion. Second and third, he argues that General Statutes § 54-102a violates both the fourth amendment to the federal constitution and article first, § 7 of the state constitution. The defendant cannot prevail on these claims because the provisions set forth in General Statutes § 54-102a fall within the special needs exception to the warrant requirement, do not result in a constitutionally unreasonable search and seizure, and Geisler[4] analysis reveals that our state constitution does not provide any protection greater than that already afforded by the federal constitution.

I. ADDITIONAL RELEVANT FACTS

On October 18, 2017, the state, on behalf of the victims, filed a Motion for Venereal Examination and AIDS/HIV testing pursuant to General Statutes § 54-102a. D.App., A0006.

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[4] State v. Geisler, 222 Conn. 672, 684-86, 610 A.2d 1225 (1992).

On December 6, 2017, the defendant filed a Memorandum of Law in Opposition to the state's Request for HIV Testing, arguing that such testing would violate both the fourth amendment to the federal constitution and article first, § 7, of the state constitution. He further argued that testing was not warranted under the facts of this case, asserting that the acts of which he is accused carry a low-risk of infection and he is able to address his own health-related issues, should they exist. D.App., 0009 (Memorandum of Law in Opposition).

Thereafter, pursuant to General Statutes §§ 54-102a(a) and (b), on January 16, 2018 victims represented by Attorney Joel T. Faxon filed a Request to Obtain HIV/STD/Venereal Information Relating to Defendant Bemer. First, the victims requested that the defendant provide current, verified evidence of his HIV and STD status. Second, if such medical documentation was not available, they requested that the defendant undergo an examination to determine his present HIV/STD/Venereal disease status. D.App., A025. They further alleged that there was a good faith basis to believe that the defendant had HIV/AIDS and had failed to disclose such information. D.App. A028. On January 28, 2018, victims represented by Attorney Kevin C. Ferry, filed an almost identical Request.[5] D.App., A028.

At the February 16, 2018 hearing before the trial court, the defendant invoked General Statutes § 19a-582 in support of his assertion that this statute governed how to file motions or requests for AIDS/HIV testing and that, therefore, the state and victims should have used a pseudonym, rather than his name, in making the testing request. Tr. 2/16/18, p. 8. He further argued that this statutory provision required the existence of clear and imminent danger to the public and that such danger did not exist because the allegations were at least two years old, the acts at issue involved fellatio, and there was no evidence of

[5] Upon information and belief, the victim represented by Attorney Gerald S. Sack, filed an almost identical request on or about January 19, 2018. State's Appendix ("St. App."), A-15. Counsel for this victim participated in the hearing on February 16, 2018. Tr. 2/16/18, pp. 1, 30-32.

AIDS/HIV transmission. Tr. 2/16/18, pp. 23, 33, 39, 41.

In contrast, the state argued that General Statutes § 54-102a supersedes § 19a-582 and governs the victims' right to request testing separate and apart from a showing of clear and imminent danger to the public. Tr. 2/16/18, pp. 19-20, 35-36, 41. The confidentiality provisions of § 19a-582, however, are relevant to the test performed as a result of the trial court's order. Tr. 2/16/18, p. 20.

Counsel for the victims first noted the existence of JD-CR-105, entitled "Request by Victim of Sexual Act to Test Defendant for AIDS/HIV," which was marked as state's exhibit 1. Tr. 2/16/18, pp. 15, 18-19; State's Appendix ("St.App."), A-17. This form allows a victim to request that the trial court order a defendant, accused of one of the enumerated crimes, be tested for AIDS/HIV and that the results be disclosed to the victim. Counsel argued that a plain reading of General Statutes § 54-102a, in accordance with General Statutes § 1-2z, reveals that the imminent harm requirement in § 19a-582 is not incorporated into § 54-102a because of the term "notwithstanding." Tr. 2/16/18, p. 37, 28. As to the constitutionality of the testing, counsel argued that this threshold was met because the arrest warrant established the bases for the criminal charges. Tr. 2/16/18, pp. 28-29. With regard to this case, based on the allegations contained in the arrest warrant affidavit, counsel argued that the length of time of the conspiracy charged, the number of victims involved, and the statements by the defendant and King all supported the trial court's granting of the motion and requests. Tr. 2/16/18, p. 27; see also, Tr. 2/16/18, p. 36 (state's argument).

Based on its reading of General Statutes § 54-102a(b), the trial court opined that § 19a-582 governs disclosure of test results and not the preliminary order for testing. Tr. 2/16/18, pp. 9, 22. On March 2, 2018, the trial court issued its order on the state's motion and the victims' requests. The trial court ordered the defendant to provide it, within thirty days, with current medical documentation as to whether he is suffering from any venereal disease. D.App., A007, A026, A029. If the defendant was unable to supply such

documentation, the trial court ordered him "to submit to an examination for such purpose pursuant to General Statutes § 54-102a(a)." D.App., A007, A026, A029. With regard to the requests for AIDS/HIV testing, the trial court further ordered, pursuant to General Statutes § 54-102a(b) and (c), that the defendant submit to such testing and specified that the test results "may be disclosed to the victim at the discretion of the court consistent with the provisions of that section." D.App. A007, A026, A029. The trial court ordered "that no treatment provider conducting the test is to interrogate or inquire of the defendant, in any fashion, any matter relating to the pending case." D.App. A007, A026, A029.

II. THE TRIAL COURT'S ORDER IS AN APPEALABLE FINAL JUDGMENT

Except insofar as the legislature has specifically provided for an interlocutory appeal or other form of interlocutory appellate review, appellate jurisdiction is limited to final judgments of the trial court. State v. Fielding, 296 Conn. 26, 35-36, 994 A.2d 96 (2010). Final judgment in a criminal case occurs upon the imposition of sentence. Fielding, 296 Conn. at 36. Here, the trial court issued its order pursuant to General Statutes § 54-102a, which allows for the testing of a person *accused* of certain sex crimes that involve a "sexual act" as defined in General Statutes § 54-102b(c). Because the trial court issued its order prior to imposition of a criminal sentence, its order is interlocutory.

An otherwise interlocutory order is appealable if it meets one of the two criteria set forth in State v. Curcio, 191 Conn. 27, 463 A.2d 566 (1983). Fielding, 296 Conn. at 37. An otherwise interlocutory ruling is appealable if: (1) the order or action terminates a separate and distinct proceeding; or, (2) the order or action so concludes the rights of the parties that further proceedings cannot affect them. Fielding, 296 Conn. at 37; Curcio, 191 Conn. at 31. Because the trial court's order satisfies either prong of the Curcio test, it constitutes an appealable final judgment and this matter is properly before this Court.

With regard to the first prong of Curcio, a matter is separate and distinct if it is severable from the central cause. State v. Parker, 194 Conn. 650, 654, 485 A.2d 139

(1984). The question to be asked is whether the main action could proceed independent of the ancillary proceeding. Parker, 194 Conn. at 654. Here, the criminal prosecution of the defendant can, and is, moving forward because, although the test results are of great import to the victims, they are not relevant to the prosecution or defense of the charged crimes of patronizing a prostitute who was the victim of human trafficking or of conspiracy to commit human trafficking.[6] Therefore, the underlying prosecution can proceed independent of the order for testing and the first prong of Curcio is satisfied.

