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BRISTOL, SS SUPERIOR COURT  
FILED

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CLERK/MAGISTRATE

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COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO.: BRCV2004-1027

COMMONWEALTH OF MASSACHUSETTS,  
Petitioner,

vs.

DAVID FLAVELL,  
Respondent.

**MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT**

This action was filed on September 15, 2004 by the Petitioner, Paul F. Walsh, Jr., as District Attorney for Bristol County on behalf of the Commonwealth of Massachusetts ("the Commonwealth") pursuant to M.G.L. c. 123A, § 12(b), seeking to have the Respondent, David Flavell ("Flavell") adjudicated a sexually dangerous person. At such time, Flavell was scheduled to be released from the Bristol County House of Correction in connection with a committed sentence. On September 29, 2004, a temporary order of commitment to the Treatment Center was made pursuant to M.G.L. c. 123A, § 12(e). On November 10, 2004, a probable cause hearing was held before a justice of this court pursuant to G.L. c. 123A, § 13, resulting in the issuance of an order for temporary commitment to the Treatment Center on November 26, 2004. Flavell was thereafter examined by two qualified examiners pursuant to G.L. c. 123A, § 13(a), who have filed written reports pursuant to the statute.

The Commonwealth thereafter moved for trial pursuant to G.L. c. 123A, § 14(a), and the matter was tried before this court, without jury, commencing on January 9, 2006 with the evidence concluding on January 12, 2006.

## FINDINGS OF FACT

Flavell is an African-American male who is presently thirty-six years of age having been born on June 22, 1969 to a couple who gave him up for adoption. He thereafter lived in foster homes for the first two years of his life until he was adopted by his Caucasian adoptive parents who raised him in East Bridgewater in a middle class household. Flavell participated in football and track at highschool until his graduation in 1987 and considered attending college however did not do so for financial reasons. He has held various jobs over the years including working for Shaw's Supermarket between 1988 and 1996 and for Shaw's warehouse in New Hampshire beginning in 1996. He has also worked for other companies including UPS and Costco.

He has had some past difficulty with alcohol abuse and attended AA meetings during some point of his incarceration. He has no history of any use of illicit drugs.

### **Legal History and Sexual Behavior**

Since being a teenager, Flavell has had several heterosexual relationships including a relationship with a woman whom he dated for eighteen months and two other women each of whom he dated for several years. The vast majority of Flavell's criminal transgressions involve exhibitionism which includes public masturbation. The experts who have testified in this case concur that Flavell has a congenital or acquired condition that affects his mental or emotional condition in a manner that predisposes him to the commission of criminal sexual acts and in particular exhibitionism. The experts differ however as to whether or not such condition fits the definition of "mental abnormality" as

contained in G.L. c. 123A, § 1.

A summary of Flavell's legal history involving exhibitionism and his one "contact" offense is hereinafter described.

On March 4, 1996 in Salem, New Hampshire, Flavell was charged with indecent exposure and lewdness after he was observed by a Kmart security officer urinating in a mop bucket and then walking over to another location in the store and masturbating on children's clothing.

On April 10, 1996, while in a Bradlees department store in Salem, New Hampshire, Flavell was observed on a video monitoring service masturbating into a shirt hanging on a display. He was again charged with indecent exposure and lewdness. He was given a twelve month suspended sentence for these offenses and placed on probation and ordered to attend a sex offender program.

On June 24, 1996, Flavell again offended by publically masturbating on a bench in front a supermarket. On July 9, 1996, he was arrested for publically masturbating in front of a store. On July 11, 1996, he was committed to prison in New Hampshire and released in September 1996 to be a in a community based treatment program.

In December 1996, he was once again incarcerated in New Hampshire on account of parole violations occurring in December 1996 which included an incident on December 13, 1996 when he exposed himself at a shopping center in Methuen resulting in him being charged with open and gross lewdness.

On the evening of December 13, 1996, in Methuen, he was at an American Legion Post and met a woman while they were consuming alcoholic beverages at the bar. They talked and danced during the evening and during the course of the conversation the female

requested that Flavell provide her with a ride home. They left the American Legion and went into the parking lot at which time Flavell physically assaulted the female by punching and kicking her. He then removed her shoes, pants and underpants and then stopped the assault and stated to her "[w]e have to get you to a hospital". He then began trying to assist her in getting dressed. Once she was dressed, she ran into the American Legion Post and sought assistance from those inside while Flavell left the area. These December incidents were apparently the basis for the New Hampshire parole violation referred to above and on July 1, 1997 he was released from his New Hampshire commitment and transferred to the Essex Correctional Facility in Middleton, transferred for evaluation to Bridgewater State Hospital and returned to the Essex Correctional Facility in August of 1997. The charges against Flavell included assault and battery with a dangerous weapon, to wit, a shod foot and assault with intent to rape.

