

cause to believe that the respondent is sufficiently dangerous to require confinement in a secure treatment facility during pendency of the proceedings herein and that lesser conditions of supervision will not be sufficient to protect the public. See Judge Lynch's decision in *Mental Hygiene Legal Service v Spitzer*, __ F. Supp. 3d __, 2007 WL 4115936 (S.D.N.Y).

The first determination this Court must make is whether there is probable cause to believe that the respondent is, indeed, a "detained sex offender". In relevant portion to these proceedings, a "detained sex offender" includes "...a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is... A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article..." MHL §10.03 (g)(4). The effective date of Article 10 of the Mental Health Law is April 13, 2007.

The respondent herein was convicted of attempted robbery in the third degree, PL §110/160.05, having pled guilty to such crime on

December 13, 2004. On January 24, 2005, he was sentenced as a second felony offender to an indeterminate sentence of one year, six months to three years incarceration. Attempted robbery in the third degree is a "designated felony". See MHL §10.03 (f). Such was clearly committed by the respondent prior to the effective date of MHL Article 10. Respondent is clearly in the custody of an agency with jurisdiction with respect to such designated felony and being detained.

"Sexually motivated" means "...that the act or acts constituting a designated felony were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor." MHL §10.03 (s). It is the petitioner's contention that there is probable cause to believe that the "designated felony" committed by the respondent was "sexually motivated".

The sole witness who testified at the probable cause hearing conducted herein was a psychologist licenced in the State of New York, Dr. Erika Frances. This Court determines that she was a very credible and well-informed witness. All factual determinations

related to this Court's probable cause determination are based upon her testimony and the documents admitted into evidence at the hearing.

The essential details of the underlying incident related to the "designated felony" conviction of the respondent are that he came up behind a 14-year old female, grabbed her vagina and then stole her purse and ran. In a homework assignment of the sex offender program that respondent attended while incarcerated, respondent admitted to having an urge "to feel on" the victim which precipitated him grabbing and holding her vagina. (This Court credits such statement as truthful notwithstanding that it appears that admission of the sexual offense was required to complete the program.) It is the expert opinion of Dr. Frances, that there clearly was a sexual motive for respondent's conduct. Furthermore, it should be noted that even when defense counsel sought to impeach this opinion of Dr. Frances by asking whether there could be other motives for someone grabbing the genitals of the victim, to wit: degrading them, frightening them, physically hurting them, to embarrass them, or to

establish control, it was the expert opinion of Dr. Frances that in fact all of these factors can play a role in sexual motivation and gratification. This Court determines that there is probable cause to believe that the "designated felony" was "sexually motivated" and that respondent accordingly, is a "detained sex offender."

This Court next must determine as to the issue of whether there is probable cause to believe that the respondent is a sex offender requiring civil management, is whether there is probable cause to believe that the respondent, as a "detained sex offender," "...suffers from a mental abnormality". MHL §10.03 (q). "Mental abnormality" is defined as "... a congenital or acquired condition, disease or disorder that affects the emotional, cognitive or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct". MHL §10.03 (i).

Ample evidence was presented at the hearing that respondent suffers from a "mental abnormality", to wit: personality disorder

not otherwise specified. Various criteria to support such a diagnosis are distortions in the way someone thinks, feels, relates to others and impulse control. As to respondent's thinking, respondent has described himself as someone with "twisted thinking". He blamed the victim for being out late at the time of the incident. He consistently denied culpability for the instant offense as well as for his previous sex offenses (two convictions for attempted sexual abuse, PL §110/130.55, in 1997). As to the way respondent feels, respondent frequently in the past admitted to being angry and to having an explosive temper. As to the way respondent relates to others, respondent has had interpersonal problems in relating to his girlfriend as well as his wife. He admitted to Dr. Frances that he uses females to financially support him. As to respondent's impulse control, respondent has demonstrated that he suffered from an urge to grab the vagina of the complainant. Respondent furthermore has demonstrated an inflexible and pervasive pattern of non-conforming behavior that affects him across different areas of his life; to wit: repeated criminal behavior, problems while incarcerated,

interpersonal problems because he was incarcerated, and impact to his ability to sustain employment because he was incarcerated.

It is the opinion of Dr. Frances, to a reasonable degree of professional certainty, that respondent's personality disorder does predispose him to engage in sexually offending behavior. Psychological testing of the respondent conducted by Dr. Frances, with two specific testing tools, to wit: the Static -99 test and the MnSOST - R test were predictive that respondent has a high risk for sexually re-offending and recidivism. This Court concludes that there is probable cause to believe that respondent suffers from a "mental abnormality" and that he is accordingly, a sex offender requiring civil management.

Finally, this Court must determine whether there is probable cause to believe that the respondent is sufficiently dangerous to require confinement in a secure treatment facility during pendency of the proceedings herein. As noted herein, it is the expert opinion of Dr. Frances that respondent has a high risk for sexually re-offending and recidivism. It is her opinion that respondent is

sufficiently dangerous to require treatment in a secure facility and that there is no less restrictive alternative that would protect the public sufficiently from the respondent. It should be noted that the respondent has done very poorly in the past while under parole and probation supervision, having failed repeatedly to comply with the conditions of his parole and probation. The respondent did not complete the sex offender program that he attended while incarcerated having been discharged from the program after receiving a severe disciplinary violation. It is this Court's considered opinion the respondent's failure to comply with parole and probation supervision in the past indicates that release of the respondent to the community while these proceedings are pending would not be appropriate. Based upon respondent's poor past performance, this Court concludes that respondent would not be compliant with less restrictive alternatives that would included attending a sexual offender program in the community while at liberty. This Court further concludes that less restrictive alternatives would not be sufficient to protect the public and that, accordingly, there is

probable cause to believe that the respondent is sufficiently dangerous to require confinement in a secure treatment facility during pendency of the proceedings herein. Such confinement is therefore ordered herein.

The foregoing constitutes the order, opinion and decision of this court.

STEPHEN A. KNOFF, J.S.C.