With regard to the second prong of Curcio, it focuses on the nature of the right involved, and whether the order threatens the preservation of a right already secured and whether that right will be irretrievably lost unless there is an immediate appeal. Fielding, 296 Conn. at 37. "The right itself must exist independently of the order from which the appeal is taken." (Citation omitted). Fielding, 296 Conn. at 38. Here, a blood test constitutes a search and seizure under both the federal and state constitutions. Schmerber, 384 U.S. at 767; Grotton, 180 Conn. at 293. A defendant's right to be free from an unreasonable search and seizure exists and is a right already secured to the defendant. Once the test is performed, the defendant will have been subject to a search and his right to bodily integrity could not be restored. In addition, because the medical information obtained as a result of the trial court's order will not be admissible for evidentiary purposes, the defendant might not be able to challenge the trial court's order as part of an appeal from a criminal conviction. The trial court's order therefore satisfies Curcio's second prong.

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[6] In contrast, if the state had sought testing for the purpose of taking nontestimonial evidence, i.e. in accordance with Practice Book §§ 40-32 and 40-34 or via a warrant, the trial court's order granting such testing would not meet the Curcio test because it would involve the granting of a discovery request. State v. Grotton, 180 Conn. 290, 292, 429 A.2d 871 (1980). As a matter of discovery, the import of the test results could not be fully apprehended until after trial has concluded and any challenge to the legality of the test or its admissibility into evidence could be fully addressed on direct appeal from a conviction. Grotton, 180 Conn. at 292, 294-95; see e.g., State v. Grant, 286 Conn. 499, 508-18, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271 (2008).

III. STATUTORY TESTING FOR SEXUALLY TRANSMITTED DISEASES, GENERAL STATUTES §§ 54-102a AND 19a-582

General Statutes § 54-102a(b), enacted in the May 1994 special session, was an amendment to an already existing statute, General Statutes § 53a-90, entitled "Venereal examination may be ordered by court." The government interest in testing for, treating, and controlling the spread of, sexually transmitted diseases is part of the health concerns that underlie § 54-102a(b) and these concerns have existed for the past one-hundred years.

Our statutes historically have provided for testing for venereal disease for persons involved in prostitution. Specifically, Public Acts 1919, Ch. 77, entitled "An Act concerning Prostitution," provided punishment for "person[s] who shall receive, or offer" any person for purposes of prostitution, lewdness or assignation. Section 3 specified that "a person infected with venereal disease shall be paroled or placed on probation only upon such terms and conditions as shall insure medical treatment therefore and prevent the spread thereof." This statute further specified that the "court may order any person convicted under the provisions of this act to be examined for venereal disease, by one or more competent physicians." Public Acts 1919, Ch. 77, § 3. This provision remained essentially unchanged in Public Acts 1923, Ch. 278, "An Act Amending An Act Concerning Prostitution," and General Statutes (1930 Rev.) § 6226, "Prostitution; lewdness; assignation."

Beginning in 1943, our statutes provided for the testing of persons accused of various sex related crimes for venereal disease. Specifically, section 739g of the 1943 Supplement to the General Statutes allowed for an examination of a person accused of having committed the crime of rape to determine if he was suffering from any venereal disease, and specified that if such examination disclosed the presence of a venereal disease, the court could issue an order "with reference to . . . treatment or other disposition of such person as the public health and welfare require." This statute further provided that the examination would be conducted at the expense of the state and that

any person who failed to comply with the court's order was subject to a fine or imprisonment. Section 1011h of the 1945 Supplement to the General Statues amended § 739g to add a provision that "[a] report of the result of such examination shall be filed with the state department of health on a form supplied by it." This provision remained unchanged as codified in General Statutes (1949 Rev.) § 8565, and applied to any violation of any provision of chapter 422, offenses against chastity, which included prostitution as codified in § 8548. This provision remained unchanged as codified in General Statutes (1959 Rev.) § 53-241, and applied to any violation of any provision of chapter 944, which included prostitution as codified in § 53-226. The 1969 codification of the penal code did not alter these provisions and General Statutes (Rev. to 1971) § 53a-90 allowed for the examination of an accused, before final disposition of a case, involving a violation of chapter 952, which included prostitution.

With regard to AIDS testing and confidentiality, in 1989 the legislature enacted Public Acts No. 89-246, entitled "An Act Concerning AIDS Related Testing and Medical Information and Confidentiality." The Act was designed and intended to combat the AIDS epidemic by protecting confidentiality and thus encouraging testing which, in turn, would help health care providers "identify those people with the disease, to treat them and to educate them in an attempt to put an end to the epidemic." Doe v. Marselle, 236 Conn. 845, 852, 853, 675 A.2d 835 (1996). In furtherance of this goal, the Act allowed for notification of the partners of infected individuals. Doe v. Marselle, 236 Conn. at 852.

Public Acts No. 89-246 was codified in Chapter 368x, AIDS Testing and Medical Information. Sections 1 through 5 were codified at General Statutes §§ 19a-581 through 19a-585, and section 10 was codified at General Statutes § 19a-590. Section 19a-581 is the definitional section for this chapter. A "protected individual" is a "person who has been counseled regarding HIV infection, is the subject of an HIV-related test or who has

been diagnosed as having HIV infection, AIDS or HIV-related illness." General Statutes § 19a-581 (7). A "partner" is defined as "an identified spouse or sex partner of the protected individual or a person identified as having shared hypodermic needles or syringes with the protected individual." General Statutes § 19a-581(10).

General Statutes § 19a-582 is entitled "General consent required for HIV-related testing. Counseling requirements. Exceptions." Paragraph (a) pertains to obtaining consent for HIV testing. Paragraph (b) addresses limited liability for persons ordering a test without informed consent. Paragraph (c) mandates that counseling and referrals accompany the disclosure of test results. Paragraph (d) contains ten exemptions from the requirement that consent be obtained prior to testing.

General Statutes § 19a-583 is entitled "Limitations on disclosure of HIV-related information." Paragraph (a) specifies when and to whom confidential HIV-related information may be disclosed.

General Statutes § 19a-584 is entitled "Informing and warning of known partners of possible exposure to the HIV virus. Disclosure of HIV-related information to public health officers." Paragraphs (a) and (b) permit public health officers and physicians to inform or warn partners if they "reasonably believe[ ] the protected individual will not inform the partner," and they are further required to "provide or make referrals for the provision of the appropriate medical advice and counseling for coping with the emotional consequences of learning the information and for changing behavior to prevent transmission or contraction of HIV infection." General Statutes § 19a-584(a) and (b). In warning the partners, the public health officer or physician "shall not disclose the identity of the protected individual or the identity of any other partner." General Statutes § 19a-584(a) and (b).

General Statutes § 19a-585 is entitled "Requirements for disclosure of HIV-

related information." Paragraph (a) articulates the statement that must accompany the disclosure of HIV-related information and specifies that the information may not be further disclosed without specific written consent from the protected individual. General Statutes § 19a-590, entitled "Liability for violations," creates a private cause of action for the willful violation of the provisions of chapter 368x.