This incident was the only contact sexual offense with which Flavell has ever been charged.

Flavell indicated to various therapists examining him that the December 13, 1996 incidents were both precipitated by events earlier in the day which included an embarrassing incident occurring at work when it was discovered by fellow employees that he was required to register as a sex offender and also a revelation to him by his then girlfriend that he was not the father of a five year old boy whom Flavell had been raising as his own son. Flavell essentially asserts that the incidents of December 13<sup>th</sup> were the direct result of the above referenced incidents and that he harbored anger or resentment toward women which contributed to his actions. He was first arraigned in Lawrence District Court for assault and battery with a dangerous weapon and on November 6, 1997 was

arraigned in Superior Court on four indictments including assault with intent to rape, assault and battery by dangerous weapon, assault and battery and indecent exposure.

Flavell pled guilty to the above indictments on April 14, 1998 and was sentenced to two and one half years in the House of Correction on the charge of assault and battery with a dangerous weapon with a concurrent six month sentence on the assault and battery charge. He was sentenced to three years probation on the assault with intent to rape charge.

He was released from the House of Correction on January 18, 2000 with an order that he participate in sex offender treatment as a condition of probation. He moved to East Bridgewater to live with his mother and obtain employment at a pizza shop. His next encounter with the law involved an incident occurring on or about December 8, 2000 at a Gap store in Taunton where Flavell exposed himself and masturbated.

On April 13, 2001, Flavell exposed himself outside of a Brooks Pharmacy in Fairhaven, Massachusetts.

Finally on September 4, 2001, Flavell exposed himself in front of a Gap store in Canton in the presence of a mother and her four children who were in a motor vehicle parked in the store parking lot.

Flavell has indicated to the clinicians who have evaluated him that he is probably exposed himself publically a total of fifteen times during his lifetime and that he has done so primarily in the presence of women in their twenties or thirties who he finds to be attractive.

Flavell received a nine month committed sentence on November 5, 2001 in connection with the above referenced incidents.

After his release, commencing in approximately October of 2002 and continuing to November of such year, Flavell made various calls to "hotlines" using various aliases and contending that he had or was about to commit certain offenses, including offenses against children. Such incidents occurred in Franklin and Taunton, Massachusetts and resulted in his apprehension and his admission that he had made the aforesaid calls and further resulting in voluntary admission to the Milford Hospital for psychiatric evaluation. He thereafter was transported to Bridgewater State Hospital for evaluation and returned to court on January 15, 2001 in response to a probation surrender request on account of the aforementioned calls and not attending all counseling sessions. Also, on March 19, 2003, the Salem, New Hampshire police responded to a call from a "Help Line" advising them that a male had indicated that he had followed a mother and her child into a store and was having a crisis. This resulted in Flavell being apprehended in Salem, New Hampshire and charged with disorderly conduct and making false public alarms. On April 28, 2003, the probation department for the New Bedford District Court obtained a final surrender of Flavell and he was ordered committed to the Bristol County House of Correction for a period of two years.

Prior to completion of the aforesaid sentence, the within petition was filed by the district attorney on behalf of the Commonwealth.

Since Flavell's admission to the Treatment Center, he has made a good faith effort to receive appropriate sexual offender treatment. On September 30, 2004, he signed the necessary forms to express his desire to participate in such treatment with treatment starting on the following Monday. Certificates were offered into evidence which included the following:

1. A certificate dated June 7, 2005 indicating that Flavell had passed a class entitled "Victim Empathy I".
2. A certificate dated June 10, 2005 indicating Flavell had passed a class entitled "Conflict Resolution".
3. A certificate dated June 13, 2005 indicating that Flavell was currently participating in a "Workbook I" class and doing well.
4. A certificate dated September 16, 2005 indicating that Flavell had passed a class entitled "Domestic Violence I" with a comment that "Mr. Flavell was an active participant in class, completed all assignments and passed his final exam. It is recommended that he take Domestic Violence II."
5. A certificate dated October 3, 2005 indicating that Flavell is continuing to participate in "Workbook I" class and doing well.
6. A certificate dated October 3, 2005 indicating that Flavell was participating in a class entitled "Workbook II".
7. A certificate dated December 23, 2005 indicating that Flavell had passed a class entitled "Domestic Violence II" with a comment that "Mr. Flavell showed understanding of the presented material, joined group discussions, asked thought provoking questions and prepared and presented a thorough final project."
8. A certificate dated December 27, 2005 indicating that Flavell had passed a class entitled "Men's Work I" with a comment that "David was a valuable class member. His willingness to share personal experiences with his peer added to the class experience. He showed a willingness to give and receive

feedback and engage in class discussions. He appeared genuinely interested in the class material and demonstrated an understanding of same. He treated the personal material presented by his peers with an appropriate degree of respect. He was a pleasure to have in class."

