STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 12, 2013)

STATE OF RHODE ISLAND	:	
	:	
V.	:	**C.A. No. PM 12-1859**
	:	
EVAN LEON	:	

DECISION

GIBNEY, P.J. Evan Leon, an indigent sexual offender, seeks appointed counsel for his appeal to the Superior Court from a Magistrate's decision increasing the Sex Offender Board of Review's classification of his risk to re-offend.

I

Facts and Travel

As a juvenile, Evan Leon was adjudicated delinquent in Family Court on July 29, 2008 on a charge of second degree child molestation sexual assault. See Stetson School Discharge Summary, Mem. in Supp. of Obj., Ex. 1; Stetson School Initial Psychological and Risk Assessment, Sept. 23, 2008, Rec. Ex. 6 at 4. The Family Court petition arose out of several incidents of sexual contact with minors that occurred when Mr. Leon was between the ages of nine and fourteen. See id. Mr. Leon received a suspended sentence and was placed on probation at Further Order of the Court. See Stetson School Initial Psychological and Risk Assessment, Sept. 23, 2008, Rec. Ex. 6 at 4. As a condition of his probation, Mr. Leon was required to undergo treatment for sexually abusive youth. See id. He was admitted to the Stetson School for Residential Treatment and Special Education on July 31, 2008 and remained there until April

2011. See id. at 7; Letter from Myles Glatter to Magistrate Burke, May 3, 2012, Mem. in Supp. of Obj., Ex. 2.

After leaving the Stetson School, Mr. Leon transitioned to a temporary community placement. (Tr. Sept. 18, 2012 at 6.) Mr. Leon remained under the supervision of the Department of Children, Youth, and Families until his nineteenth birthday. Id. Upon his release from supervision, Mr. Leon was required to register as a sex offender pursuant to R.I. Gen. Laws §§ 11-37.1-1 et seq., the Sexual Offender Registration and Community Notification Act. (Tr. Sept. 18, 2012 Hearing at 3, 6.)

On December 20, 2011, the Sex Offender Board of Review ("Board") issued a decision classifying Mr. Leon as a Level II risk to re-offend.[1] Id. at 1. As required by § 11-37.1-13, the Board sent Mr. Leon a letter notifying him of his Level II classification, informing him that he was entitled to seek review of the Board's decision in Superior Court and further informing him that he was entitled to appointed counsel for that review. See Notice to Level II Offenders, Rec. Ex. 1 at 2. Mr. Leon timely filed a request with this Court on January 9, 2012 to review the Board's classification. (Tr. Sept. 18, 2012 at 1.) Pursuant to § 11-37.1-14, a Superior Court Magistrate appointed counsel to represent Mr. Leon. See Letter from Counsel, Dec. 18, 2012.

Superior Court Magistrate Flynn held a hearing on this matter on September 11, 2012 at which both parties were allowed to present oral argument, testimony, and further evidence. See Tr. Sept. 18, 2012 at 2. Petitioner also submitted a memorandum with various accompanying exhibits, including a discharge summary from his treatment provider and a letter from his therapist. See id. at 2. After reviewing the record from the Board and considering the parties'

[1] A Level II classification indicates that an individual presents a moderate risk of re-offending. See R.I. Admin. Code 49-2-1:1.13.2.

arguments and submissions, the Magistrate, sua sponte,[2] increased Mr. Leon's classification from a Level II to a Level III risk to re-offend in a decision rendered September 18, 2012. Id. at 12. At the time of decision, Mr. Leon's counsel informed the Magistrate of her client's intent to appeal the decision and his desire to have the costs of the appeal waived. See id. at 13. The Magistrate instructed counsel that Mr. Leon should file documentation showing proof of indigency. Id.

That same day, Mr. Leon, through counsel, filed an appeal seeking review of the Magistrate's decision by a justice of this Court pursuant to G.L. 1956 § 8-2-39.2(j). Shortly thereafter, on September 21, 2012, Mr. Leon, through counsel, filed a Motion to Proceed In Forma Pauperis on appeal from the Magistrate's decision, accompanied by an affidavit of indigency. After a question arose as to whether indigent sexual offenders are entitled to court-appointed counsel on appeal to this Court from a Magistrate's decision, Mr. Leon's counsel addressed an inquiry to the Presiding Justice of this Court. See Letter from Counsel, Dec. 18, 2012. Mr. Leon's counsel sought resolution of this question and expressed her concern that a failure to provide Mr. Leon with counsel may violate his constitutional rights to due process and equal protection.[3] See id.

