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THE PEOPLE OF THE STATE OF NEW YORK,

ORDER

Case No. 71889-23

HON. RAYMOND A. TIERNEY

District Attorney, Suffolk County
200 Center Drive
Riverhead, NY 11901

-against-

MICHAEL BROWN, ESQ.

Attorney for Defendant
320 Carleton Avenue, Suite 2000
Central Islip, NY 11722

REX A. HEUERMANN

Defendant.

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By order to show cause dated August 1, 2022, the People seek an order pursuant to CPL 240.40 (2) (b) (v), compelling defendant to permit the taking of oral swab samples.

The defendant submitted opposition papers dated August 7, 2022.

Pursuant to CPL 240.40, the Court may order the defendant to provide non-testimonial evidence in the form of “blood, hair or other materials from his body in a manner not involving an unreasonable intrusion thereof or a risk of serious physical injury thereto” (CPL 240.40 [2] [b] [iii], [v]). However, it is well settled that such an order is premised upon “(1) probable cause to believe the suspect has committed the crime, (2) a ‘clear indication’ that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable” (Matter of Abe A., 56 NY2d 288, 291 [1982]). Additionally, the Court “must weigh the seriousness of the crime, the importance of the evidence to the investigation and the unavailability of less intrusive means of obtaining it, on the one hand, against concern for the suspect’s constitutional right to be free from bodily intrusion on the other” (id.).

In the matter at hand, the defendant is charged with three counts of Murder in the First Degree (Penal Law § 125.27 [1] [a] [x] [i]) and three counts of Murder in the Second Degree (Penal Law § 125.25 [1]).

The Court finds that contrary to the defendant’s contentions, there is probable cause to believe that the defendant committed the crimes charged and, therefore, a basis to compel the

buccal swab. On December 11, 2010, Police Officer John Malia was conducting a training exercise with his K9 partner, "Blue," along Ocean Parkway in Gilgo Beach, New York. During that time, Blue discovered human remains which were later identified as those of Melissa Barthelemy. Ms. Barthelemy's cause of death was later determined to be a homicide. On December 13, 2010, the Suffolk County Police Department located three additional sets of human remains within a quarter mile of the discovery of Ms. Barthelemy's remains. The three additional sets of remains were later identified as Maureen Brainard-Barnes, Megan Waterman, and Amber Costello. The cause of death for all three women was later determined to be homicidal in nature. Since that time, a voluminous amount of evidence was recovered including, *inter alia*, DNA, phone records, cell site information, defendant's telephone billing records, defendant's internet searches, defendant's financial records, the fact that the defendant owned a 2002 Chevrolet Avalanche which was discovered to have been used to pick up Ms. Costello immediately prior to her disappearance, and the fact that the defendant matched the description of the "John" who was believed to be the last person who saw Ms. Costello alive. In addition, a hair was recovered from underneath the burlap material which was utilized to constrain the remains of Ms. Waterman. Said hair was linked by DNA analysis to a person of Caucasian/European descent.

Four additional hairs were also recovered from three of the victim's bodies and were found to have belonged to the same DNA profile of that of the first hair that was found. These hairs were later compared to a female DNA profile retrieved from an abandoned water bottle recovered from outside of the defendant's home and were believed to belong to the defendant's wife or a closely related individual. Since that time, the defendant's wife, daughter and stepson have provided buccal swabs upon consent for further DNA analysis. After all of the hairs were sent to an outside forensic laboratory, that laboratory was able to generate a DNA profile for the initial hair found with Ms. Waterman on July 31, 2020. On April 27, 2023, that same initial hair was delivered to another outside forensic laboratory which conducted further analysis.

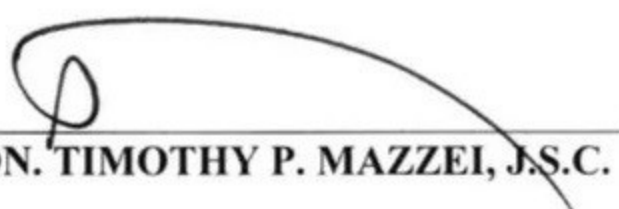
On March 14, 2022, the defendant became a suspect in this investigation, and on January 26, 2023, FBI Special Agent Craig Matteo collected a pizza box containing partially eaten pizza crust and a used napkin which were abandoned by the defendant outside of his office in Manhattan. On January 27, 2023, it was determined that the DNA profile on the pizza crust and on the napkin were a match. Thereafter, on March 23, 2023, the crust and napkin were sent to an outside forensic laboratory and on June 12, 2023, the laboratory determined that the mitochondrial profile from the initial hair found with Ms. Waterman and the mitochondrial profiles from the napkin and pizza crust were all the same. As a result, the defendant could not be excluded from being the contributor of the hair recovered from Ms. Waterman.

Despite the aforementioned probable cause, the Court notes that it has been held that a grand jury indictment alone is enough to provide the requisite probable cause for the taking of a buccal swab from a defendant (*see People v Kluge*, 180 AD3d 705 [2d Dept 2020]; *People Roshia*, 133 AD3d 1029 [3d Dept 2015], *aff'd* 28 NY3d 989 [2016]).

In light of the foregoing, the Court finds that a comparison of the defendant's sample with the evidence obtained, to wit, the initial hair recovered from Ms. Waterman, and the DNA found on the pizza crust and napkin, will yield probative material evidence, whether it is inculpatory or not. Therefore, it is

ORDERED that the People's motion is granted, and the oral swab sample shall be taken from the defendant while he is in the presence of his attorney.

This shall constitute the Decision and Order of the Court.


HON. TIMOTHY P. MAZZEI, J.S.C.