2019 IL App (1st) 180813-U

FOURTH DIVISION
June 28, 2019

No. 1-18-0813

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re COMMITMENT OF MICHAEL LEMBERGER,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 06 CR 80020
v.	)	
	)	
Michael Lemberger,	)	Honorable
	)	Peggy Chiampas,
Respondent-Appellant).	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly found that respondent was not entitled to an evidentiary hearing when he failed to show probable cause that circumstances had changed since his previous reexamination such that he was no longer a sexually violent person; and (2) the trial court did not abuse its discretion in denying respondent's request to appoint an expert.

¶ 2 Respondent Michael Lemberger stipulated to being a sexually violent person (SVP) under the Sexually Violent Persons Commitment Act (SVP Act) (725 ILCS 207/1 *et seq*. (West 2006)) and was civilly committed to the Illinois Department of Human Services (DHS) in 2007.

Under the SVP Act, a person may be found to be a SVP after having been convicted of a sexually violent offense, and is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2016). Once the SVP has been civilly committed, the State must file a review and evaluation every 12 months to determine whether the committed individual has made enough progress for conditional release or a change in condition such that the individual is no longer a SVP. 725 ILCS 207/55(a) (West 2016). The State filed annual motions to continue respondent's civil commitment. In February 2018, the trial court considered the State's motions for findings of no probable cause based on the annual reexamination reports for 2015, 2016, and 2017, and granted the State's motions finding no probable cause for an evidentiary hearing. Respondent appeals, arguing that (1) probable cause exists to believe respondent is no longer a SVP because the diagnosis in the annual reexamination reports changed three times in two years and the diagnosis is not recognized by the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-5); and (2) the trial court abused its discretion in denying respondent's request to appoint Dr. John Fabian as an expert witness.

¶ 3 In December 2006, the State filed a petition to commit respondent as a SVP under the SVP Act. The petition was based on Dr. Ray Quackenbush's diagnosis of respondent with paraphilia, not otherwise specified (NOS), nonconsenting persons, as well as personality disorder, NOS, with antisocial and narcissistic features. In Dr. Quackenbush's report, he detailed respondent's criminal history as well as treatment history.

¶ 4 In 1980, respondent was convicted of one count of rape and sentenced to six years in prison (case number 80 C 3341). In the 2006 interview with Dr. Quackenbush, respondent stated

that he used drugs and drank with his 16-year-old girlfriend when he was 18. She did not want to have sex with him and he became aggressive and "pushed the issue." He pled guilty to rape.

¶ 5 In 1987, respondent was convicted of aggravated criminal sexual assault with a weapon and aggravated kidnapping (case number 85 C 60046901) in South Holland, Illinois, and sentenced to concurrent terms of 10 years in prison. The crimes occurred in August 1985, when respondent drove a 15-year-old victim to a park against her wishes. He told the victim to exit the vehicle and walk toward a river. He told the victim to remove her clothing and when she refused, respondent threatened to kill her with a knife. The victim then removed her clothing and respondent "pushed her down and forcibly had sexual intercourse with her." Respondent had intercourse with her several times and forced her to put his penis in her mouth. Respondent also slapped and choked her. After a couple hours the victim told respondent if he drove her home, then she would not say anything. Instead, respondent drove her to his house. He gave her beer and she threw up. Respondent drove her back to the park and he forced additional vaginal and oral intercourse upon her again.

¶ 6 In 1995, respondent was convicted in three cases of aggravated criminal sexual abuse (case numbers 95 CR 11214, 95 CR 11215, and 95 CR 11216). Respondent pled guilty and was sentenced to 24 years in prison, with the sentences to be served concurrently. These offenses occurred in 1993 when respondent was the roommate of a woman and her 13-year-old daughter. Respondent would give the teen daughter and her two 13-year-old friends alcohol and marijuana. The teen daughter told one of her friends that she was dating respondent. When the victims were under the influence of the drugs and alcohol, respondent would have the girls play "Truth or Dare," which included dares to remove clothing. One victim estimated they played the game around 100 times with respondent. Often the victims and respondent would be naked and then

dared them to touch body parts of another. The aggravated criminal sexual abuse offenses involved touching the breasts and vagina, inserting his finger in the girls' vaginas, and placing his penis in the mouth of one of the victims. He threatened to tell at least one of the victim's parents that she was using marijuana if she did not perform oral sex. He also told her that he would kill her if she told anyone what had happened.

¶ 7 In a November 2006 interview, respondent admitted to "getting high" and that he "made a pass" at two young girls, but claimed both girls were 15 years old. He then admitted he committed the offenses as written in court records. Also in that interview, respondent alleged that he victimized approximately 30 different teenage girls, with the youngest victim being 12 years old. Dr. Quackenbush's report included details from a 2004 mental health evaluation in which respondent stated, "I've had consensual sex with adult women but it's like taking Tylenol 4's. To me forced sex with an underage girl is like shooting up pure heroin. It's more intense. If I could get a drug like that I'd be on it all the time."