[2] The State had moved to affirm the Board's classification of Mr. Leon as a Level II offender. See State's Mot. to Affirm, April 10, 2012.

[3] After receiving counsel's inquiry, the Court afforded both parties an opportunity to address this issue.

II

Law and Analysis

A

Statutory Right to Counsel

Under the current version of G.L. 1956 §§ 11-37.1-13 and 11-37.1-14, enacted in 1996, a sexual offender is entitled to a review in Superior Court of the Sex Offender Board of Review's classification of his or her risk level, and is entitled to appointed counsel for that review.[4] See Secs. 11-37.1-13(2)-(3) and 11-37.1-14(3); P.L. 1996, ch.104, § 1. In Administrative Order No.

[4] Section 11-37.1-13 provides, in relevant part:

> "If . . . the board is satisfied that risk of re-offense by the person required to register is either moderate or high, the sex offender community notification unit of the parole board shall notify the person:
> . . .
>
> (2) That unless an application for review of the action is filed . . . with the criminal calendar judge of the superior court . . . requesting a review of the determination to promulgate a community notification, that notification will take place;
> (3) That the person has a right to be represented by counsel of their own choosing or by an attorney appointed by the court, if the court determines that he or she cannot afford counsel[.]" Sec. 11-37.1-13 (emphasis added).

Similarly, § 11-37.1-14 specifies that the Superior Court shall appoint counsel once an offender requests review. That provision, in pertinent part, states:

> "Upon receipt of a request from a person subject to community notification . . . the superior court . . . shall:
>
> (1) Set a date for hearing and decision on the matter;
> (2) Provide notice of the date for the hearing to both the applicant or his or her counsel and to the attorney general;
> (3) Appoint counsel for the applicant if he or she cannot afford one[.]" Sec. 11-37.1-14.

2000-19, the former Presiding Justice of this Court enacted rules of procedure to govern the review of sex offender classifications pursuant to § 11-37.1-13. That Order states that the appointment of counsel should take place at an "initial hearing" but does not specify the duration of the appointment.[5] Sections 11-37.1-13 and 11-37.1-14, and the accompanying administrative order appear to speak of only one level of review in Superior Court for sex offender classifications.

In 2005, the Legislature amended § 8-2-39.2 to specifically designate that the Superior Court Drug Court Magistrate would "hear and decide all matters that may come before the superior court pursuant to chapter 37 of title 11 . . . ." See P.L. 2005, ch. 343, § 1. In 2007, the Legislature, in effect, added an additional level of review for sex offender classifications by amending § 8-2-39.2 to provide that any "party aggrieved by an order entered by the Drug Court Magistrate shall be entitled to a review of the order by a justice of the superior court." See P.L. 2007, ch. 73, art. 3, § 6. Section 8-2-39.2 is silent, however, as to whether litigants seeking review of a Drug Magistrate's decision by a justice of this Court are entitled to court-appointed counsel. Since amending § 8-2-39.2 in 2007, the Legislature has not amended § 11-37.1-13 or § 11-37.1-14 to reflect this additional level of review.[6]

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[5] In particular, Administrative Order No. 2000-19 states:

> "At the initial hearing, the Court shall inquire, if an applicant is not represented by counsel, if he/she desires that one be appointed. If counsel is requested, the Court shall require the applicant to file an affidavit of indigency in support of such request. If the Court is satisfied that the applicant is unable to afford an attorney, the Court shall appoint counsel to represent the applicant." Admin. Order. No. 2000-19.

[6] Superior Court Administrative Order No. 94-12 sets out procedures to govern this Court's review of magistrates' decisions but does not address the right to counsel. See Administrative Order No. 94-12.