The next legislative action pertaining to AIDS/HIV testing occurred in 1994. As set forth previously, the provision for AIDS/HIV testing at issue here was enacted during the May 1994 special session. During the regular session, however, similar legislation had been proposed, Substitute House Bill No. 5790 1994 Sess., entitled "An Act Concerning Human Immunodeficiency Virus Testing of Sexual Offenders and the Provision of Certain Services to Victims of Sexual Acts." St.App., A-18. The stated purpose of this Bill was "[t]o allow the victims of certain sexual offenses to request that the court order the offender to be tested for the presence of the etiologic agent for acquired immune deficiency syndrome or human immunodeficiency virus and that the results be disclosed to the victim and the offender and to require provision of certain services to victims of sexual acts." CGA Bill Status; St.App., A-20. The testing provision for this Bill, as set forth in section 2, permitted testing only after conviction. Substitute House Bill No. 5790; St.App., A-18. One of the criticisms of this proposed legislation, in both oral and written testimony before the Judiciary Committee in March 1994, was that the long delay between a sexual assault and conviction rendered test results marginally helpful. Both the Susan B. Anthony Project and the National Organization for Women noted that current law already allowed victims to seek a court order for testing of the assailant, prior to conviction, for venereal disease and, where applicable, for disclosure of the test results. The other criticism was the lack of certainty with testing because a defendant's negative test result did not mean that he was not infected, due to it taking

approximately six months after infection for antibodies to appear, and a positive test result did not mean that the victim had in fact been infected. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 4, 1994 Sess., pp. 1379-1381 (St.App., A-23); see also, written testimony of the Department of Public Health and Addiction Services (St.App., A-27); written testimony of the National Organization for Women (St.App., A-29); written testimony of the Susan B. Anthony Project Sexual Assault Crisis Services (St.App., A-28).

In May 1994, the House entertained an amendment to this Bill, LC0937, House Amendment C, which would allow a trial court to order an AIDS/HIV test prior to conviction. 37 H.R. Proc., Pt. 21, 1994 Sess., pp. 7639 –7641; St. App., A-31. This provision was to be added to the "current law" that permitted testing for venereal disease prior to conviction. 37 H.R. Proc., supra, p. 7642. Representative Farr, the proponent of the amendment, explained that its purpose was to "give peace of mind" to the victim, even if testing was not perfect. 37 H.R. Proc., supra, p. 7651; see p. 7660 (remarks of Representative Ward; victim has right to information to be able to make informed decision). Opponents voiced the same criticism as set forth previously, as to the true meaning of either a negative or positive test result; 37 H.R. Proc., supra, pp. 7648, 7669; and further opposed the amendment because no treatment existed that could be started "immediately." 37 H.R. Proc., supra, pp. 7647, 7650. In support of this amendment, Representative Ward noted that adding AIDS/HIV testing to already existing legislation was consistent with current jurisprudence. 37 H.R. Proc., supra, p. 7642. Representative Simmons also observed that the amendment would contribute to the development of information that could be used to protect others. 37 H.R. Proc., supra, p. 7653. Similarly, Representative Wollenberg noted that such testing would allow the defendant to be treated and may help prevent the spread of AIDS once it is

known that he is infected. 37 H.R. Proc., supra, p. 7667; see p. 7676 (similar remarks of Representative Wassermann); see also, pp. 7673-74 (remarks of Representative Norton noting testing can result in behavioral changes). The House adopted Amendment C, however, this legislation was passed temporarily resulting in it not being enacted as part of the regular session. 37 H.R. Proc., supra, pp. 7678, 7684.

The House revisited AIDS/HIV testing in the May special session. The impetus for including this testing legislation in May Special Session, Public Act 94-6, "An Act Concerning Miscellaneous Provisions Needed to Implement the Budget," was because the state would lose federal funding if it did not enact testing legislation. 37 H.R. Proc. Pt. 25, 1994 May Spec. Sess., p. 9013; 37 S. Proc., Pt. 9, 1994 May Spec. Sess., p. 3343. In adopting this legislation, the legislators referred to it having been debated and previously adopted. 37 H.R. Proc., Pt. 25, May Spec. Sess., p. 9014.

Sections 24, 25, 26 and 27 of Public Act 94-6 pertained to AIDS/HIV testing and counseling. Section 24, currently codified at General Statutes § 54-102b, provided that a trial court entering a judgment of conviction for one of the enumerated criminal offenses that involved a sexual act, as defined by subsection (b) of that section, shall at the request of the victim order the defendant to be tested for AIDS/HIV, and that the results would be disclosed to both the victim and offender. Section 27 amended General Statues § 53a-90 by adding section (b). This section, currently codified at General Statutes § 54-102a(b), provided for the trial court to order a defendant accused of one of the enumerated criminal offenses that involved a sexual act, before final disposition of the case, to be tested for AIDS/HIV, "notwithstanding" the provisions of § 19a-582. Section (c) provided that a report of the examination or test shall be filed with the Department of Public Health and Addiction Services ("'DPH"), that if the examination or test discloses the presence of a venereal disease or AIDS/HIV, the trial

court may make an order, including for "treatment or other disposition of such person as the public health and welfare require." As with the previous statutory provisions, the examination or test shall be conducted at the expense of DPH. In 1995, General Statutes § 53a-90 was transferred to its current section, § 54-102a.[7]

Consistent with §§ 54-102a and 54-102b, the judicial branch promulgated form JD-CR-105, Rev. 10-06, which facilitates a victim's ability to request and obtain testing of a defendant accused of having committed crimes involving a sexual act. St.App., A-17. Similarly, the informational pamphlet from the Office of Victim Services, entitled "Information for Victims of Sexual Assault and Their Families," contains notification that victims of some sexual assaults can ask the court for the defendant to be tested for HIV. Office of Victim Services, Information for Victims of Sexual Assault and Their Families, Section Two: Medical Care (Rev. 10/12), p. 8, found at https://www.jud.ct.gov/Publications/vs030.pdf.

IV. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ISSUING ITS ORDER PURSUANT TO GENERAL STATUTES § 54-102a

The defendant argues that the trial court abused its discretion in ordering him to either disclose current medical information as to whether he is suffering from any venereal disease or to undergo an examination, and ordering him to undergo testing for AIDS/HIV. In part, the defendant argues that the trial court abused its discretion because it failed to

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[7] Section 25 of Public Act 94-6, codified at § 19a-112b, required the department of public health and addiction services ("DPH") to provide victims, of one of the enumerated crimes involving a sexual act, with counseling services pertaining to HIV and AIDS, HIV-related testing, and referral services for appropriate health care and support services. Section 26, codified at § 19a-112c, required that the DPH work with the Connecticut Sexual Assault Crises Services, Inc., to develop educational materials pertaining to HIV and AIDS in relation to sexual assault to be distributed to sexual assault victims. The materials must include information as to the risks associated with HIV and sexual violence, as to testing and risk reduction, and as to referrals and information regarding rape crisis centers and HIV testing sites.

follow the procedures set forth in General Statutes § 19a-582(d)(8).[8] Defendant's Brief ("D.Br."), pp. 4, 5, 6, 7. Based on his assertion that the trial court was required to follow the requirements set forth in § 19a-582(d)(8), the defendant further argues that the trial court abused its discretion because testing will be of no benefit to him; D.Br., pp. 5-6; the state has failed to show that the victims are in "danger" if he is not tested; D.Br., p. 6; no compelling need exists because the victims themselves can be tested; D.Br., p. 7; and the acts that he claims are at issue, i.e., fellatio, carry a low-risk of infection. D.Br. pp. 7-8.