¶ 8 In respondent's case, Dr. Quackenbush used three actuarial instruments: the Static-99, the Minnesota Sex Offender Screening Tool Revised (MNSOST-R), and the Hare Psychotherapy Checklist-Revised (PCL-R). Respondent scored in the "moderate to high" range category on the Static-99 and specifically scored a 4. Respondent scored a 15 on the MNSOST-R, which placed him in the "high risk" category to repeat as an offender. On the PCL-R, respondent scored 16 on Factor 1, which is indicative of a selfish, callous and remorseless use of others," and was in the 100th percentile rank among male inmates. Respondent scored 16 on Factor 2, which indicates a chronically unstable antisocial lifestyle, which was in the 84th percentile of male inmates. His total score was in the 96th percentile, and based on these results, respondent "appears to manifest a high degree of psychopathic traits relative to incarcerated adult male offenders."

¶ 9 On January 23, 2007, respondent stipulated that he was a SVP and the trial court committed him to institutional care. Under section 55 of the SVP Act (725 ILCS 205/55 (West 2014)), respondent has been reexamined every 12 months. Dr. Robert Brucker diagnosed respondent with "paraphilia, [NOS], sexually attracted to adolescent females, nonexclusive type" during respondent's 2007 annual reexamination. The same diagnosis was entered in his 2008 annual reexamination by Dr. Brucker, in 2009 by Dr. Christina Heath, in 2010 by Dr. Brucker, and in 2011 and 2012 by Dr. Richard Travis.

¶ 10 Dr. Travis's reexaminations in 2011 described the evidence of this diagnosis as follows:

> "[Respondent] has acknowledged forcibly raping two adolescent females and engaging in sexual activities with several other adolescent females while they were intoxicated. He continues to admit to being sexually attracted to females as young as 12 years old. He has been incarcerated or detained for most of his adult life for these sexual behaviors.
>
> The Nonexclusive Type specifier indicates that he is not solely attracted to adolescent females."

¶ 11 In the 2011 report, Dr. Travis noted that respondent denied ever stating that "Forced sex with an underage girl is like shooting up pure heroin."

¶ 12 In the 2014 reexamination by Dr. Travis, Dr. Travis noted that since his commitment, respondent has alternately reported 12 or 13 victims, all female, and 18 victims, including one male. Dr. Travis diagnosed respondent under the DSM-5, which was published in 2013, with "Other Specified Paraphilic Disorder, Sexually Attracted to Adolescent Females, Nonexclusive Type, In a Controlled Environment." Dr. Travis explained the criteria and evidence for this diagnosis.

> "This diagnosis requires recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with adolescent females over a period of at least six months. The person must experience distress or impairment in social, occupational, or other important areas of functioning; or the satisfaction of the paraphilic interest has entailed personal harm, or risk of harm, to others.
>
> [Respondent] has acknowledged forcibly raping two adolescent females and engaging in sexual activities with several other adolescent females while they were intoxicated. He engaged in these behaviors over a period of at least10 years when he was not incarcerated. He has been incarcerated or detained for most of his adult life for these sexual behaviors.
>
> The Nonexclusive Type specifier indicates that he is not solely attracted to adolescent females. He asserts he is mainly attracted to mature adult females. In a Controlled Environment indicates that he is living in an institutional environment where opportunities to sexually act out against adolescents is not possible."

¶ 13 Dr. Travis also diagnosed respondent with antisocial personality disorder with borderline traits, moderate alcohol use disorder, severe cannabis use disorder, and moderate other hallucinogen use disorder. Dr. Travis administered two actuarial tests. On the Static-99R, respondent scored a 5 which placed him in the moderate-high risk category for being recharged or reconvicted of another sexual offense. On the Static-2002R, respondent scored a 6 which placed him the moderate risk category. At that time, respondent was 52 years old and the Static-99R accounts for age-based risk reduction. Dr. Travis found no indication for any additional age-based risk reduction at that time.

¶ 14 In September 2014, based on the 2014 reexamination report, the State filed a motion for finding of no probable cause to warrant an evidentiary hearing on the issue of whether respondent was a SVP in need of treatment and to continue respondent's commitment under the SVP Act. On November 7, 2014, the trial court granted the State's motion for a finding of no probable cause. In December 2014, respondent filed a motion to vacate the finding of no probable cause, arguing that the State did not meet its burden because the mental disorder diagnosis in Dr. Travis's 2014 report is also known as hebephilia, which is not generally accepted and cannot be used to justify respondent's continued commitment. Respondent relied on the recent Illinois Supreme Court decision in *In re Detention of New*, 2014 IL 116306, which was filed nearly two weeks after the trial court had granted the State's motion. In *New*, the supreme court described hebephilia as the "sexual attraction to pubescent children, that is to say, those early in their sexual development, around the ages of 11 to 14. Pedophilia, unlike hebephilia, involves sexual attraction to prepubescent children, generally younger than 11." *Id*. ¶ 19. In that case, the supreme court had held that a diagnosis of hebephilia is subject to a hearing under *Frye v. United States*, 293 F. 1012 (D.C. Cir. 1923). *Id*. ¶ 53.