At the time of trial, Flavell had completed essentially all courses which were available to temporary detainees at the Treatment Center.

#### **Expert Testimony Proffered by the Commonwealth**

The Commonwealth offered the testimony of Dr. Stephen DeLisi, Ph.D., a qualified examiner who had examined Flavell pursuant to the statute. Dr. DeLisi holds a B.A. in psychology, an M.A. in clinical psychology and a Ph.D. in clinical psychology. Dr. DeLisi had interviewed Flavell on two occasions. Dr. DeLisi opined that Flavell's sexual problem is defined in the clinical literature as exhibitionism which according to the DSM is:

"The paraphiliac focus in exhibitionism involves the exposure of one's genitals to a stranger. Sometimes the individual masturbates while exposing himself (or while fantasizing and exposing himself). If the person acts on these urges there is generally no attempt at further sexual activity with a stranger. In some cases the individual is aware of a desire to surprise or shock the observer. In other cases the individual has a sexually arousing fantasy that the observer will become sexually aroused."

Dr. DeLisi opined that Flavell fits the criteria for a mental abnormality as defined by G.L. c. 123A and that his condition makes him predisposed to commit criminal sexual acts to a degree that is a menace to the health and safety of other persons. Whether or not Flavell's exhibitionist conduct constituted a menace to the health and safety of others was a major bone of contention in this case. Dr. DeLisi testified that Flavell's conduct was a menace in that it was at best, "annoying" to those to whom he exposed himself and at

worst a threat or otherwise frightening.

Essentially, Dr. DeLisi concluded that because of the past failures of Flavell to control his impulse to expose himself, notwithstanding his participation in some therapy and the controls of probation, he was likely to reoffend unless confined to a secure facility.

On cross-examination, Dr. DeLisi admitted that he had never treated an exhibitionist and further that the treatment at the Treatment Center is not specific to this particular type of behavior. Also, Dr. DeLisi had not reviewed, nor did he have knowledge of, any particular surveys or materials relating to the risk of recidivism of exhibitionists.

The Commonwealth also called Carol Feldman, a licensed psychologist since 1979. Dr. Feldman opined that Flavell suffers from a mental abnormality and that he is likely to reoffend if not confined to a secure facility. The basis of her opinion of a mental abnormality was the number of offenses of exhibitionism committed by Flavell as well as the fact that he reoffended while on probation. She further testified that Flavell suffered from a personality disorder due to his inability to control his sexual impulses. She concluded that he needs physiological and visceral intervention. Dr. Feldman has acknowledged that she has never interviewed Flavell and that Flavell appeared to be doing well in his therapy although he needed more intense treatment. She has never treated sex offenders nor provided specific treatment. On cross-examination, Dr. Feldman conceded that in September 2004, in a report which she prepared, she indicated that Flavell suffered from a personality disorder and that as of the time of trial she concluded that he was suffering from a mental abnormality. Dr. Feldman, was not familiar with any empirical data relating to exhibitionism, nor had she considered any literature or research relating to the same.

The respondent called Fabian M. Saleh, M.D.. Dr. Saleh is board certified in general psychiatry and board certified in the medical sub-specialty of forensic psychiatry. He is presently employed by the UMass Memorial Medical Center where he is an assistant professor of psychology. Dr. Saleh has met with the defendant on five separate occasions from May 2005 through November 2005.

Dr. Saleh concluded that Flavell neither suffers from a mental abnormality as defined by G.L. c. 123A, nor a personality disorder. He further concluded that Flavell is not likely to reoffend nor is he in need of commitment to the Treatment Center. Dr. Saleh concluded that while Flavell suffers from a clinical mental illness due to his exhibitionism, he does not fit the definition under the statute in that he is not likely to reoffend nor is he a menace to the health and safety of others. In support of his conclusion, Dr. Saleh testified that he had reviewed the literature relating to exhibitionism and trauma and that there was no data that supported a conclusion that a person subjected to an exhibitionist would suffer trauma. He noted that while there are victims of exhibitionists, there are degrees of victimization, pointing out that Pedophilia has serious impact on children while there is no strong data in existence showing any serious impact of exhibitionism. Dr. Saleh testified that while Flavell does not need inpatient treatment, he would benefit from pharmacological therapy and individualized psychotherapy and while his risk of reoffense as an exhibitionist is low, it is not nil.