There is nothing in § 11-37.1-13, § 11-37.1-14, § 8-2-39.2 or Administrative Order No. 2000-19 specifically limiting the right to counsel to only the review before the Magistrate. See In re Proposed Town of New Shoreham Project, 25 A.3d 842, 515 (R.I. 2011) (court will not "read in prohibition" where "not evident anywhere in statute."); New England Die Co. v. Gen. Prods. Co., 92 R.I. 292, 298, 168 A.2d 150, 154 (1961) (it is not within the province of the Court to insert a prohibition that does not appear in the express terms of the statute). Nevertheless, the Legislature's provision for an additional level of review in § 8-2-39.2(j), without specifically addressing the right to counsel, arguably creates some ambiguity when juxtaposed with its express provision for counsel in § 11-37.1-13. Other courts have held that application of the rule of lenity to interpret sex offender registration and notification statutes in favor of the offender is appropriate when those statutes are ambiguous. See U.S. v. Hoang, 636 F.3d 677, 682 (5th Cir. 2011); U.S. v. Cain, 583 F.3d 408, 417 (6th Cir. 2009) (noting that where "ambiguity clouds the meaning of [federal Sexual Offender Registration and Notification Act], the tie must go to the defendant[]"); State v. Caton, 273 P.3d 980, 981 (Wa. 2012). Since §§ 11-37.1-13 and 8-2-39.2 are unclear about the duration of a sexual offender's right to counsel, the rule of lenity would dictate that § 11-37.1-13 be interpreted in Mr. Leon's favor to provide him with appointed counsel for his appeal to this Court. See State v. Parker, 921 A.2d 366, 369 (N.H. 2007) (citing rule of lenity and concluding that "to the extent the language of the . . . order is ambiguous . . . we ought to err on the side of protecting a defendant's . . . right to counsel[]").

B

Constitutional Right to Counsel

The "right to counsel 'flows from different constitutional provisions[,] depending on the nature of the proceedings.'" State v. Chase, 9 A.3d 1248, 1252 (R.I. 2010) (quoting State v. Palomo, 80 F.3d 138, 141 (5th Cir. 1996)) (alterations in original). As there is not a clear statutory mandate that Mr. Leon receive counsel on appeal, the Court examines whether there is a constitutional requirement that Mr. Leon receive the assistance of appointed counsel for his appeal of the Magistrate's decision.

1

Civil-Criminal Distinction under the Sixth and Fourteenth Amendments[7]

The Sixth Amendment to the United States Constitution provides a criminal defendant with the right to counsel during all critical stages of a criminal prosecution. See State v. Oliveira, 961 A.2d 299, 809-09 (R.I. 2008). Under Rule 44 of the Rhode Island Superior Court Rules of Criminal Procedure, criminal defendants have a right to counsel "at every stage of the proceeding" in Superior Court. See R.I. Super. R. Crim. P. 44. The Rhode Island Supreme Court has recently held, however, that sexual offender registration and notification pursuant to §§ 11-37.1 et seq. is a civil, rather than a criminal, process because its primary purpose is to

[7] The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution and section 2 of article I of the Rhode Island State Constitution contain similar language. Compare U.S. Const. Amend. XIV, with R.I. Const. art. I, § 2. Likewise, section 10 of article I of the R.I. Constitution incorporates language similar to that contained in the Sixth Amendment to the Federal Constitution. Compare U.S. Const. Amend. VI, with R.I. Const. art. I, § 10.

protect the public rather than punish the offender.[8] See State v. Germane, 971 A.2d 555, 593 (R.I. 2009). Thus, in Rhode Island, there is no automatic right under the Sixth Amendment to counsel for a sexual offender's challenge of his or her classification.

In contrast, for purposes of determining when an indigent is entitled to the appointment of counsel under the Due Process and Equal Protection clauses of the Fourteenth Amendment, the civil-criminal distinction is not dispositive, and a state may not deny an indigent litigant counsel by styling a proceeding as "civil." See Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011); Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981); In re Gault, 387 U.S. 1 (1967). In particular, the United States Supreme Court has held that where a state's sexual offender statute allowed offenders to be civilly committed for a period of anywhere from one day to life, upon a finding that they presented a threat of bodily harm to the public or were suffering from mental illness, due process and equal protection required the offender to receive counsel and a hearing, regardless of whether the commitment proceeding was denominated civil or criminal. See Specht v. Patterson, 386 U.S. 605, 608-11 (1967).[9] Unlike a criminal defendant's right to counsel under the Sixth Amendment, however, a right to appointed counsel under the Due Process and Equal Protection clauses of the Fourteenth Amendment is not categorical or automatic. See Halbert v. Michigan, 545 U.S. 605, 611 (2005); Lassiter, 452 U.S. at 31-32.

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[8] Likewise, in Smith v. Doe, 538 U.S. 84 (2003), the United States Supreme Court held that Alaska's sexual offender registration law did not violate the Ex Post Facto clause's prohibition on retroactive punishment because it found that the law's purposes were non-punitive. See also Kansas v. Hendricks, 521 U.S. 346 (1997) (holding that Kansas' sexual offender law was not criminal and therefore did not violate the constitutional prohibitions against double jeopardy or retroactive punishments).

