

**SUPREME COURT: HON. TIMOTHY MAZZEI
COUNTY OF SUFFOLK: STATE OF NEW YORK**

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In the Matter of the Application of

RAYMOND A. TIERNEY
District Attorney of Suffolk County

**AFFIRMATION
IN OPPOSITION**

Indictment No. 71889-23

For an Order requiring
REX A. HEUERMANN
To Provide Buccal Samples

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DANIELLE COYSH, ESQ., an attorney duly admitted to practice law before the courts of the State of New York, hereby affirms under the penalty of perjury that:

1. I am one of the attorneys assigned by the Court and the Assigned Counsel Defender Plan of Suffolk County to represent defendant Rex A. Heuermann on the matters pending before this Court under Indictment No. 71889-23.
2. I offer this Affirmation in opposition to the People's request for an Order requiring defendant Rex A. Heuermann to provide buccal samples.
3. The factual assertions contained within the instant Affirmation are premised upon the assertions made and facts alleged in the People's *Order to Show Cause and Affirmation in Support*, which were served upon this Court on the first of August 2023.

THE PEOPLE HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT REX A. HEUERMAN COMMITTED THE CRIMES CHARGED IN INDICTMENT NO. 71889-23

4. The Criminal Procedure Law of the State of New York [hereinafter CPL] §245.40 (e) gives the Court the authority, upon motion of the prosecution, to require a defendant to provide

non-testimonial evidence, including permitting the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof.

5. CPL §245.40 authorizes the Court to order the defendant to provide such non-testimonial evidence only upon a showing by the prosecution that (1) probable cause exists to believe the defendant has committed the crime, (2) a clear indication that material evidence will be found, and (3) that the method used to secure such evidence is safe and reliable.

6. CPL §245.40 is the codification of the three-prong test established by the Court of Appeals in the case of *Matter of Abe A.*, 56 N.Y.2d 288, 452 N.Y.S.2d 6 (1982).

7. In the case before this Court, the People maintain that they have met their burden as to the first prong of the test, i.e., a showing that probable cause exists to believe the defendant has committed the crime, based upon the fact that defendant Rex Heuermann has been indicted for the offenses. (See People's *Affirmation in Support*, page 7, paragraphs 28).

8. As authority for their position in this regard, the People cite a lower court ruling from a Westchester County court, *People v. Beechum*, 25 Misc.3d 1214(A); 901 N.Y.S. 2d 908 (Supreme Ct. Westchester County, 2009). The People further cite to the cases of *Colon v. City of New York*, 60 N.Y.2d 78 (1983) and *Dunnigan v. Weissman*, 181 A.D.3d 731 (2nd Dept., 1992) as implicitly supporting their proposition.

9. The People's reliance on these cases, however, is misplaced.

10. *Colon v. City of New York*, 60 N.Y.2d 78, 468 N.Y.S.2d 453 (1983) involved issues arising from a lawsuit for malicious prosecution. The *Colon* Court's discussion of the significance of an indictment was within the context of the effect that factor had upon the elements of an action

for malicious prosecution. *Colon, supra* at 82. Specifically, the element requiring a showing of a lack of probable cause.

11. The context of the *Colon* Court's discussion is readily identifiable by the precedent cited by the Court following its statement that a Grand Jury action creates a presumption of probable cause. The Court cited to four civil cases, *Lee v. City of Mt. Vernon*, 49 N.Y.2d 1041; *Caminito v. City of New York*, 25 A.D.2d 848; *Eberhardt v. Consolidated Edison*, 1 A.D.2d 1001 and *Boose v. City of Rochester*, 71 A.D.2d 59; all four of which involved issues arising from actions claiming of malicious prosecution and/or false imprisonment. The *Colon* Court's cited precedents continued with a cite to *Restatement, Torts 2d* and American Law Reports, *Malicious Prosecution – Effect of Grand Jury Indictment on Issue of Probable Cause*, 28 ALR 3d 748.

12. The Second Department, in the case of *Elie v. City of New York*, 183 A.D.3d 867, 123 N.Y.S.3d 672 (2nd Dept., 2020) was even more specific in applying qualifying language to the significance of an indictment while citing to the *Colon* case. **“Regarding malicious prosecution (emphasis added), once a suspect has been indicted, the grand jury action creates a presumption of probable cause.”** *Elie v. City of New York, supra* at 871.

13. By contrast, in criminal cases, the court has not discharged the prosecution of its burden to demonstrate the requisite probable cause before an order will issue merely by virtue of the fact that there has been an indictment.

14. In the case of *People v. Oliver*, 92 A.D.3d 900, 938 N.Y.S.2d 619 (2nd Dept., 2012) the issue was whether the trial court had properly granted the People's motion to compel the defendant to provide a buccal swab sample for DNA analysis. The Court of Appeals held that the People's moving papers had failed to establish probable cause to believe the defendant committed the crime

at issue. The Court ruled that the Assistant District Attorney's papers submitted in support of the motion contained only conclusory assertions and that the trial court had not been presented sufficient evidence to support granting the motion. Consequently, the Court held that it had been error for the trial court to grant the People's motion and overturned the defendant's conviction, remanding the case back to the lower court for a new trial.