The defendant asserts that "Section 54-102a(b) states that the provisions of § 19a-582, which concern HIV-related testing, apply to § 54-102a(b)." D.Br. p. 4. Because the plain language of § 54-102a(b) specifically excludes this provision from the requirements of General Statutes § 19a-582, there is no merit to the defendant's assertion. It therefore follows that the trial court cannot be said to have abused its discretion by not making findings required by § 19a-582(d)(8). In addition, and as set forth further, below, Argument, § V, p. 30, that the victims can be tested and that fellatio carries a low risk of infection do not undermine the state's concern with public health and do not render the trial court's order an abuse of discretion.

A. Relevant Legal Principles Pertaining To Statutory Construction, A Trial Court's Exercise Of Discretion And Standard of Review

In construing a statute, it is this Court's fundamental objective to ascertain and give effect to the apparent intent of the legislature. State v. Dupigney, 295 Conn. 50, 58, 988

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[8] General Statutes § 19a-582(d)(8)(A) allows for a court to issue an order for testing without consent if it finds a "clear and imminent danger to the public health or the health of the person and that the person has demonstrated a compelling need for the HIV-related test result that cannot be accommodated by other means." This subparagraph further requires that in assessing "compelling need," the trial court "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." Subparagraph (B) requires that in requesting testing, a pseudonym be used in place of the true name of the subject to be tested. Subparagraph (C) provides for notice and an opportunity to be heard, and subparagraph (D) requires, with exceptions, that the court proceeding as to the involuntary test be conducted *in camera*.

A.2d 851 (2010); State v. Jenkins, 288 Conn. 610, 620, 954 A.2d 806 (2008). In doing so, this Court seeks to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of the case. Dupigney, 295 Conn. at 58. When seeking to determine the meaning of a statute, "words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." Dupigney, 295 Conn. at 58-59 (citing General Statutes § 1-1(a)). In accordance with General Statutes § 1-2z, this Court must first consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of the text is plain and unambiguous and does not yield absurd or unworkable results, this Court does not consider extratextual evidence of the meaning of the statute. If, however, the statute is not plain and unambiguous, this Court considers the legislative history and circumstances surrounding the statute's enactment, the legislative policy it was designed to implement, and its relationship to existing legislation and common law principles governing the same general subject matter. Jenkins, 288 Conn. at 620. Issues pertaining to statutory interpretation raise questions of law subject to plenary review on appeal. Jenkins, 288 Conn. at 619.

With regard to a trial court's exercise of discretion, "[s]ound discretion, by definition, means a discretion that is not exercised arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law." State v. Muhammad, 91 Conn. App. 392, 396, 881 A.2d 468, cert. denied, 276 Conn. 922 (2005). An exercise of discretion "requires a knowledge and understanding of the material circumstances surrounding the matter." Muhammad, 91 Conn. App. at 396. When reviewing a trial court's exercise of discretion, this Court makes every reasonable presumption in favor of upholding the trial court's ruling. Muhammad, 91 Conn. App. at 396-97. This Court disturbs an exercise of discretion only if it "has been abused or the error is clear and involves a misconception of

the law." Muhammad, 91 Conn. App. at 396.

B. Section 54-102a(b) Does Not Incorporate The Procedures Set Forth In § 19a-582(d)(8) And The Trial Court Properly Exercised Its Discretion

As set forth previously, General Statutes § 54-102a(b) provides, in pertinent part,

> (b) ***Notwithstanding*** *the provisions of section 19a-582*, the court before which is pending any case involving a violation of . . . 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. . . . If the victim of the offense requests that the accused person . . . be tested, the court may order the testing of the accused person . . . 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.*

(Emphasis added). As set forth previously, § 19a-582 is the statutory provision addressing consent, and the exceptions to that requirement, for the performance of AIDS/HIV testing.

The word "notwithstanding" means that "no matter what any other law may otherwise provide, *the operative clause* of this provision controls." (Emphasis in original). Gay and Lesbian Law Students Ass'n v. Bd of Trustees, 236 Conn. 453, 488-89, 673 A.2d 484 (1996); see Black's Law Dictionary (10th Ed. 2014) (first meaning of "notwithstanding" is "despite."). The first phrase of § 54-102a(b) makes clear that subsection (b), and not § 19a-582, is the governing provision for ordering testing pursuant to § 54-102a(b). 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."

The plain and unambiguous language of § 54-102a(b) establishes that, contrary to

the defendant's assertion, the trial court was not required to apply § 19a-582(d)(8) and, therefore, was not required to find a clear and imminent danger to public health or to the victims and that the state and/or the victims had demonstrated a compelling need for him to be tested. See D.Br., pp. 6-7. Accordingly, the defendant's argument that the trial court abused its discretion because it did not make these findings is unavailing.

Moreover, a review of the record reveals that, in light of the facts and circumstances of this case, the trial court properly exercised its discretion in ordering the defendant to produce current medical information or to undergo testing pursuant to § 54-102a(a), and to undergo AIDS/HIV testing pursuant to § 54-102a(b). First, by incorporating the provisions of chapter 368x, except those requiring consent and precluding disclosure to the victim, the trial court's order in this case furthers the government's interest in protecting the health of its citizens, including the defendant, and stemming the spread of sexually transmitted diseases and AIDS/HIV by making sure that the defendant has received counseling, in part, as to available medical treatment and medical services, and of the need to notify his various partners. General Statutes §§ 19a-582(c), 54-102c. Second, the provisions of § 19a-584 will ensure that if public health officers reasonably believe that the defendant will not inform his numerous partners, they are authorized to notify these partners and inform them that they may have been exposed to HIV and, at that time, provide medical advice, emotional counseling and, in furtherance of limiting the spread of the disease, information "for changing behavior to prevent transmission or contraction of HIV infection." General Statutes § 19a-584.

The ability to notify partners in this case is particularly acute because the defendant has been engaging in sexual conduct with numerous young men over the past twenty to twenty-five years. Investigators identified fifteen victims with whom the defendant has engaged in sexual conduct. These young men, in turn, engaged in sexual conduct not only with Trefzger but with other unidentified clients who were known to the investigators. The

arrest warrant affidavit further reveals that the young men were drug users, with one specific reference to victim #4 having injected narcotics, and that one of the victims, victim #2, admitted that he sometimes did "not use protection while he had sex." Arrest Warrant Affidavit, ¶¶ 16, 24.

The Centers for Disease Control and Prevention ("CDC") has identified people with "higher risk factors" of having an HIV infection as those with "more than one sex partner, other STDs, gay and bisexual men and individuals who inject drugs." CDC | GetTested | Frequently Asked Questions | "What is HIV and should I be tested?"; St.App., A-71; see Connecticut State Department of Public Health, HIV Care & Prevention ("Gay and bisexual men, injection drug users . . . represent other populations at greatest risk of infection."); St. App., A-96. As of the end of 2015, an estimated 1.1 million people in the United States had HIV and, of those people, approximately 15%, or 1 in 7 did not know that they were infected. CDC | Basic Statistics | HIV Basics | "How many people have HIV in the United States?"; St.App., A-87. With regard to testing, the CDC estimates that "more than 90% of all new infections could be prevented by proper testing and linking HIV positive persons to care. . . . It is one of the most powerful tools in the fight against HIV." CDC | GetTested | Frequently Asked Questions | "What is National HIV Testing Day?"; St.App., A-73.