¶ 15 In June 2015, the State filed its annual motion for a finding of no probable cause based upon Dr. Travis's reexamination. In Dr. Travis's report, respondent told him that he was "interested in girls who were just entering puberty. He likes young girls, but not pre-pubescent girls. He said he was aroused by pubic hair and did not like bare or shaved vaginas." Respondent also told Dr. Travis that thinks about "adult females' breasts" during self-gratification. Respondent was currently in phase 2 of the five-phase treatment program.

¶ 16 Dr. Travis entered the same diagnosis as in 2014, "Other Specified Paraphilic Disorder, Sexually Attracted to Adolescent Females, Nonexclusive Type, In a Controlled Environment." In

the evidence of the diagnosis, Dr. Travis listed the same evidence with the following inclusion: that during respondent's entry to treatment evaluation, "he reported sexually assaulting 17 females and one male, who were from 12 to 17 years old."

¶ 17 Again, Dr. Travis entered the same additional diagnoses for respondent, antisocial personality disorder with borderline traits, moderate alcohol use disorder, severe cannabis use disorder, and moderate other hallucinogen use disorder. Dr. Travis readministered two actuarial tests. On the Static-99R, respondent scored a 6 which placed him in the high risk category for being recharged or reconvicted of another sexual offense. On the Static-2002R, respondent scored a 7 which placed him the moderate-high risk category. At that time, respondent was 53 years old and the Static-99R accounts for age-based risk reduction and respondent still scored in the high risk category. Dr. Travis found no indication for any additional age-based risk reduction at that time.

¶ 18 In September 2015, a hearing was conducted on respondent's motion to vacate the finding of no probable cause. At the hearing, respondent's counsel noted that the State submitted a response with an affidavit from Dr. Travis. The response is not in the record on appeal, but the affidavit is in the record. In the affidavit, Dr. Travis stated that respondent's paraphilia

> "is characterized by his efforts to sexually interact with people with whom he feels he is in total control, including using intimidation, physical force, threats, and weapons to make his victims do what he wants them to do; which meets the 'nonconsenting' criterion for presence of a Paraphilia. [Respondent] specifically stated in his June 11, 2014 interview with me that 'I pick them because they're easy targets.' "

¶ 19 Dr. Travis further stated that in a questionnaire, respondent indicated that he was most aroused by females 12 to 30 years old and males 30 years and over. Dr. Travis clarified that respondent was not primarily attached to the "physical immaturity of females," but he is attracted to

> "youthfulness; but it is more the lack of maturity, sophistication, worldliness, and emotional, physical and personality strength which makes younger adolescents sexually attractive to him, because he can intimidate, control, manipulate (through using drugs or alcohol), or physically force them: into doing what he wants them to do sexually."

¶ 20 Dr. Travis observed that the threat to tell a victim's parents she smoked marijuana if she did not perform sexual acts would not work on a normal adult. Significantly, Dr. Travis stated that respondent's paraphilic disorder was

> "not synonymous with Hebephilic Disorder or Pedohebephilic Disorder, because it is not primarily the barely pubescent physical characteristics which are mostly arousing to him, but the immaturity, naiveté, and more significantly perceived vulnerability which drives his sexual, attraction to pubescent and, post-pubescent adolescent females: Therefore, [respondent] does not present with Other Specified Paraphilic Disorder, Hebephilia."

¶ 21 At the hearing, respondent argued that the fact the State submitted the affidavit demonstrated the need for vacating the 2014 judgment because the parties were now addressing facts not presented to the trial court in 2014. Counsel asserted that Dr. Travis's affidavit contained a new diagnosis that is not recognized in Illinois, that respondent is attracted to the victims' emotional immaturity and lack of worldliness. The State responded that the diagnosis in

the 2014 reexamination was the same as in the *New* case, but the affidavit explained the distinction between Dr. Travis's diagnosis and hebephilia. The trial court observed that respondent was asking to vacate the finding based on facts that were not present at the time of the hearing, namely the decision in *New* had not been issued. The court noted that both sides were essentially trying to offer new facts, the case and the affidavit. The court then denied the motion to vacate, noting that the 2015 motion for a finding of no probable cause had already been filed by the State, and that respondent could respond to that motion.