In Dr. Saleh's report (Exhibit 36), he outlines numerous protective and dynamic factors decreasing Flavell's risk of recidivism at this time which include his present motivation, his contact with treatment centers in the community, the absence of a paraphilic disorder such as Pedophilia, the absence of cognitive distortions, his ability to

attend mundane activities such as keeping a job and fostering long term relationships, the absence of substance abuse difficulties and limited difficulties with alcohol use, the absence of a destabilizing major mental illness, the absence of a personality disorder, the absence of a history of juvenile delinquency, no history of homelessness and a stable treatment network in place upon his release.

Michael J. Murphy, Ed.D., testified on behalf of the respondent. Dr. Murphy, along with Dr. DeLisi, were the qualified examiners appointed in this matter to examine Flavell. While Dr. Murphy originally opined that Flavell was sexually dangerous, he revised his opinion months later as expressed in his report dated August 19, 2005 (Exhibit 38).

Dr. Murphy testified that Flavell has made significant progress toward taking responsibility for his actions and is motivated to address his problems in the future. He concluded that he would benefit from sexual offender treatment and needs to continue to participate in order to lessen the likelihood of reoffense. He noted that Flavell has been detained at the Treatment Center since September 2004 and has participated in sexual offender treatment during his detention. He concluded that Flavell suffers from the mental abnormality of exhibitionism. He further concluded that he does not appear to demonstrate any signs of anti-social personality disorder since his offenses consist of primarily of non-contact sexual offenses.

Dr. Murphy concluded that the majority of information which he has evaluated which is currently available does not support the conclusion that Flavell is likely to reoffend as a result of his mental abnormality to a degree that the public safety requires that he be detained at a secure facility. He therefore recommended that he be determined to be not sexually dangerous.

Leonard Bard, Ph.D., a licensed psychologist, testified on behalf of the respondent. As with the other clinicians, Dr. Bard opined that Flavell suffers from exhibitionism although his conduct does not rise to the level of a mental abnormality as defined by the statute. He further opined that he does not suffer from a personality disorder. He concluded that Flavell's exhibitionist conduct does not make him a menace to the health and safety of others as defined by the statute and the case law and that he does not require commitment to the treatment center in that he is not likely to commit any additional serious sexual offense if not confined.

Lastly, the respondent called Barbara K. Schwartz, Ph.D., who is a forensic psychologist specializing in the evaluation and treatment of sex offenders. Dr. Schwartz opined that Flavell does not suffer from a personality disorder although he does suffer from exhibitionism and that his conduct is obnoxious and offensive and is on a "lower scale versus hands-on offenses." Based upon her experience and training, she concluded that considering the availability of intervention and treatment on an outpatient basis as well as weighing the seriousness of potential harm, Flavell does not suffer from a mental abnormality as defined by the statute and does not require detention at the Treatment Center.

Dr. Schwartz also opined that outpatient pharmacological and behavioral therapy is available to Flavell. She also felt it significant that Flavell, when feeling the urge to reoffend had sought intervention by calling hotlines under fictitious names.

She further concluded that there is little evidence of any likelihood of Flavell to commit any hands-on violent offenses in the future.

Offered into evidence at trial was a report of Cornelius F. Kiley, Ph.D., a qualified

examiner, who had evaluated Flavell on May 27, 2002 which was after Flavell's last incident of exhibitionism.

After Dr. Kiley's evaluation of the defendant, he concluded that the majority of Flavell's offenses did not appear to be those envisioned by the statute. He further noted that with Flavell's one hands-on sexual assault, he interrupted the assault and offered to assist the victim in obtaining medical assistance.

He thus indicated that he was unable to conclude that it was likely that Flavell is a sexually dangerous person.

#### DISCUSSION

After having reviewed the testimony of the witnesses in this action as well as the exhibits, the court is required to determine whether or not Flavell constitutes a sexually dangerous person within the meaning of G.L. c. 123A, §1. It has been stipulated by counsel that Flavell has committed a sex offense as defined by the statute. The Commonwealth is further required to establish that Flavell suffers from a mental abnormality or personality disorder which makes him likely to engage in sexual offenses if not confined to a secure facility.

"[M]ental abnormality" is defined as "a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."

"[P]ersonality disorder" is defined as "a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses."

The Commonwealth must establish that Flavell meets this statutory criteria beyond a reasonable doubt.