[9] Thirty years after the Supreme Court decided Specht, it rejected a substantive due process challenge to Kansas' Sexually Violent Predator Act, which also provided for civil commitment. See Kansas v. Hendricks, 521 U.S. 346 (1997). In Hendricks, the Court found that the statute impinged on a protected liberty interest, but held that it was constitutionally permissible for Kansas to burden that interest so long as the offender received sufficient procedural protections. 521 U.S. at 356-67.

2

Right to Counsel on Appeal under the Due Process and Equal Protection Clauses

Mr. Leon's counsel suggests that the failure to provide Mr. Leon with counsel for his appeal of the Magistrate's decision to this Court may violate his constitutional rights to due process and equal protection. See Letter from Counsel, Dec. 18, 2012. Although the Federal Constitution does not require states to provide litigants with a right to appellate review, once a state affords that right, due process and equal protection considerations prohibit it from creating unreasoned distinctions between indigent and affluent litigants that will effectively cut off appeal rights for indigents. See Halbert, 545 U.S. at 610; M.L.B., 519 U.S. at 110. This principle applies both to criminal appeals and to civil appeals when a protected liberty interest is at stake.[10] See id.; M.L.B., 519 U.S. at 110; see also Krieger v. Commonwealth, 567 S.E.2d 557, 578 (Va. Ct. App. 2002) (equal protection requires appointed counsel on appeal in those fundamental matters where there is a right to counsel below and a right of appeal is provided); Grove v. State, 897 P.2d 1252, 1256-57 (Wa. 1995) (holding same). The U.S. Supreme Court has stressed that

[10] The right to counsel on appeal originates with the Supreme Court's decision in Douglas v. California, 372 U.S. 353 (1963), wherein the Court held that a state must provide counsel for criminal defendants on first-tier appeals as of right. In 1996, in M.L.B. v. S.L.J., 519 U.S. 102, the Court held that under the Due Process and Equal Protection clauses, indigents have a right to equal access to civil appeals where a fundamental interest is at stake. There, the Court held that an indigent litigant could not be denied access to an appeal from a lower court's order terminating her parental rights by reason of her inability to pay the cost of a transcript. See 519 U.S. at 128; see also Lindsey v. Normet, 405 U.S. 56 (1972) (holding that double bond requirement for litigants appealing an adverse judgment in an eviction action violated indigent appellants' equal protection rights). The Court in M.L.B. did not specifically address the right to counsel for appeals but suggested that the right to counsel on appeal could be less encompassing than an overall right of "equal access" to an appeal. See 519 U.S. at 113. In particular, the Court suggested that due process and equal protection did not require counsel for discretionary appeals for either civil or criminal matters. See id. (citing Ross v. Moffitt, 417 U.S. 600 (1974)). In 2005, however, the Court held that the right to counsel under the Due Process and Equal Protection clauses encompasses a category of appeals broader than just first-tier appeals as of right. See the discussion of Halbert v. Michigan, 545 U.S. 605 (2005) in this decision.

the appointment of counsel is often necessary to ensure that appeals are more than "meaningless ritual[s]" because most laymen need the assistance of counsel in order to present an appeal in a form suitable for appellate review. See Evitts v. Lucey, 469 U.S. 387, 393 (1985) (quoting Douglas v. California, 372 U.S. 353, 358 (1963)); Halbert, 545 U.S. at 620.

In Halbert v. Michigan, 545 U.S. 605 (2005), a criminal case, the Court did away with its previous rule that due process and equal protection only require counsel to be appointed for first-tier appeals as of right. See id.; see also Taveras v. Smith, 463 F.3d 141, 147 (2d Cir. 2006) (noting that after Halbert, it is clear that the right to counsel on appeal encompasses more than just first-tier appeals as of right). The Court replaced this rule with a multi-factor analysis of the nature of the particular appellate process at issue. See Halbert, 545 U.S. at 611. Thus, under the Supreme Court's equal protection and due process jurisprudence, an indigent civil litigant's right to counsel on appeal depends on (1) the nature of the interest at stake; and (2) the nature of the proceeding. See M.L.B., 519 U.S. at 120-121; Lassiter, 452 U.S. at 26-28; see also Halbert, 545 U.S. at 611.

i

Nature of Interest at Stake in Sexual Offender Registration and Notification

With respect to the first consideration—the nature of the interest—the process that an appellant is constitutionally due "'depends on . . . not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty and property' language of the Fourteenth Amendment.'" In the Matter of Civil Commitment of D.L., 797 A.2d 166, 172 (N.J. Super. Ct. App. Div. 2002) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). There is a general presumption that an indigent civil litigant only has a Due Process right to appointed counsel when he or she faces a possible deprivation of his or her physical

liberty.[11] See Turner, 131 S. Ct. at 2516; Lassiter, 452 U.S. at 24. This presumption may be overcome, however, where an important liberty interest is at stake; where the State's interest in denying counsel is mostly pecuniary; and where the proceedings are likely to be complex or overwhelming for pro se litigants. See Turner, 131 S. Ct. at 2517-18; Lassiter, 452 U.S. at 27-31.