The importance to the victims and society as to whether the defendant may have been a source of infection, however, has not resulted in a violation of the defendant's privacy. Rather, with regard to the AIDS/HIV test result, the confidentiality provisions of § 19a-583, and the cause of action for a willful violation of the defendant's privacy as set forth in § 19a-590, fully protect the defendant. Moreover, to further protect the defendant with regard to the underlying criminal prosecution, the trial court ordered that no treatment provider, when conducting the test, was to question the defendant on any matter relating to the criminal prosecution.

The facts and circumstances of this case present the confluence of three high-risk factors for HIV transmission. Based on the trial court's knowledge and understanding of the case before it, prostitution of young men with other men, involving multiple victims over a very long period of time with men who have engaged in IV drug use, and in light of the public health concerns associated with the high-risk behaviors present here and the statutory purpose to provide the victims and defendant's partners with counseling and treatment, the trial court did not act arbitrarily or willfully resulting in an abuse of discretion.

V. TESTING PURSUANT TO GENERAL STATUTES § 54-102a DOES NOT VIOLATE THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION

The defendant challenges the constitutionality of § 54-102a. D.Br., p. 9. Because legislative enactments carry with them a strong presumption of constitutionality, the party challenging the constitutionality of a validly enacted statute bears the "heavy burden of proving the statute unconstitutional beyond a reasonable doubt." State v. Anderson, 319 Conn. 288, 300, 127 A.3d 100 (2015). The defendant cannot meet his burden.

Specifically, the defendant argues that § 54-102a is unconstitutional because it does not fall within the "special needs" exception to the warrant requirement. D.Br., pp. 9, 10. In support of his argument, the defendant presents the special needs exception as being limited to four fact based categories of cases. D.Br., pp. 10-11. The special needs exception is not limited to these categories but, rather, more broadly applies to situations involving a search outside traditional concerns pertaining to crime detection. Here, the governmental interest in the health of its citizens and, more particularly in addressing HIV/AIDS infections, outweighs the defendant's individual interest in not undergoing a blood test, the results of which are subject to confidentiality protections. The search authorized by § 54-102a therefore falls comfortably within the ambit of what is reasonable under the fourth amendment.

A. Relevant Legal Principles Pertaining To Unreasonable Searches And Seizures

There is no dispute that a blood test constitutes a search under the fourth amendment. Schmerber, 384 U.S. at 767. The fourth amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Maryland v. King, 569 U.S. 435, 446-47, 133 S. Ct. 1958 (2013), *citing* Schmerber, 384 U.S. at 768. In other words, the fourth amendment does not proscribe all searches and seizures, but only those that are unreasonable. King, 569 U.S. at 447; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619, 109 S. Ct. 1402 (1989). Whether a search is reasonable "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Skinner, 489 U.S. at 619; see King, 569 U.S. at 448 (intrusion must be reasonable both in scope and manner of execution).

Although "some quantum of individualized suspicion" is preferred to support the reasonableness of an intrusion, it is not "a prerequisite to a constitutional search or seizure . . . . [T]he Fourth Amendment imposes no irreducible requirement of such suspicion." King, 569 U.S. at 447; see Skinner, 489 U.S. at 624 (a showing of individualized suspicion is "not a constitutional floor, below which a search must be presumed unreasonable."). Rather, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." Skinner, 489 U.S. at 624; see Chandler v. Miller, 520 U.S. 305, 308, 117 S. Ct. 1295 (1997). The determination of reasonableness requires a balancing of the promotion of legitimate governmental interest against "the degree to which the search intrudes" upon an individual's fourth amendment interests. King, 569 U.S. at 448; Skinner, 489 U.S. at 619.

The "special needs" exception to the warrant requirement allows for searches in the absence of individualized suspicion when special needs pertaining to "concerns other than crime detection" are alleged in justification of the intrusion. Chandler, 520 U.S. at 313-14; Skinner, 489 U.S. at 619. The special needs inquiry is context specific, focusing on the competing private and public interests at issue. Chandler, 520 U.S. at 314; Skinner, 489 U.S. at 619. The special need must be important enough to override the fourth amendment's requirement of individualized suspicion. Chandler, 520 U.S. at 318, 323 ("where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable.'").

B. Testing Pursuant To General Statutes § 54-102a Is Constitutionally Reasonable And Falls Within The Special Needs Exception

As to the defendant's private interests, they are minimal here. First, although a blood test constitutes a search for purposes of the fourth amendment, the intrusion occasioned by a blood test is not significant and a blood test does not constitute an unduly extensive imposition on an individual's privacy and bodily integrity.[9] Skinner, 489 U.S. at 625; see Schmerber, 384 U.S. at 771 and n.13 (blood tests commonplace, quantity of blood extracted minimal, and for most "the procedure involves virtually no risk, trauma, or pain."). Second, the circumstances justifying testing are clearly set forth in § 54-102a(b) based on the nature of the charged crime and whether it involved a statutorily defined sexual act and testing therefore is not entirely "suspicionless." United States v. Ward, 131 F.3d 335, 342 n.6 (3rd Cir. 1997). Third, the permissible limits of the intrusion that may result from the results of the testing, in particular to whom and how results may be disseminated, are

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[9] Although there are HIV/AIDS tests that can be performed on oral fluids and urine, drawing blood is a more intrusive manner of testing; Birchfield v. North Dakota, __ U.S. __, 136 S. Ct. 2160, 2185 (2016); and, because the defendant might be required to submit to a blood test, the state's argument assumes *arguendo* that a blood test is the testing method that must meet the reasonableness requirement. See CDC | Testing | HIV Basics | "What kinds of tests are available, and how do they work?"; St.App., A-90.

narrowly circumscribed by statute. See Skinner, 489 U.S. at 622, 624 (because circumstances justifying toxicological testing and the permissible limits of testing defined narrowly and specifically in authorizing regulations, warrant would add little to the assurances of certainty and regularity and not essential to render intrusions at issue constitutionally reasonable).

In contrast, the government has a compelling interest in testing in furtherance of protecting the health and welfare of its citizens by stemming the spread of HIV/AIDS. Identifying infected individuals allows them to receive treatment for their individual health needs and education for changing behaviors and for preventing infection of others. This identification also permits public health officials, when necessary, to inform partners of the tested individual who, in turn, can undergo testing and, if necessary, treatment. The governmental interest is even more compelling now than in 1989 and 1994 in light of the number of undiagnosed people who, as set forth further below, Argument § VI, p. 36, with the benefit of treatment can live longer, healthier lives and decrease their viral load so as to no longer be a source of contagion.