15. On remand, the People again sought an order to compel the defendant to provide a buccal swab sample. *People v. Oliver*, 38 Misc.3d 546, 955 N.Y.S.2d 481 (County Court, Suffolk County, 2008). The trial court, consistent with the ruling of the Appellate division, required the People to make a factual showing establishing probable cause independent of the indictment before issuing the order.

16. The holdings and practices in both *Oliver* cases are consistent with the black letter language of CPL §245.40 (1). CPL §245.40 (1) requires an independent and objective review of the factual assertions of the People's moving papers to determine the existence of the requisite probable cause.

17. In the case before this Court, the assertions made in the People's moving papers are inadequate to establish probable cause to believe defendant Rex A. Heuermann committed the crimes charged in the indictment.

18. The allegations contained within the People's moving papers, in sum and substance, assert:

a) That a questioned hair, identified as Q2, was recovered from the bottom of the burlap utilized to constrain the remains of Megan Waterman.

b) That, on January 26, 2023, defendant Rex A. Heuermann discarded a pizza box which contained a partially eaten pizza crust and a used napkin, which was subsequently recovered by FBI Special Agent Craig Matteo.

c) That a laboratory identified as Forensic Laboratory #1 was able to develop a nuclear DNA profile from a cutting of the used napkin.

d) That laboratory identified as Forensic Laboratory #2 was able to develop a mitochondrial profile from the Q2 hair and a mitochondrial profile from swabs taken from the pizza crust.

e) And that a comparison of the mitochondrial profile from the Q2 hair and the mitochondrial profile from the pizza crust swabs indicated that the mitochondrial DNA profiles were the same, at an EMPOP database rate that would exclude 99.96% of the population.

19. The People essentially concede that they have no evidence establishing that defendant Rex A. Heuermann actually ever came into contact with the pizza crust or the used napkin found in the discarded pizza box. In paragraph 32 of the People's *Affirmation in Support* the People acknowledge that presently they can state nothing more than Rex A. Heuermann is *purported* to have used or touched those items. Thus, by the People's own admission, the nexus between the partially eaten pizza crust and used napkin and the defendant Rex A. Heuerman is at best a matter of conjecture and assumption, not fact.

20. In paragraph 7 of the People's *Affirmation in Support* passing reference is made to other purported evidence. However, those references are general and conclusory in nature. No specific facts are provided.

21. The closest paragraph 7 comes to providing "facts" is a recitation of a description given by an unidentified person of a male in his forties. 6'4", largely built with dark bush hair and glasses *believed to be* the last person to see Amber Costello alive. There is no claim defendant Rex A. Heuerman was ever identified through either a corporeal or photographic identification as that person.

22. Taken as a whole and viewed in the light most favorable to the People, the assertions contained in the People's moving papers might be construed as rising to the level of a reasonable suspicion, but that is a far cry from the standard of probable cause required to justify granting the order sought by the People.

23. Consequently, the People have failed to meet their burden of demonstrating to this Court the probable cause needed to satisfy the first prong of the *Abe A* test and their motion should be denied.

SHOULD THIS COURT GRANT THE PEOPLE'S MOTION, THEN DEFENDANT REQUESTS A MODIFICATION OF THE ORDER TO PROVIDE THAT AN ATTORNEY FOR THE DEFENDANT, OR A DULY DESIGNATED AGENT THEREOF, BE PRESENT DURING THE TAKING OF THE BUCCAL SWAB

24. Should this Court grant the People's motion and direct the defendant Rex A. Heuermann to submit to the taking of a buccal swab, then the defense requests a modification of the People's proposed order directing that Rex A. Heuermann's defense attorney, or a duly designated agent thereof, be permitted to be present at the taking of the buccal swab.

25. Although the unobtrusive presence of a defense attorney will not impede or complicate the taking of the buccal swab, it will ensure that the post-arraignment interaction between the defendant, Rex A. Heuermann, and members of law enforcement does not escalate, intentionally

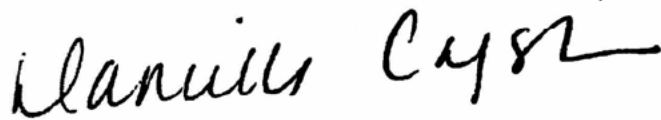
or otherwise, to an impermissible infringement of his constitutional rights under the 4th, 5th, and 14th Amendments to the United States Constitution.

26. The presence of defendant Rex A. Heuermann's attorney will also insure that, should Mr. Heuermann have questions or concerns over the process, they may be addressed immediately, thus avoiding and unwarranted delay in the process.

WHEREFORE, it is respectfully requested that this Court deny the People's Motion to Order the defendant Rex A. Heuermann to submit to the taking of a buccal swab or, in the alternative, that the People's proposed order be modified to permit defendant Rex A. Heuermann's defense attorney, or a duly designated agent thereof, to be present at the taking of the buccal swab.

Dated: Central Islip, New York
August 7, 2023

Respectfully submitted,



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[REDACTED]

cc: Raymond A. Tierney, Suffolk County District Attorney
Hon. Timothy Mazzei
Clerk, Criminal Court, Special Term