The United States Supreme Court has emphasized that there is a distinction between ordinary civil actions and those actions that, while labeled civil, involve the "awesome authority of the state" coming down upon a litigant to work a potential deprivation.[12] See M.L.B., 519 U.S. at 127-28. The Court has been most willing to recognize a right to counsel for those civil proceedings that affect a litigant's fundamental interest in familial association, the archetype being termination of parental rights proceedings. See Lassiter, 452 U.S. at 27-28; M.L.B., 519 U.S. at 116-17. In contrast, the Court has been least solicitous of proceedings that touch only upon economic rights. See M.L.B., 519 U.S. at 112-113.

[11] Several state courts have held that sexual offenders who may be deprived of their physical liberty through civil commitment as a result of being adjudicated sexually violent predators are constitutionally entitled to counsel on appeal. See, e.g., Jenkins v. Dir. of Va. Ctr. for Behavioral Rehab., 624 S.E.2d 453, 460 (Va. 2006); In the Matter of D.L., 797 A.2d at 172-74; State ex rel. Seibert v. Macht, 627 N.W.2d 881, 885-86 (Wis. 2001); see also Merryfield v. State, 241 P.3d 573, 580 (Kan. Ct. App. 2010) (sexual offender constitutionally entitled to appointed counsel for collateral attack of civil commitment). One court, however, specifically declared that civil commitment of sexual offenders "implicates procedural protections for reasons in addition to the loss of physical freedom" because it may "'engender adverse social consequences to the individual' and '[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.'" In the Matter of D.L., 797 A.2d at 173 (quoting Vitek v. Jones, 445 U.S. 480 (1980)).

[12] In Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003), the U.S. Supreme Court specifically declined to reach the issue of whether Connecticut's sexual offender registration and notification law burdened a protected liberty interest for the purposes of procedural due process. See 538 U.S. at 7.

Sexual offender registration and notification proceedings in Rhode Island do not directly result in an offender's loss of physical liberty through civil commitment. Cf. Specht v. Patterson, 386 U.S. 605, 608-11 (1967) (holding that a hearing with counsel was required before a sexual offender could be civilly committed). Nonetheless, our Supreme Court has clearly held that Rhode Island's Sexual Offender Registration and Notification Act "burdens a protectible liberty interest and therefore triggers the individual's right to procedural due process[13] under . . . the [F]ederal . . . [C]onstitution." Germane, 971 A.2d at 578. In so holding, our Supreme Court stated that "liberty, as defined by the [S]tate and [F]ederal [C]onstitutions, is 'not confined to mere freedom from bodily restraint'" but "'extends to the full range of conduct which the individual is free to pursue[.]'" Id. (quoting Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954)). The Court emphasized that the requirements of §§ 11-37.1 et seq. may subject offenders to a wide range of serious consequences, including exposure to physical or verbal harassment, police surveillance, ostracism, loss of employment and associational opportunities, possible lifetime registration requirements and felony prosecution if they fail to comply with those requirements, and restrictions on where they may reside. See 971 A.2d at 578. Additionally, in Germane, the Court "note[d] with approbation" the words of another state supreme court, observing that sex offender notification involves "a government agency focus[ing] its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic . . ." and implicates, for purposes of Due Process, "an interest in knowing when the government is moving against you and why it has singled you out . . . ." 971 A.2d at 577

[13] In contrast, our Supreme Court in Germane, rejected a substantive due process challenge to §§ 11-37.1 et seq. The Court held that although the rights affected by the registration and notification requirements are protected by due process, they may be curtailed so long as the state provides adequate procedural protections. 971 A.2d at 583.