At least twelve other courts have addressed the constitutionality of statutorily authorized HIV testing, both before and after conviction, and all have concluded that such testing falls within the special needs exception to the warrant requirement. United States v. Ward, 131 F.3d 335, 340-42 (3rd Cir. 1997) (testing after conviction); Virgin Islands v. Roberts, 756 F.Supp. 898, 904 (D. Virgin Islands 1991) (testing before conviction); State v. Superior Court In and For County of Maricopa, 187 Ariz. 411, 930 P.2d 488, 491-94 (Ariz. Ct. App. 1997) (testing of juvenile sex offender; A.R.S. § 13-1415(A) permits testing before conviction); Love v. Superior Court, 226 Cal.App.3d 736, 276 Cal.Rptr. 660, 662-66 (Cal. App. 1991) (testing after conviction for prostitution; Cal. Penal. Code § 1202.1); Fosman v. State, 664 So.2d 1163, 1164-66 (Fla. Dist. Ct. App. 1995) (testing before conviction; F.S.A. 960.003); Adams v. State, 269 Ga. 405, 498 S.E.2d 268, 271-72 (Ga. 1998) (testing before

conviction); People v. Adams, 149 Ill.2d 331, 597 N.E.2d 574, 579-84 (Ill. 1992) (testing after conviction for prostitution); State in Interest of J.G., 151 N.J. 565, 701 A.2d 1260, 1265-71 (N.J. 1997) (testing before or after conviction); People v. J.G., 171 Misc. 2d 440, 655 N.Y.S.2d 783, 788-90 (N.Y. Sup. Ct. 1996) (testing after conviction); State v. Houey, 375 S.C. 106, 651 S.E.2d 314, 316-17 (S.C. 2007) (testing before conviction); State v. Handy, 191 Vt. 311, 44 A.3d 776, 779-85 (Vt. 2012) (testing after conviction); Matter of Juveniles A, B, C, D, E, 121 Wash.2d 80, 847 P.2d 455, 458-62 (Wa. 1993) (testing after conviction).

These cases identify two overriding governmental interests. First, the ability to stem the spread of HIV, in particular because tested individuals receive counseling to medically and emotionally address the disease. As first set forth by the Illinois Supreme Court in People v. Adams,

> There are few, if any, interests more essential to a stable society than the health and safety of its members. Toward that end, the State has a compelling interest in protecting and promoting public health and, here, in adopting measures reasonably designed to prevent the spread of AIDS. "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." (Jacobson v. Massachusetts, (1905), 197 U.S. 11, 27, 25 S. Ct. 358, 3362, 49 L.Ed. 643, 650). . . . Once persons who are carriers of the virus have been identified, the victims of their conduct and the offenders themselves can receive necessary treatment, and, moreover, can adjust their conduct so that other members of the public do not also become exposed to HIV. In this way, the spread of AIDS through the community at large can be slowed, if not halted. We believe that the HIV testing requirement advances a special governmental need. See Love v. Superior Court, (1990), 226 Cal.App.3d 736, 743, 276 Cal.Rptr. 660, 664 (upholding California law requiring HIV testing of persons convicted of prostitution).

People v. Adams, 597 N.E.2d at 580-81, quoted in Adams v. State, 498 S.E.2d at 271; Fosman, 664 So.2d at 1165-66; People v. J.G., 655 N.Y.S.2d at 790; Houey, 651 S.E.2d at 317; see Roberts, 756 F.Supp. at 904 (government has a "substantial interest" in curbing HIV transmission); Love, 276 Cal.Rptr at 662, 664 (control of communicable disease valid

exercise of state's police power; counseling and testing of infected persons important component of prevention strategy, especially of prostitutes); Matter of Juveniles A, B, C, D, E, 847 P.2d at 460-61 (state has compelling interest in combating spread of AIDS).

The second recognized governmental interest is to protect victims' rights. Roberts, 756 F.Supp. at 903; State v. Superior Court In and For County of Maricopa, 930 P.2d at 493 (noting Arizona constitution's Victims' Bill of Rights); State in Interest of J.G., 701 A.2d at 1268 (noting heightened awareness of victims' rights at federal and state levels; citing Victims of Crime Act of 1984 and state constitutional amendments); Matter of Juveniles A, B, C, D, E,, 847 P.2d at 461; Conn. Const. art. I. § 8(b). These rights focus on both the potential medical and emotional benefits to the victims. State in Interest of J.G., 701 A.2d at 1268 (state has compelling interest in making information available when it directly affects physical and mental well-being of survivors of sexual assault). The New Jersey Supreme Court noted that, in particular, survivors of sexual assault constitute a "significant class of victims whose unique needs have been acknowledged" by the federal Department of Justice as well as in caselaw. State in Interest of J.G., 701 A.2d at 1268; see Handy, 44 A.3d at 784 (discussing "obvious trauma and suffering endured by victims of sexual assault").

As to protecting victims' medical well-being, although testing a defendant may not be definitive, as the New Jersey Supreme Court noted, medical authorities nevertheless have recommended that a victim obtain as much information as possible about the defendant's status in order to make an informed treatment decision, noting that such information "could alter the survivor's course of prophylactic antiviral therapy." State in Interest of J.G., 701 A.2d at 1269-70; see Roberts, 756 F.Supp. at 903-04 (status of potential source of infection important factor in deciding prophylactic courses of treatment). Courts therefore have rejected the argument, suggested by the defendant here; D.Br., pp. 6-7, 14-16; that the potentially inconclusive nature of HIV tests defeats the government's overriding interest.

Adams v. State, 498 S.E.2d at 272; Matter of Juveniles A, B, C, D, E,, 847 P.2d at 461-62. Although an HIV test may not be dispositive of either a victim's or defendant's HIV status, "it is effective enough to justify its use," and "[l]ack of perfection does not render a legislative scheme invalid." Matter of Juveniles A, B, C, D, E,, 847 P.2d at 461; see People v. Adams, 597 N.E.2d at 578 (court's task to determine if legislation constitutional, not if it necessarily provides the best or most effective means of curtailing spread of disease).

With regard to victims' emotional well-being, again, even despite the potentially inconclusive nature of the results, courts have recognized the psychological benefit to the victims of having the perpetrator tested because it can provide "peace of mind" to a victim, particularly if the test results are negative. State v. Superior Court In and For County of Maricopa, 930 P.2d at 494; Adams v. State, 498 S.E.2d at 272; State in Interest of J.G., 701 A.2d at 1270-71 ("The strongest case for imposed preconviction testing rests on the psychological benefits it may offer the survivor."); Handy, 44 A.3d at 784; Matter of Juveniles A, B, C, D, E, 847 P.2d at 461 ("Where a victim is left to wonder as to an attacker's HIV status, the 'mental anguish suffered by the victim . . . is real and continuing, and the intrusion upon defendant of a routine drawing of a blood sample is very minimal and commonplace.'") Therefore, the defendant's argument that providing peace of mind cannot justify the trial court's order; D.Br., p. 7; is unavailing and does not undermine the government's interest.

With regard to whether requiring probable cause for testing could jeopardize the government's interests, as other courts have noted, the answer is "yes." To require probable cause that the defendant suffered from HIV as a basis for ordering testing would jeopardize the governmental interest because it would be nearly impossible to show probable cause. The near impossibility exists because HIV infection does not usually manifest clear outward symptoms, especially with the current advances in medical treatment. State v. Superior Court In and For County of Maricopa, 930 P.2d at 492; State in

Interest of J.G., 701 A.2d at 1267; Houey, 651 S.E.2d at 317; Handy, 44 A.3d at 780-81. However, that the defendant had sexual contact with the victim does provide some modicum of individualized suspicion. See State v. Superior Court In and For County of Maricopa, 930 P. 2d at 492.