¶ 22 In November 2015, respondent filed his response and objection to the State's 2015 motion for a finding of no probable cause. In his motion, respondent advanced two arguments in favor of denying the State's motion: (1) respondent's commitment is based upon the diagnosis of hebephilia which had not been proven by the State as generally accepted within the scientific community; and (2) respondent's commitment is based on a diagnosis that has never been described or accepted by any version of the DSM or subjected to a *Frye* hearing. Respondent attached Dr. Travis's affidavit submitted with the State's response to the motion to vacate the 2014 finding as an exhibit.

¶ 23 The State filed a reply to respondent's response and objection in November 2015. The State contended that *New* has no impact on the case because respondent's diagnosis is not hebephilia, noting the different factual basis for respondent's diagnosis. The State also argued that the facts of respondent's sexual offenses along with his own statements aligns with a nonconsent paraphilic disorder, which is a valid mental disorder under the SVP Act. The State also attached Dr. Travis's affidavit to its reply.

¶ 24 In April 2016, the trial court conducted a hearing on the State's 2015 motion for a finding of no probable cause. Following arguments, the trial court found that a *Frye* hearing was not

necessary as the diagnosis was not within *New*, but did have a concern with the specificity of what the diagnosis was. The court ordered a limited hearing as to the issue of the actual diagnosis offered by Dr. Travis. The court stated that based on the hearing, respondent was not precluded from raising available issues. The probable cause motion was entered and continued.

¶ 25 In June 2016, the State filed its 2016 motion for a finding of no probable cause based on Dr. Travis's reexamination of respondent. In Dr. Travis's May 2016 report, the doctor discussed at length respondent's recent disclosures in his therapy group. In January 2016, respondent told his disclosure therapy group that "his first sexual offense occurred because he 'made a decision to rape her before even talk[ing] to her' if she did not assent to sex." He then stated that he committed his next sexual offense while on parole following his first offense. "He claimed he planned to have consensual sex with her, but 'knew if it wasn't going to be then going to rape. [*Sic*.]' " He told the group he had committed 22 sexual offenses and was convicted for four of the offenses. He also said 18 of the victims were underage and involved psychoactive substances. "He claimed that all of the underage victims were physically mature. He said he was trading drugs for sex when he was offending, and he was 'not looking at IDs.' "

¶ 26 In his February 2016 therapy group, respondent "spoke about his opposition to acknowledging possible offenses against pubescent female children." Respondent stated, " 'I just don't understand grown men who have sex with a prepubescent child.' " He suggested that children have " 'no sexual identity at all' and that was what differentiated offending against children and against post-pubescent persons."

¶ 27 Dr. Travis diagnosed respondent with "Other Specified Paraphilic Disorder, Nonconsenting Adolescent Females, Nonexclusive Type" as well as the same antisocial

personality disorder, alcohol, cannabis, and other hallucinogen disorders. Dr. Travis noted the following evidence to support the paraphilia disorder.

> "[Respondent] has acknowledged forcibly raping two adolescent females and engaging in sexual activities with many other adolescent females while they were intoxicated. During his most recent disclosures of offenses, he reported sexually assaulting 17 females and one male, who were from 12 to 17 years old. He has recently spoken about his sense of entitlement and planning to rape if efforts to manipulate compliance were unsuccessful. His offending was focused on maximizing control, and making females do what he wanted them to do sexually (Knight, Sims-Knight, & Guay, 2013). He engaged in these behaviors over a period of at least 10 years when he was not incarcerated. During the 2015 re-examination, he indicated he was interested in girls who were just entering puberty, but not pre-pubescent girls (Blanchard, 2009). He has been incarcerated or detained for most of his adult life for these sexual behaviors.
>
> The Nonexclusive Type specifier indicates that he is not solely attracted to nonconsenting adolescent females. He asserts he is mainly attracted to mature adult females."

¶ 28 Dr. Travis again administered the actuarial instruments of the Static 99-R and Static 2002-R. He received the same scores as in 2015, a 6 in the high risk category for the Static 99-R, and a 7 in the moderate-high risk for the Static 2002-R. Dr. Travis made the following conclusion:

> "Therefore, due to his mental disorders and assessed risk, he remains substantially probable to engage in future acts of sexual violence. His condition *has not*

changed since the most recent periodic reexamination such that he is no longer a sexually violent person.

[Respondent] did not make significant progress in treatment during this review period." (Emphasis in original.)

¶ 29 In July 2016, the State filed a motion to vacate a July 22, 2016 hearing in which Dr. Travis was scheduled to testify, arguing that the only matter currently pending is the review of the 2016 motion for probable cause and the reexamination report. The State noted that respondent has not filed a petition for discharge, and therefore, the trial court should conduct a probable cause hearing without testimony from the doctor.