(quoting Noble v. Bd. of Parole and Post-Prison Supervision, 964 P.2d 990 (Or. 1998));[14] see M.L.B., 519 U.S. at 127-28 (noting that litigants in civil termination of parental rights proceedings are not seeking "state aid to subsidize their privately initiated action" but rather are "seek[ing] to be spared from the State's . . . adverse action.").[15] Thus, according to our Supreme Court's holding in Germane, sexual offender risk assessments impact liberty interests protected by due process.

ii

Nature of the Process for Review of Sexual Offender Classifications

With respect to the second consideration, the nature of the appellate process, the United States Supreme Court has stated that the Due Process and Equal Protection clauses may require that indigents receive counsel when (1) the appeal involves some consideration on the merits, such as an error-correction type of review; and (2) the appeal will involve claims that have not yet been presented by appellate counsel and passed upon by an appellate court. Halbert, 545 U.S. at 611. The Court has looked at a variety of factors that tend to indicate that pro se litigants may be "ill-equipped" to represent themselves. Id. at 617. In particular, the Court has considered: the reviewing court's power to grant, deny, give other relief or request additional materials; whether the litigant has already had the assistance of appellate counsel to prepare a brief that defines the legal principles upon which the claims of error are based and which

[14] In Germane, the Rhode Island Supreme Court cited at least six other state courts that have held that sexual offender risk assessments burden a protected liberty interest. See 971 A.2d at 575-76.

[15] Analogously, the Rhode Island General Assembly and the Supreme Court have recognized a right to appointed counsel for Termination of Parental Rights and Post-Conviction Relief proceedings, which proceedings, even though labeled civil, invoke the power of the State to work a deprivation of a protected interest. See Ferrell v. Wall, 889 A.2d 177 (R.I. 2005); § 10-9.1-5; In re Bryce T., 764 A.2d 718, 721 (R.I. 2001); R.I. Family Court Rule of Juvenile Proceedings 18(c)(4). The interests at stake in these proceedings—loss of physical liberty and familial association—are indisputably fundamental. See M.L.B., 519 U.S. at 117.

designates the relevant portion of the record; and, any personal characteristics of a litigant that may place him or her at a unique disadvantage such as age, education, illiteracy, or learning disabilities. See id. at 617-621. Among the factors that may weigh against recognizing a right to counsel are the availability of a transcript or written decision from the trial court, the relative simplicity of the procedure for filing and effectuating an appeal, and additional opportunities for direct review. See id. at 622; Ross v. Moffitt, 417 U.S. 600, 615 (1974). To determine if a civil litigant is entitled to appointed counsel, the Court has also considered whether the pro se litigant may find him or herself matched against an experienced state prosecutor, despite the "civil" styling of the process. See Turner, 131 S. Ct. at 2520.

In this case, the Sex Offender Board of Review classified Mr. Leon as a Level II risk to re-offend. Sections 11-37.1-14 and 11-37.1-13 have already provided Mr. Leon with one opportunity to challenge that classification during a full evidentiary hearing before a Magistrate of this Court, and have afforded Mr. Leon certain procedural protections during that review, including the assistance of appointed counsel. See Ross, 417 U.S. at 615 (finding no right to counsel where appeal was discretionary second-tier review). In § 8-2-39.2(j), the Legislature has afforded Mr. Leon a right to a review of the Magistrate's decision by a justice of this Court. Mr. Leon's counsel below apparently assisted him with filing a notice of appeal with this Court. Cf. Halbert, 545 U.S. at 615-16, 622 (noting that appellant was forced to file application for leave to appeal without assistance of counsel).

The review of a decision of a magistrate of this Court by a justice of this Court presents a unique procedural posture. On appeal, this Court will review the Magistrate's decision de novo based upon the record before the Magistrate to determine if the Magistrate's decision was supported by competent evidence. See Administrative Order No. 94-12. While this Court does

not have to formally conduct a new hearing, it may in its discretion receive further evidence or recall witnesses. See id. This Court has the authority to "accept, reject or modify, in whole or in part, the judgment [or] order . . . of the [magistrate]." Id.; see Halbert, 545 U.S. at 617-18 (fact that appellate court had discretion to grant or deny application, enter final judgment, request additional material, or require concise statement of facts weighed in favor of right to counsel).