In seeking to establish that the trial court had abused its discretion in ordering testing, and in furtherance of his public policy analysis for purposes of his state constitutional claim, the defendant suggests that because of the lapse of time since the last sexual act, testing would reveal "nothing" about the victims' medical status, would not affect their treatment options, and would provide no medical benefit. D.Br., pp. 7, 16. The governmental interest in preventing the spread of HIV/AIDS and in protecting the health of the victims "are advanced regardless of the time of testing." Houey, 651 S.E.2d at 318; see also, State in Interest of J.G., 701 A.2d at 1271 (knowledge about AIDS treatment and diagnosis constantly evolving; "court should be 'hesitant to dismiss a victim's desire to know the HIV status of . . . assailant'"). Moreover, the defendant's argument appears to support the need for pre-conviction testing; it is unavailing because nothing in the statute contains a temporal limitation; and, as set forth above, even in cases where testing occurs post-conviction, the passage of time has not negated the benefits of testing. See Isom v. State, 722 So.2d 237, 238, 239 (Fla. App. 1998).

In seeking to establish that the trial court abused its discretion, the defendant also argues that testing is not warranted because the sexual act that he alleges occurred, fellatio, carries a minimal risk of infection. D.Br., pp. 7-8. The government's interest in testing is not negated by a minimal risk of exposure. Rather, because there is no cure for AIDS, the potential harm from an infection is extremely high. Matter of Juveniles A, B, C, D, E, 847 P.2d at 462. The potential harm is greater if an infected individual is not treated and, because effective treatments do exist, the benefits of testing are even greater and outweigh the alleged minimal risk of exposure.

Finally, where, as here, there are restrictions on the dissemination of the defendant's test results, courts have concluded that this provision supports the reasonableness of the statutory requirement for HIV testing. State v. Superior Court In and For County of Maricopa, 930 P.2d at 493; State in Interest of J.G., 701 A.2d at 1271; Handy, 44 A.3d at 785; Matter of Juveniles A, B, C, D, E, 847 P.2d at 460.

In sum, § 54-102a implicates concerns other than crime detection. The government has a substantial and compelling interest in protecting the health of its citizens and the rights of victims of crime, in particular, victims of sexual assault. In contrast, a defendant's undergoing a blood test is a minimal intrusion that does not outweigh the governmental interests involved. Moreover, § 54-102a and the applicable sections of chapter 368x protect the confidentiality of the test results and authorize testing limited by the charged crime and statutorily defined sexual acts. Consequently, § 54-102a falls within the special needs exception and constitutes a constitutionally reasonable search.

VI. GENERAL STATUTES § 54-102a IS CONSTITUTIONAL UNDER ARTICLE FIRST, § 7 OF THE STATE CONSTITUTION

The defendant also argues that § 54-102a is unconstitutional under our state 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." D.Br., p. 12. As discussed further, below, reasonableness is the touchstone of both the fourth amendment and article first, § 7. Within the criminal context, this Court has balanced law enforcement interests and individuals' privacy interests when determining whether to provide an exception to the constitutional preference for warrants. State v. Miller, 227 Conn. 363, 384, 385, 630 A.2d 1315 (1993). Our state's preference for warrants has provided a basis for departure from fourth amendment jurisprudence when, for example, the impracticality of obtaining a warrant no longer exists; Miller, 227 Conn at 385; this Court has sought to uphold the deterrent effect of the exclusionary rule; Geisler, 222

Conn. at 686-90; State v. Marsala, 216 Conn. 150, 165-71, 579 A.2d 58 (1990); or our common law basis appears to differ from the development of federal jurisprudence. State v. Oquendo, 223 Conn. 635, 650-52, 613 A.2d 1300 (1992). As a review of the Geisler[10] factors reveals, however, nothing within the contours of our state constitution provides a basis to depart from federal jurisprudence. Rather, the balancing test that gives rise to the federal special needs exception for searches and seizures occurring outside the law enforcement context, is essentially the same rationale that this Court has applied in determining reasonableness for purposes of article first, § 7. This overlapping rationale therefore supports adoption of the federal special needs test for article first, § 7. Accordingly, for the same reasons as previously discussed under the federal constitution, Argument, § V, § 54-102a is constitutional under our state constitution.

As to the first and fifth Geisler factors, the text of the federal and state constitutional provisions and the historical considerations, these factors favor the state's position that § 54-102a is constitutional. As this Court has previously observed, the language of article first, § 7, was based on the fourth amendment and was adopted with little debate. State v. Mikolinski, 256 Conn. 543, 548, 775 A.2d 274 (2001). "Thus, the circumstances surrounding the adoption of article first, § 7, lend weight to the view that, in most cases, a practice permitted under the fourth amendment is permissible under article first, § 7." Mikolinski, 256 Conn. at 548-49. In determining whether article first, § 7 has been violated, this Court uses the same analytical framework that is used under the federal constitution. State v. Kelly, 313 Conn. 1, 15, 95 A.3d 1081 (2014). Even though, as the defendant notes; D.Br., p. 13; this Court has "held that in some circumstances article first, § 7, provides greater protections than those afforded under the federal constitution, [this Court] also ha[s] observed that the standards governing [the] analysis for purposes of article first, § 7, mirror

[10] State v. Geisler, 222 Conn. at 685.

those set forth by the United States Supreme Court . . . with regard to [federal] fourth amendment analysis." (Internal quotation marks omitted). Kelly, 313 Conn. at 15.

With regard to the second Geisler factor, holdings and dicta of Connecticut appellate courts, this factor favors the state. Although there are no prior decisions interpreting § 54-102a or applying the special needs test, this Court has previously recognized that "[t]here can be no ready test for determining [the] reasonableness [of a search and seizure] other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." Mikolinski, 256 Conn. at 549. This Court judges "the permissibility of a particular law enforcement practice by balancing its intrusion on the individual's interests against its promotion of legitimate state governmental interests, and examine the intrusion to determine whether it is the minimum search necessary under the circumstances." Mikolinski, 256 Conn. at 549, 550-51 (applying balancing test in concluding sobriety checkpoints constitutionally reasonable under article first, § 7; government interest in preventing motorist driving under influence of alcohol outweighed minimal intrusion on individual's privacy); see State v. Darwin, 25 Conn. Supp. 153, 158, 198 A.2d 715 (1964) ("In passing upon the issue of reasonableness, the importance of public benefit, which the legislature had in mind, is to be balanced against the seriousness of the restriction of private rights guaranteed by the constitution."). As part of the balancing test, this Court evaluates "the degree to which the seizure advances the public interest." Mikolinski, 256 Conn. at 550. In assessing reasonableness among alternative techniques, the choice among alternatives to address a serious public interest, remains with the governmental officials, not the courts. Mikolinski, 256 Conn. at 550-51.

"Because reasonableness is the touchstone of both the fourth amendment and article first, § 7, persuasive federal precedent applying that standard is particularly relevant to our state constitutional inquiry." Kelly, 313 Conn. at 15-16. The third Geisler factor, federal precedent, therefore favors the state because, as previously discussed, Argument,

§ V, under the fourth amendment HIV testing is constitutionally reasonable in accordance with the special needs exception.