¶ 30 On April 13, 2017, the trial court conducted a hearing on the State's motion to vacate the June 22, 2016 hearing. The motion was heard by a different trial judge than the judge who ordered the hearing in which Dr. Travis was to testify. Following arguments, the court continued the matter by agreement. On June 13, 3017, the court granted the State's motion to vacate the hearing, noting that a hearing to determine Dr. Travis's diagnosis is not necessary at that stage in the litigation and was more of a trial issue. The court observed, "But at this stage, at least pursuant to the pleadings, I'm pretty clear as to what Dr. Travis's diagnosis is, in which case I don't see the need for an in-court examination of Dr. Travis to basically outline what's in his report."

¶ 31 On June 19, 2017, the State filed its 2017 motion for a finding of no probable cause based on Dr. Travis's recent reexamination, which was attached to the motion. In the 2017 reexamination report, Dr. Travis noted that respondent's master treatment plan, dated November 3, 2016, stated that respondent had "demonstrated a commitment to treatment."

¶ 32 According to the report, in April 2016, respondent spoke in his therapy group about "having fond memories of his relationship with a 13-year-old girl he sexually offended. He considered their relationship to be boyfriend-girlfriend and still struggled with those feelings, even though he now knows the relationship was abusive." Respondent frequently observed that his violent sexual impulses were intensified if he drank alcohol, including that all of his offenses were committed under the influence of alcohol, and he believed that if he does not drink alcohol, then he will not sexually offend. In November 2016, respondent spoke about the power women have sexually, stating, " 'At the end of the day, they have the power, and they control their vagina and whether we have sex.' " Later, when respondent was discussing his rape of a 14-year-old girl, he described her as a " 'f***-toy, a life support system for a vagina.' "

¶ 33 In December 2016, respondent offered several justifications and minimizations about his offending relationship with the 13 year-old girl who lived with him. "He insisted that if a girl is on birth control pills, then she is aware of the long-term consequences of an adult male being sexual with her." Respondent noted that he was rejected when he approached adult women, but when he approached the young girl, she " 'jumped on' " him.

¶ 34 In January 2017, respondent discussed the sexual offenses committed when he was 20 to 33 years old. The girls were 12 to 17 years old. He offended against 17 girls in this manner. Respondent "described a pattern of manipulating and grooming, including tell them he did not want to go to jail, but he was willing to because they were so attractive." He stated that did not believe the teen girls were victims, and that it was normal to be sexually attracted to teenagers. He said, " 'Teens are responsible for their actions.' " When it was pointed out that attraction is normal, but acting on it is a criminal offense, respondent stated, " 'That's what her vagina is for. It would be different if I was raping a boy in the a**.' " Respondent contended that this behavior

was natural and how girls' hips widen around age 13. Respondent argued that "the Creator would not make girls fertile if they could not procreate." In February 2017, respondent discussed his reading about why teenagers in sexual relationships with adults are considered victims, including the still developing brain of teenagers. He stated, " 'Based upon what I know now, I'd never engage a teen.' " Respondent advanced to phase 3 of the five-phase treatment program in February 2017.

¶ 35 Dr. Travis reported the same diagnosis as in 2016, "Other Specified Paraphilic Disorder, Nonconsenting Adolescent Females, Nonexclusive Type" as well as the same antisocial personality disorder, alcohol, cannabis, and other hallucinogen disorders. Dr. Travis noted the following evidence to support the paraphilia disorder.

> "[Respondent] has acknowledged forcibly raping two adolescent females and engaging in sexual activities with 21 other adolescent females, 12 to 17 years old, often while they were intoxicated. He has spoken about his sense of entitlement and planning to rape if efforts to manipulate compliance were unsuccessful. His offending was focused on maximizing control, and making females do what he wanted them to do sexually (Knight, Sims-Knight, & Guay, 2013). He engaged in these behaviors over a period of at least 10 years when he was not incarcerated. During the 2015 re-examination, he indicated he was interested in some girls who were just entering puberty, but not pre-pubescent girls (Blanchard, 2009). He has been incarcerated or detained for most of his adult life for these sexual behaviors.

> The Nonexclusive Type specifier indicates that he is not solely attracted to nonconsenting adolescent females. He asserts he is mainly attracted to mature adult females."

¶ 36 Dr. Travis again administered the actuarial instruments of the Static 99-R and Static 2002-R. He received the same scores as in 2015 and 2016, a 6 on the Static 99-R, and a 7 on the Static 2002-R. Both scores fell within the revised category of IV-b risk category, which was the highest of five risk categories and described as " 'Well Above Average Risk.' " Dr. Travis noted that both instruments account for an age-based risk reduction, but respondent still scored in the highest risk categories. He found no further age-based risk reduction was warranted.

¶ 37 Dr. Travis concluded the following:

> "Due to his mental disorders and assessed risk, he remains substantially probable to engage in future acts of sexual violence. His condition *has not* changed since the most recent periodic reexamination such that he is no longer a sexually violent person." (Emphasis in original.)

