

**Matter of McIntosh**

2023 NY Slip Op 34820(U)

March 21, 2023

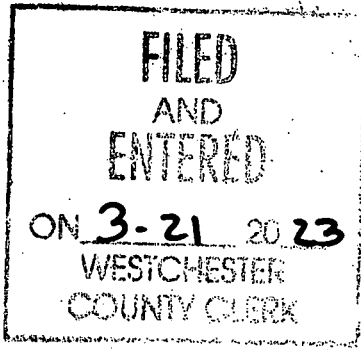
Supreme Court, Westchester County

Docket Number: Indictment No. 70071-23

Judge: Susan M. Capeci

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At a Criminal Term of the Supreme Court of the State of New York, County of Westchester, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York on the 21st day of March, 2023.

PRESENT: HON. SUSAN M. CAPECI  
ACTING SUPREME COURT JUSTICE

SUPREME COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
IN THE MATTER

OF

THE APPLICATION TO REQUIRE  
**ROBERT MCINTOSH** TO PERMIT THE  
TAKING OF A BUCCAL SAMPLE FROM HIS BODY

**ORDER**

Indictment No.: 70071-23

-----X  
CAPECI, J.

By Order to Show Cause dated March 1, 2023, with accompanying affirmation and memorandum of law, the People move for an order pursuant to CPL §240.40(2)(b)(v) requiring defendant, Robert McIntosh, to permit the taking of DNA samples from his body, specifically by a buccal swab of his mouth. The defendant, represented by counsel, has not submitted any opposition to the People's application.

The defendant was charged by indictment with criminal possession of a weapon in the second degree (P.L. 265.03(1)(b)), criminal possession of a weapon in the third degree (P.L. 265.023(1)), criminal possession of a firearm (P.L. 265.01-b(1)), attempted assault in the third degree (P.L. 110/120.00(1)), and menacing in the second degree (P.L. 120.14(1)), based upon acts alleged to have been committed on January 26, 2022. It is alleged that the defendant, who was the victim's boyfriend at the time,

menaced her with a handgun that he possessed inside the residence 463 East 5<sup>th</sup> Street in Mount Vernon, NY. She called 911 during the altercation with the defendant, during which he is also alleged to have slapped, punched and choked her. After she called 911, he put the gun in another bedroom. The police arrived outside, and the victim ran out of the apartment. The defendant eventually exited the apartment, and was placed under arrest.

Following the incident, police officers secured the residence while other officers obtained a search warrant to search the premises for a black firearm described by the victim. A detective then recovered a firearm from the location, while wearing latex gloves. It was loaded and operable. The grip, handle, slide, and trigger were swabbed for DNA evidence.

The People now seek a DNA sample from the defendant in the form of a buccal sample, to be compared to the samples taken from the firearm recovered from the residence to determine whether the defendant's DNA profile matches any evidence recovered from the firearm.

Pursuant to CPL §240.40(2)(b)(v), the People may make an application in the court in which an indictment is pending for an order permitting the taking of blood, hair or other materials from a defendant's body. The standard of review governing the issuance of such an order requires the People to establish: "(1) probable cause to believe the [defendant] 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); see also Matter of Santorelli v District Attorney of Westchester County, 252 AD2d 504 (1998)).

It is the finding of this Court that the People have sustained their burden of proof pursuant to Matter of Abe A. After a careful balancing of the severity of the crime, the need for the corporeal evidence and the absence of less intrusive means of obtaining it against the defendant's constitutional rights (see Matter of Abe A., supra at 291; Matter of Santorelli v District Attorney of Westchester County, supra), it is hereby

ORDERED, that ROBERT MCINTOSH permit the taking of DNA samples via a buccal swab from his mouth; and it is further


ORDERED, that said DNA samples will be taken by an individual designated by the Westchester County District Attorney's Office who is qualified to take such samples, including but not limited to appropriate personnel at the Westchester County Jail or County Courthouse in White Plains, NY; and it is further

ORDERED that the defendant's counsel shall be notified in advance and permitted to be present during the taking of the buccal swab from the defendant; and it is further

ORDERED, that said DNA samples will be taken by said individual in accordance with standard medical and/or forensic procedures; and it is further

ORDERED, that the samples be immediately turned over to the Westchester County Department of Laboratories and Research, or a representative of the Westchester County District Attorney's Office.

Dated: White Plains, New York  
March 21, 2023



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HON. SUSAN M. CAPECI  
A.J.S.C.

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