Section 636 of title 28 of the U.S. Code allows Federal District Courts to delegate authority to Federal Magistrates in a manner similar to the delegation of authority from this Court to the Drug Court Magistrate under R.I. Gen. Laws § 8-2-39.2. When our statutes and rules are similar to federal statutes and rules, we may look to the federal courts for guidance. See Furtado v. Laferriere, 839 A.2d 533, 540 (R.I. 2004); State v. Rodriguez, 822 A.2d 894, 908 (R.I. 2003). While the Federal Magistrate Act does not address whether indigents have a right to counsel, Federal District Court judges have fairly broad statutory authority to appoint counsel for indigent litigants and to allow them to proceed in forma pauperis in both civil and criminal matters pursuant to 28 U.S.C. § 1915. That provision states that "any court of the United States may authorize" a litigant to proceed in forma pauperis for "the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein . . . ." upon a showing of indigency.[16] 28 U.S.C. § 1915(a)(1). Section 1915(e)(1) specifically authorizes federal courts, in their discretion, to "request an attorney to represent any person unable to afford

[16] Section 1915(c) makes particular reference to District Court judges' review of magistrates' findings and recommendations. See 28 U.S.C. § 1915(c). That section provides that upon a showing of indigency, "the court may direct payment by the United States of the expenses of . . . preparing a transcript of proceedings before a United States magistrate judge in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title[.]" 28 U.S.C. § 1915(c).

counsel."[17] 28 U.S.C. § 1915(e)(1). The appointment of counsel under § 1915(e), however, is wholly a matter of statutory privilege and is not a Constitutional right. See Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971); Gardner v. Madden, 352 F.2d 792 (9th Cir. 1965). Thus, it is not technically helpful in determining whether Mr. Leon has a Federal Constitutional right to counsel.

Nonetheless, the nature of the review of magistrates' decisions in the federal context provides at least some insight into the nature of review of magistrates' decisions in this Court. Under § 636(b)(1), District Court judges reviewing magistrates' findings and recommendations—like justices of this Court reviewing magistrates' decisions—are not required to conduct a second hearing and recall witnesses but may do so in their discretion. See U.S. v. Raddatz, 447 U.S. 667, 675-76 (198).[18] In enacting the standard of review that appears in

[17] The right to counsel under § 1915 is dependent upon the court finding, inter alia, that "the action or appeal" is not "frivolous or malicious" and "state[s] a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2); see for example, Free v. U.S., 879 F.2d 1535 (7th Cir. 1989) (denying litigant's request to proceed in forma pauperis on appeal of magistrate's decision where claim lacked merit). In practice, however, some federal courts consider the requirement that a litigant's claim have merit to be only a threshold question and have gone on to consider other factors before finding that an indigent litigant should receive counsel. See, e.g., Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986); Childs v. Duckworth, 705 F.2d 915 (7th Cir. 1983). Those other factors include an indigent's ability to investigate crucial facts, whether conflicting evidence may indicate a need for cross-examination during trial, the complexity of the legal issues involved, and any other individualized reasons why the assistance of counsel may lead to a more just result. See id.

[18] In particular, § 636(b)(1)(B) authorizes Federal District Court judges to "designate a magistrate judge to conduct hearings . . . and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court" of various civil or criminal motions and certain other matters. 28 U.S.C. § 636(b)(1)(B). That provision further provides that:

> "any party may serve and file written objections to [the magistrate's] proposed findings and recommendations . . . . A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court

§ 636(b)(1), Congress attempted to expedite review by not requiring District Court judges to conduct a second hearing in every case, but made certain to vest "ultimate adjudicatory power" in the District Courts and to grant them the "widest discretion" to determine how much reliance to place on the magistrates' findings and recommendations.[19] Id. at 675-77. "Congress made clear that the . . . magistrate acts subsidiary to and only in aid of the district court." Id. at 681.

On the one hand, the fact that the District Court judge's factual review is intended to be more limited than that of the magistrate suggests that the assistance of counsel may be somewhat less important when a litigant appears before the District Court than before the magistrate. See Lassiter, 452 U.S. at 32-33 (considering benefit of counsel in analyzing and presenting evidence). On the other hand, it appears that the District Court judge is supposed to be the key decision-maker in the statutory scheme, rather than the magistrate. Moreover, Congress' decision to vest wide discretion in the District Court was intended to make the District Court's review of a magistrate's decision thorough and searching rather than perfunctory. Such considerations—evidencing that the District Court judge's review of a magistrate's decision is a significant and consequential part of the statutory review process—would weigh in favor of providing counsel at this important stage of proceedings. See Halbert, 545 U.S. at 611, 617-18

> may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1).

This standard of review is substantially similar to the standard of review that justices of this Court employ when reviewing a decision of a magistrate of this Court. Compare § 636(b)(1) with Administrative Order No. 94-12.

[19] In enacting § 636(b)(1), Congress' "plain objective [was] to alleviate the increasing congestion of litigation in the district courts" by allowing for delegation of certain tasks to magistrate judges but to do so in a manner that did not run afoul of the restrictions on delegation in Article III of the Federal Constitution or the Due Process clause of the Fifth Amendment. Raddatz, 447 U.S. at 676 n.3.