¶ 38 In November 2017, respondent filed a motion to appoint Dr. John Fabian as an expert to testify as to the general acceptance or lack thereof of the diagnosis offered by the State and to set the matter for an evidentiary hearing to determine the reason for the changing diagnoses. In December 2017, the State filed its response to respondent's motion. The State asserted that the facts of respondent's sexual offenses as well as respondent's statements show that respondent's paraphilic disorder aligns with a diagnosis of paraphilia NOS, nonconsent. Such a nonconsent diagnosis is a valid diagnosis under the SVP Act and is not subject to a *Frye* hearing. The State also argued that the only matter currently pending before the court was its 2017 motion for a

finding of no probable cause and arguments on the 2015 and 2016 motions for no probable cause.

¶ 39 On February 15, 2018, the trial court conducted a hearing on the respondent's motion to appoint an expert as well as the 2015, 2016, and 2017 motions for a finding of no probable cause. We note this hearing was conducted by a different judge than those who had previously ordered the hearing on Dr. Travis's testimony and that later vacated that hearing. Following arguments, the trial court denied respondent's motion to appoint an expert and for an evidentiary hearing and granted the State's 2015, 2016, and 2017 motions for a finding of no probable cause. In its ruling, the court first addressed respondent's motion and found that based on the facts of the case, respondent was not subject to *Frye*.

> "It's very, very clear, both not only in the affidavit that's attached by Dr. Travis filed July 22, 2015, but in the subsequent filings of June 23, 2016, evaluations and the latest of June 19, 2017, that Dr. -- that the doctor's -- that Dr. Travis's diagnosis has not changed. It's not hebephilia. He makes that very clear. Not -- Thus, it is not subject to a *Frye* hearing.
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> ***
>
> And I am incorporating in my ruling all of not only the motions, but specifically the affidavit of Dr. Travis that was submitted and dated on June --July 20, 2015, that specifically, [respondent's] paraphilia is characterized by his efforts to sexually interact with people with whom he feels he is in total control, including using intimidation, physical force, threats, and weapons to make his victims do what he wants them to do, which meets the nonconsenting criteria for presence of a paraphilia."

¶ 40 The trial court also observed on the record that it is not reasonable to appoint an expert for respondent when "respondent has shown no need for one, particularly in situations like this where he has not affirmatively opted to petition for discharge. There has been no significant change in his course of treatment either."

¶ 41 In its ruling on the three probable cause motions, the court again wanted to "make it very very clear that this Court does not find in any way, shape, or form" a hebephilia diagnosis, which is supported by Dr. Travis's "consistent reevaluations and examinations." The court observed that it had not seen "any meaningful investment for treatment for change in any of the evaluations that were presented." The court made the following conclusions.

> "Due to his mental disorders and assessed risk, he remains substantially probable to engage in future acts of sexual violence. His condition, italicized, has not changed and this Court has found absolutely nothing before this Court to suggest otherwise. Has not changed since the most recent periodic reexamination such that he is no longer a sexually violent person."

¶ 42 The court held that there was no probable cause to believe that respondent was no longer a SVP on all three of the pending evaluations and his commitment would continue. The court also found no probable cause to warrant a full evidentiary hearing at that time.

¶ 43 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on March 8, 2018. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 44 On appeal, respondent first argues that this court should reverse the judgment of the trial court and remand for an evidentiary hearing because there is probable cause to believe that

respondent is no longer a SVP. The State maintains that the reexaminations reports show that respondent remains a SVP.

¶ 45 The SVP Act allows for the involuntary commitment of "sexually violent persons" by the DHS for "control, care and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2016). As relevant here, a "sexually violent person" is defined under the SVP Act as "a person who has been convicted of a sexually violent offense, *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." *Id.* § 5(f). A "mental disorder" is a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *Id.* § 5(b).

¶ 46 After a person has been committed under the SVP Act, the State must submit a written report based on an evaluation of the individual's mental condition "at least once every 12 months after an initial commitment." *Id.* § 55(a). The primary purpose of the written report is to determine whether "(1) the person has made sufficient progress in treatment to be conditionally released and (2) whether the person's condition has so changed since the most recent periodic reexamination *** that he or she is no longer a [SVP]." *Id.*

¶ 47 At the time of the annual examination by the State, the committed person receives notice of the right to petition the court for discharge. *Id.* § 65(b)(1). "If a person does not file a petition for discharge, yet fails to waive the right to petition under this Section, then the probable cause hearing consists only of a review of the reexamination reports and arguments on behalf of the parties." *Id.*

¶ 48 "At a probable cause hearing, the trial court's role is 'to determine whether the movant has established a *plausible account* on each of the required elements to assure the court that there

is a substantial basis for the petition.' " (Emphasis in original and internal quotation marks omitted.) *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 62 (quoting *In re Detention of Hardin*, 238 Ill. 2d 33, 48 (2010)). The requirement that the evidence supporting each element be "plausible" indicates that trial judges need not ignore "blatant credibility problems," but this type of hearing was " 'not a proper forum to choose between conflicting facts or inferences.' " *Hardin*, 238 Ill. 2d at 48 (quoting *State v. Watson*, 595 N.W.2d 403, 420 (Wis. 1999)).