The fourth Geisler factor, sister state decisions, also favors the state. As set forth previously, at least twelve other courts have concluded that HIV testing is constitutionally reasonable under the special needs exception. Argument, § V, p. 26. Eleven of these cases have resolved the issue under the federal constitution. Five states - Florida, Illinois, New Jersey, South Carolina and Vermont - have concluded that HIV testing of defendants is constitutionally reasonable under their state constitutions because it falls within the special needs exception. Fosman, 664 So.2d at 1165-66 (Fla. 1995); People v. Adams, 597 N.E.2d at 577, 578-84 (Ill. 1992); State in Interest of J.G., 701 A.2d at 1262, 1265-71 (N.J., 1997); Houey, 651 S.E.2d at 316-18 (S.C. 2007); Handy, 44 A.3d at 778-85 (Vt. 2012).

At least thirty states and the federal government have statutes that allow for HIV testing of defendants, either before or after conviction, and either mandatorily or as a matter of discretion. See, OLR Research Report, AIDS; Prostitution, Scope: Court cases; Other States law/regulations; Connecticut laws/regulations, September 23, 1998 – Table 1; https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1096.htm (last visited 1/14/19); St.App., A-98; and **Federal**: 34 U.S.C.A. § 12391 (formerly cited as 42 U.S.C.A § 14011) (testing before conviction); **California**: Cal. Health & Safety Code, § 120155 (testing before conviction); **Florida**: F.S.A. § 960.003(2) & (4) (testing before conviction at request of victim; court ordered testing after conviction); **Nevada**: N.R.S. § 201.356 (mandatory testing when arrested for prostitution); **New Jersey**: N.J. Stat. Ann. § 2C:43-2.2 (testing before or after conviction) ; **New York**: NY Crim. Pro. § 390.15 (testing after conviction); **South Carolina**: S.C.L. § 16-3-740(B) & (E) (testing before conviction at request of victim; court ordered testing after conviction); **Virginia**: Va. Code Ann. § 18.2-62 (testing before conviction); § 18.2-346.1 (mandatory testing after conviction for prostitution); **Vermont**: 13 V.S.A. § 3256 (testing after conviction). Despite the number of jurisdictions that allow for

HIV testing of defendants, the defendant has identified only two cases, State v. Farmer, 16 Wash.2d 414, 805 P.2d 200 (Wa. 1991), and Sate v. Handy, 191 Vt. 311, 44 A.3d 776 (Vt. 2012), that he asserts support his position. D.Br, pp. 14-15. The defendant's reliance on these cases is misplaced.

With regard to State v. Farmer, 805 P.2d at 202-03, the defendant's reliance on this case is misplaced because the purpose of the testing appeared to be to determine whether the defendant should receive an exceptional sentence. The Washington Supreme Court noted, however, that "[w]here there is a legitimate compelling State interest, HIV testing of a convicted criminal defendant may be justified." Farmer, 805 P.2d at 209. In reviewing whether Farmer's HIV test was statutorily authorized, the Court focused on RCW 70.24.330 and noted that none of the statutory exceptions allowing for non-consensual testing applied to him. Farmer, 805 P.2d at 208. Although not applicable to Farmer, the fourth statutory exception permitted non-consensual testing if "otherwise expressly authorized by this chapter." Farmer, 805 P.2d at 208. What the defendant here fails to acknowledge is that RCW 70.24.340, entitled "Convicted persons--Mandatory testing and counseling for certain offenses--Employees' substantial exposure to bodily fluids--Procedure and court orders," is the statutory provision that is analogous to §§ 54-102a and 54-102b and, as the Washington Supreme Court concluded in Matter of Juveniles A, B, C, D, E., 121 Wash.2d 80, 847 P.2d 455, 459-62, HIV testing under this statutory provision is constitutionally reasonable in light of the state's compelling interest in combating the spread of AIDS and in protecting the rights of victims. The facts and circumstances of Farmer are inapposite and do little to support the defendant's position.

As to State v. Handy, although the defendant acknowledges that the Vermont Supreme Court concluded that HIV testing satisfied the special needs test, he appears to rely on this case for the proposition that testing years after the sexual act is not medically useful. D.Br., pp. 14-15. As set forth previously, Argument, § V, pp. 28-29, not only the

Handy Court, but numerous other courts, have rejected this argument, concluding that there is utility in testing even if it occurs years after the fact. The defendant also relies on Handy to suggest that the sixth Geisler factor favors him because our legislature enacted P.A. 94-6 when it did so to avoid losing federal funding. D.Br., p. 17. Although the loss of federal funding may have provided the impetus for the timing of the legislation, that impetus does not negate the purpose of enacting § 54-102a(b). The defendant's reliance on Handy is misplaced because the Vermont Supreme Court rejected this argument based on the legislative history which revealed a legislative intent unrelated to preserving federal grant money. Handy, 44 A.3d at 784; see State in Interest of J.G., 674 A.2d at 631; People v. J.G., 665 N.Y.S2d at 789-90. Therefore, Handy does little to support the defendant's position.

As to the sixth Geisler factor, public policy considerations, this factor supports the state position. According to the Connecticut Department of Public Health, HIV "is one of the most devastating epidemics in modern history." CT DPH, HIV Care & Prevention; St.App., A-96. Although no effective cure for HIV currently exists, with proper medical care, HIV can be controlled. CDC | About HIV/AIDS | HIV Basics | "What is HIV?"; "Is there a cure for HIV?"; St.App., A-81, A-84. Getting medical care and taking medicines regularly helps infected individuals live a longer, healthier life and lowers the risk of infecting others by decreasing the amount of HIV. CDC | GetTested | Frequently Asked Questions | "What is National HIV Testing Day?"; St.App., A-73. The CDC estimates that "more than 90% of all new infections could be prevented by proper testing and linking HIV positive persons to care," and that testing "is one of the most powerful tools in the fight against HIV." CDC | GetTested | Frequently Asked Questions | "What is National HIV Testing Day?"; St.App., A-73. In the United States, the CDC has estimated that 1.1 million people had HIV at the end of 2015 and that of those people, approximately 15%, or 1 in 7, did not know that they were infected. CDC | Basic Statistics | HIV Basics | "How many people have HIV in the

United States?"; St.App., A-87. People with HIV can remain asymptomatic for a decade or longer and, during this time, can transmit the disease to others. CDC | About HIV/AIDS | HIV Basics | "What are the stages of HIV?"; St.App., A-82.

There still is no cure for HIV/AIDS but there is effective treatment. Because effective treatment now exists that can reduce the likelihood of contagion and improve an infected person's overall health, identifying those who may not know that they are infected furthers the governmental interest in the health and well-being of its citizens and in stemming the spread of HIV/AIDS. Therefore, because § 54-102a(b) furthers the important public policy interest of stemming HIV infections, the sixth Geisler factor supports the state's position that this statute is constitutionally reasonable under article first, § 7.

The foregoing analysis of the Geisler factors establishes that § 54-102a(b) is a reasonable search under article first, § 7 and the defendant's argument to the contrary therefore fails.

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully requests that this Court affirm the trial court's order for medical information and testing pursuant to General Statutes § 54-102a.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

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