The court is provided with guidance relating to the application to the statute by Commonwealth v. Boucher, 438 Mass. 274 (2002). The Boucher case has provided guidance by indicating:

"In assessing the risk of reoffending, it is for the fact finder to determine what is 'likely'. Such a determination must be made on a case by case basis, analyzing a number of factors including the seriousness of the threat and harm, the relative certainty of the anticipated harm, and the possibility of successful intervention to prevent that harm."

Commonwealth v. Boucher, 438 Mass. at 276.

The court accepts the expert medical testimony that Flavell does not suffer from a personality disorder but rather is properly clinically diagnosed as suffering from exhibitionism. The court finds however, that notwithstanding such diagnosis, Flavell is not a sexually dangerous person within the meaning of the statute. The court has heard testimony which it finds to be credible that any harm from exhibitionism has far less impact upon a victim than any hands-on sexual offense. The evidence establishes that such conduct is certainly annoying and offensive however there was no testimony which established that such conduct causes any long term emotional harm. While on one occasion Flavell exposed himself to a mother and her children in a parking lot, it appears that the vast majority of his offenses were directed to women in their twenties and thirties.

The court was not provided with any victim impact statements from any person who was subjected to Flavell's exhibitionism. The court concludes that the exhibitionist conduct of Flavell does not rise to the level of conduct which would make him a menace to the health and safety of others and hence Flavell does not fit the statutory definition of mental

abnormality.

Further, the court, in assessing the risk of reoffense and determining whether reoffense is likely, concludes that the seriousness of the threatened harm weighs in Flavell's favor. The court is mindful that Flavell had one contact offense in 1996 however the court concludes based upon the evidence that this was an isolated incident. Furthermore, having reviewed the police reports and other evidence related to this incident, notwithstanding the fact that Flavell pled guilty to assault with intent to rape, it appears that Flavell did not touch the victim in a sexual way other than removing some of her clothing nor did he make any statements to her of a sexual nature. After physically assaulting the woman by punching and kicking her and removing the above referenced items of clothing, he stopped his conduct, assisted her in getting dressed and offered to take her for medical attention. Nowhere in Flavell's history is there any indication of any other physical assault upon any person, sexual or non-sexual.

The court further takes into consideration that the last incident of exhibitionism involving Flavell was on or around September 4, 2001. The court finds that in October 2001 when Flavell had an urge to reoffend, he made certain calls to various hotlines using aliases and contending that he was about to commit certain offenses including offenses against children. Also, in March of 2003, he made similar calls to a hotline in Salem, New Hampshire.

The court concludes after hearing expert testimony relating to these calls that such calls were for the purpose of Flavell obtaining intervention in order to prevent him from reoffending and that Flavell exaggerated his conduct in such calls in order to obtain attention and assistance. In fact such calls were effective in that there is no evidence that

he committed any further offenses and in fact was apprehended and referred to treatment and ultimately his probation was violated.

Flavell has made great strides towards addressing his psychological issues while at the Treatment Center albeit through courses which may not constitute part of the Treatment Center's core behavioral program. The court finds however that the vast majority of those committed at the Treatment Center have been involved in contact sexual offenses and that there is no exhibitionist specific treatment available for Flavell but rather that more appropriate treatment is available by virtue of the pharmacological and behavioral treatment which was testified to at trial and which is available on an outpatient basis.

The court further finds that Flavell has worked diligently on a relapse prevention plan which was offered into evidence. The court acknowledges that such plan did not undergo the scrutiny typically afforded such documents when one participates in a rigorous behavioral psychotherapy. However, review of the plan indicates that it appears to be the product of hard work and an honest attempt to avoid recurrence of his difficulties.

While the court acknowledges that there is a possibility that Flavell will once again engage in his exhibitionist conduct, the court concludes that it is not likely that he will do so and continued confinement to the Treatment Center is not warranted under the statute.

Flavell has demonstrated that outside of the above-referenced incidents of inappropriate conduct, he has been able to hold a productive positions of employment and also has established several long term relationships with other adults. It has also been represented that his adoptive mother has offered to permit Flavell to live with her upon his discharge.

**RULING OF LAW**

The court finds, after trial, that the Commonwealth has not met its burden of proof beyond a reasonable doubt that Flavell is a sexually dangerous person and that he should be committed to the treatment center as required by G.L. c. 123A, § 14(d).

**ORDER**

For the foregoing reasons, it is **ORDERED** that judgment enter **DISMISSING** the Petition and that Flavell be released from custody unless he is held on other process.

By the Court,



Richard T. Moses  
Justice of the Superior Court

Dated: February 13, 2006