Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18525
Y/kmg

_____AD3d_____ Submitted - January 10, 2008

ROBERT A. SPOLZINO, J.P.
HOWARD MILLER
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2007-10696 DECISION, ORDER & JUDGMENT

In the Matter of Jayson Marino, petitioner,
v Barbara Kahn, etc., et al., respondents.

(Index No. 3852/07)

Stephen N. Preziosi, P.C., Smithtown, N.Y., for petitioner.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Grazia DiVincenzo of counsel), for respondent.

Proceeding pursuant to CPLR article 78 to prohibit the respondents from enforcing an order of the County Court, Suffolk County (Kahn, J.), dated October 3, 2007, which directed the petitioner to furnish buccal swab samples upon notice from the District Attorney in connection with the investigation of the assault of a named individual.

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs or disbursements; and it is further,

ORDERED that the temporary stay granted on consent of the parties on November 21, 2007, is vacated.

It is well settled that "a court order to obtain a blood sample of a suspect may issue provided the People establish (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). The People satisfactorily established each of these elements. Upon balancing the seriousness of the crime, the importance of the evidence

to the investigation, and the unavailability of less intrusive means of obtaining the evidence, on the one hand, against a concern for the petitioner's constitutional right to be free from bodily intrusion on the other (*id.*), we conclude that the petitioner failed to demonstrate "a clear legal right to the extraordinary remedy of prohibition" (*Matter of DeFilippo v Rooney,* 46 AD3d 681).

SPOLZINO, J.P., MILLER, DILLON and McCARTHY, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court