¶ 49 The supreme court in *Stanbridge* held that "the legislature intended that to present a plausible account, the committed individual bears the burden to present sufficient evidence that demonstrates a change in the circumstances that led to the initial commitment." *Stanbridge*, 2012 IL 112337, ¶ 87. The *Stanbridge* court observed that

> "a change in circumstances could include a change in the committed person, a change in the professional knowledge and methods used to evaluate a person's mental disorder or risk of reoffending, or even a change in the legal definitions of a mental disorder or a sexually violent person, such that a trier of fact could conclude that the person no longer meets the requisite elements." *Id*. ¶ 72.

¶ 50 "If the court finds that there is probable cause to believe that the committed individual 'is no longer a sexually violent person,' it must set a hearing on the issue and the State has the burden of proving by clear and convincing evidence that the committed individual is 'still a sexually violent person.' " *Id*. ¶ 52 (quoting 725 ILCS 207/65(b)(2) (West 2008)). This court reviews the ultimate question of whether respondent established probable cause *de novo*. *In re Detention of Lieberman*, 2011 IL App (1st) 090796, ¶ 40.

¶ 51 Respondent contends that this court should reverse the trial court's findings of no probable cause and remand for an evidentiary hearing because "the wavering and incredible

nature of Dr. Travis'[s] diagnoses over time creates probable cause to believe that [respondent] is no longer [a] SVP." According to respondent, there are blatant credibility problems inherent in Dr. Travis's reports and diagnoses. We note that respondent has not cited any authority to support his claim that minor changes in a diagnosis demonstrates a plausible account that he is no longer a SVP.

¶ 52 In 2015, Dr. Travis's reexamination report diagnosed respondent with "Other Specified Paraphilic Disorder, Sexually Attracted to Adolescent Females, Nonexclusive Type, In a Controlled Environment." Also in 2015, an affidavit from Dr. Travis was submitted with the State's response to respondent's motion to vacate the 2014 no probable cause finding. In the affidavit, Dr. Travis explained that respondent's

> "Paraphilia is characterized by his efforts to sexually interact with people with whom he feels he is in total control, including using intimidation, physical force, threats, and weapons to make his victims do what he wants them to do; which meets the 'nonconsenting' criterion for presence of a Paraphilia."

Dr. Travis further explained that respondent expressed that he was most aroused by females 12 to 30 and males 30 years and over. Dr. Travis stated that while respondent was attracted to "youthfulness," it was

> "more the lack of maturity, sophistication, worldliness, and emotional, physical and personality strength which makes younger adolescents sexually attractive to him, because he can *intimidate, control, manipulate* (through using drugs or alcohol), or physically force them: into doing what he wants them to do sexually." (Emphasis added.)

¶ 53 In his 2016 and 2017 reexamination reports, Dr. Travis diagnosed respondent with "Other Specified Paraphilic Disorder, Nonconsenting Adolescent Females, Nonexclusive Type." In both reports, Dr. Travis detailed respondent's recent disclosures about his sexual assault of multiple females from 12 to 17 years old as well as his plan to sexually assault a victim if he was unable to manipulate compliance. In his reports, Dr. Travis observed that respondent had discussed "his sense of entitlement and planning to rape if efforts to manipulate compliance were unsuccessful. His offending was focused on maximizing control, and making females do what he wanted them to do sexually."

¶ 54 We find no credibility issue with Dr. Travis's diagnoses. The underlying basis for the diagnoses has remained consistent, which is that respondent is attracted to adolescent females because of his ability to intimidate, control, manipulate, or force them into sexual activities. Respondent focuses on the first portion of Dr. Travis's affidavit describing why adolescent females are sexually attractive to respondent, which misstates the point Dr. Travis was making. Respondent was not attracted to the lack of maturity and sophistication outright, but in relation to his ability to control and force them into sexual behavior.

¶ 55 We further reject respondent's contention that his earlier diagnosis in 2014 and 2015 of "Other Specified Paraphilic Disorder, Sexually Attracted to Adolescent Females, Nonexclusive Type, In a Controlled Environment" falls under the definition of hebephilia, and, thus, pursuant to the supreme court's decision in *New*, was subject to a *Frye* hearing. "The purpose of the *Frye* test is to exclude new or novel scientific evidence that undeservedly creates 'a perception of certainty when the basis for the evidence or opinion is actually invalid.' " *New*, 2014 IL 116306, ¶ 27 (quoting *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78 (2002), abrogated on other grounds by *In re Commission of Simons*, 213 Ill. 2d 523, 529 (2004)).

