



is probable cause to believe that the respondent suffers from a mental abnormality and therefore, is a sex offender requiring civil management. See MHL §10.03 (q). Next, 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 the 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*, 2007 WL 4115936 (S.D.N.Y.).

At the outset, this Court notes that respondent's conviction for attempted rape in the first degree on November 21, 2000 qualifies him as a sex offender, in that he was convicted of a felony defined in article one hundred thirty of the penal law of this state. See, MHL §10.03 (p) (1). In addition, this Court recognizes that respondent is a detained sex offender as defined in MHL §10.03 (g) (1), and is currently in the custody of the New York State Department of Correctional Services (DOCS).

This Court must determine 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).

The sole witness who testified at this probable cause hearing herein was a psychologist licensed in the State of New York, Dr. Paul Etu. This Court determines that he was a very credible and well-informed witness. All factual determinations related to this Court's probable cause determination are based upon his testimony and the documents admitted into evidence at the hearing.

Ample evidence was presented at this hearing that respondent suffers from a "mental abnormality". In support of his findings, and as a result of a personal interview of the respondent and a

review of various documents, Dr. Etu articulated the following factors; "...there's a long criminal history which suggest the violation of social norms as evidenced by his violation of the law, recurrent deceitfulness. He gave a number of different stories before he was arrested, a number of times after his arrest and even at the time of my interview with him. The rap sheet also shows various aliases he's used at times he's been arrested. A number of his actions seem to be very impulsive, certainly aggressive. A number of times he's used weapons in his criminal acts, and the violent rapes and attempted rape that he was charged and convicted of that certainly would lead me to believe that he shows a disregard to the safety of others by violating their rights and their physical being...". [H-29] When Dr. Etu discussed the respondent's criminal acts, particularly the sexual criminal acts with the respondent "... he showed no remorse for having committed those acts and seemed to have little remorse for or sympathy towards the victims". [H-30] Dr. Etu learned that much of the respondent's childhood was spent in foster homes and

institutions and that he was a troubled youth. In fact, the respondent advised the doctor that he had been the victim of sexual abuse at one of the group or foster homes. [H-31].

The respondent also denied having any mental health issues despite the fact that the record shows he was counseled a number of times over the years for such. He also denied the use of illicit drugs even though the respondent's record reflected drug and alcohol use and treatment.

Dr. Etu determined that the respondent suffers from an anti-social personality disorder and that, indeed, there is evidence that such disorder has existed since respondent's early childhood. While Dr. Etu concedes that this finding of anti-social personality disorder, by itself, is insufficient to conclude that respondent suffers from a "mental abnormality" as defined in MHL Article 10, Dr. Etu concludes that respondent's mental condition meets the statutory criteria of "mental abnormality". He bases this determination upon respondent's prior criminal history of committing sexual offenses, his predisposition to commit such

offenses in the future and that respondent has demonstrated that he has major difficulty in controlling his conduct related to sexual impulses. Psychological testing of the respondent conducted by Dr. Etu with a specific testing tool, to wit: the Static 99 test, predicted that respondent would have a high risk of sexually re-offending.

Based upon all the evidence presented at the probable cause hearing, 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 the pendency of the remaining proceedings. As noted previously, it is the expert opinion of Dr. Etu that respondent has a high risk for sexually re-offending. It is his 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 from the respondent.

In evaluating whether respondent is sufficiently dangerous to require confinement in a secure facility, Dr. Etu relied on his interview with the respondent, the respondent's criminal and disciplinary history, actuarial tables and psychological tools. In viewing the respondent's Static -99, the respondent scored a 7, which indicates a high risk for re-offending [H-80,83]. "At his Static-99 score of 7, in the next five years, the likelihood of his being reconvicted of another sexual offense is about 33 percent and in ten years it's about 43 percent..."[H-83]. Dr. Etu concluded that respondent, as compared to the average person, is 42 times more likely in the next five years to commit a contact sexual offense and 54 times more likely in the next ten years. [H-83,84]. The doctor concluded that he believed the respondent to be "...sufficiently dangerous that he might very well act out again in a sexually violent manner at this time. I know of no other alternative other than a secure treatment facility during

the pendency of the outcome of a trial" [H-83].

It should be noted that the respondent has done very poorly while under parole supervision, actually having committed an attempted rape in the first degree on November 21, 2000 while under parole supervision. Additionally, the respondent was unable to complete a sex offender program that he attended while incarcerated, having been discharged from the program for a disciplinary issue. Also, the respondent's criminal history includes a period of the last three decades and he has had a number of disciplinary infractions while incarcerated.

Based on the respondent's poor past performance, this Court must conclude that the respondent would not be compliant with less restrictive alternatives. 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 the pendency of these proceedings. Such confinement is therefor ordered herein.

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

---

STEPHEN A. KNOFF, J.S.C.