"Hebephilia," as described by the supreme court in *New*, is "sexual attraction to pubescent children, that is to say, those early in their sexual development, around the ages of 11 to 14." *Id.* ¶ 19. Respondent's argument focuses only on the specific DSM language and fails to explain how respondent's history and the evidence supporting the DSM diagnosis falls under the definition of hebephilia.

¶ 56 The question in *New* was "whether paraphilia NOS, sexual attraction to early adolescent males, otherwise known as hebephilia, is a diagnosable mental condition based upon legitimate scientific principles and methods." *Id*. ¶ 33. The supreme court concluded that it had "an inadequate basis to determine whether this diagnosis has gained general acceptance in the psychological and psychiatric communities," and thus, a hebephila diagnosis was subject to a *Frye* hearing to determine if it was "a generally accepted diagnosis in the psychiatric and psychological communities." *Id*. ¶ 53.

¶ 57 We find this case distinguishable from *New* because unlike *New*, nonconsent establishes a consistent connection in all of his diagnoses. Respondent concedes that a paraphilic disorder based on nonconsent has been consistently held to be a valid diagnosis in Illinois. See *In re Detention of Hayes*, 2015 IL App (1st) 142424, ¶ 25 (listing cases). The reviewing court in *Walker* clarified that the change in terminology from the DSM-IV term of "paraphilia NOS" to DSM-5 "other specified paraphilic disorder" did not amount to a change in professional knowledge, but simply a relabeling. *Id*. ¶ 23. We acknowledge that the DSM diagnosis in 2015 did not include the term "nonconsent," but the evidence to support the diagnosis included respondent's acknowledgment that he "forcibly" raped two adolescent females and engaged in sexual activities with "several other adolescent females while they were intoxicated." Further, respondent's 2016 and 2017 diagnosis was "Other Specified Paraphilic Disorder, Nonconsenting

Adolescent Females, Nonexclusive Type," which clearly falls within a generally accepted diagnosis.

¶ 58 Respondent also argues that the trial court abused its discretion in denying his request to appoint Dr. John Fabian as an expert. At the time of a reexamination under section 55(a) of the SVP Act, "the person who has been committed may retain or, if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her." 725 ILCS 207/55(a) (West 2016). " 'While the [SVP] Act allows for the appointment of an expert for an indigent person, it certainly does not require a court to take such action.' " *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 33 (quoting *In re Detention of Cain*, 341 Ill. App. 3d 480, 483 (2003)).

¶ 59 A respondent may be entitled to funds to hire an expert witness where expert testimony is deemed crucial to a proper defense. *People v. Botruff*, 212 Ill. 2d 166, 177 (2004). A respondent can establish that an expert witness is crucial by demonstrating that his case will be prejudiced if his request is denied. *Id*. We review the trial court's ruling on a request to appoint an independent examiner for an abuse of discretion. *Id*. at 176. "It is rational not to appoint an independent evaluator when a respondent has shown no need for one, especially during perfunctory reexamination proceedings where the respondent has not affirmatively opted to petition for discharge." *Id*. at 177-78.

¶ 60 Respondent asserts that he has demonstrated that an expert was necessary to contest Dr. Travis's "multiple different diagnoses" of him. According to respondent, Dr. Fabian's assistance was necessary to provide relevant and material information as to whether Dr. Travis's diagnoses were generally accepted.

¶ 61 We find no abuse of discretion. As discussed above, Dr. Travis's diagnoses were consistently based on respondent's history and his ongoing disclosures during his therapeutic work. The evidence to support the diagnoses established respondent's sexual interest in sexual activity with adolescent females obtained through manipulation, control, and nonconsent. Respondent has not filed a petition for discharge and asserted that he was subject to release.

¶ 62 We further find respondent's reliance on *People v. Lawson*, 163 Ill. 2d 187 (1994), to be distinguishable from the facts of this case. There, the defendant contended the trial court erred in denying his motion for funds to obtain the services of a fingerprint and shoeprint expert. *Id.* at 218-29. The court noted the expert's opinion of the shoeprint, as acknowledged by the prosecutor, was the strongest evidence presented by the State because it was the only evidence capable of establishing defendant's actual presence at the scene of the murder. *Id*. The State's only remaining evidence consisted of highly inconsistent eyewitness testimony. The court held that "[w]ithout the assistance of a shoeprint expert, defense counsel could not be sufficiently prepared to attack the scientific basis of [the State's expert's] several opinions, particularly with respect to those factors [the expert] relied on in positively identifying the impressions as made by defendant's shoes." *Id.* at 229. A defense expert could have offered his own opinions, which might have been entirely different from the State's expert. *Id*.

¶ 63 Since we have concluded that Dr. Travis's diagnoses were based on consistent evidence and respondent's history, we find that the trial court did not abuse its discretion in denying respondent's request for an expert during the probable cause proceedings.

¶ 64 Based on the foregoing reasons, we affirm the decision of circuit court of Cook County.

¶ 65 Affirmed.