(appellate court's authority to perform review of the merits and issue dispositive decisions are factors in favor of providing counsel).

In Mr. Leon's case, the Magistrate raised his classification from a Level II to a Level III risk to re-offend. (Tr. Sept. 18, 2012 at 12.) Mr. Leon's counsel has indicated that she believes that in raising Mr. Leon's classification, the Magistrate may have acted ultra vires. See Letter from Counsel, Dec. 18, 2012. Mr. Leon's legal claim that the Magistrate exceeded his authority, however, has neither been briefed by a lawyer nor passed upon by an appellate court. See Halbert, 545 U.S. at 619-20. Thus, the task of researching, briefing, and arguing this claim on appeal will be left up to Mr. Leon. Moreover, appeal of his classification may involve some need to analyze and synthesize the various psychiatric evaluations and other expert testimony contained in the record below. See Lassiter, 452 U.S. at 30 (fact that indigent litigants would be ill-equipped to understand expert medical and psychiatric testimony weighed in favor of providing counsel); see also In the Matter of D.L., 797 A.2d at 173-74 ("extensive psychological or psychiatric testimony, as well as actuarial risk assessments" presented at sexual offender hearings "may be difficult to grasp and consequently difficult to refute for . . . layman."). Mr. Leon is currently nineteen years of age, and it appears that he has not yet completed his high school education. See Tr. Sept. 18, 2012 at 5. The record also indicates that he has been diagnosed with ADHD and Asperger's Disorder. See id.; Halbert, 545 U.S. at 620-21; In the Matter of D.L., 797 A.2d at 173.

In support of Mr. Leon's request for appointed counsel on appeal, Mr. Leon's counsel directs this Court's attention to the Rhode Island Supreme Court's recent decision in State v. Campbell, 56 A.3d 448 (R.I. 2012). In that case, the trial court summarily dismissed Mr. Campbell's application for post conviction relief, without affording him the assistance of

counsel. 56 A.3d at 452-53. The statutory provisions governing post conviction relief allow for summary dismissal of applications that lack merit, but afford applicants "the opportunity to reply to the proposed dismissal." Sec. 10-9.1-6(b). Indigent applicants for post conviction relief have a statutory right to counsel. See sec. 10-9.1-5 ("An applicant who is indigent shall be entitled to be represented by the public defender. If the public defender is excused from representin0g the applicant . . . the court shall assign counsel to represent the applicant."). In Campbell, the Supreme Court held that in order for an indigent applicant's opportunity to reply to a proposed dismissal to be meaningful, he or she must receive the assistance of counsel, regardless of the merits of the application. See 56 A.3d at 458. In so holding, the Court noted that "because [Mr. Campbell] had no legal training or experience, he could neither properly frame the issues nor persuasively argue their merit."[20] Id. at 459.

In the instant case, Mr. Leon had the assistance of appointed counsel for the Magistrate's initial review of his risk level. In contrast, Mr. Campbell essentially did not receive any meaningful review of his claims, since the trial court summarily dismissed his application prior to providing him with counsel. In light of this significant distinction, this Court does not consider Campbell controlling in this matter. Nonetheless, the Supreme Court's reasoning in

[20] In the relevant portion of the decision, the Court in Campbell offers several reasons in support of its holding:

> "[i]n addition to being the most harmonious construction of §§ 10-9.1-5 and 10-9.1-6(b), requiring the appointment of counsel before an applicant's claims are dismissed not only ensures that the applicant is provided with a meaningful opportunity to reply, but also serves several laudable ends. We recognize that some applicants may need counsel's assistance in order to appreciate that [legal] principles . . . require dismissal of some or all of their claims . . . . Additionally, appointed counsel may, in an appropriate case, frame the applicant's claims in such a way as to avoid . . . waiver[.]" 56 A.3d at 458.

Campbell suggests that when the Legislature affords a litigant both a specific right to be heard and a general right to counsel, the litigant should receive the assistance of counsel if forcing him or her to proceed pro se would render the opportunity to be heard meaningless. Thus, Campbell lends some support to the idea that Mr. Leon's statutory right to counsel under § 11-37.1-13 should continue when he exercises his right to appeal pursuant to § 8-2-39.2.

In the final analysis, the Rhode Island Legislature has given Mr. Leon a right to counsel below and a right to an appeal; our Supreme Court has held that sexual offender notification burdens a protected liberty interest for the purposes of due process. See Secs. 11-37.1-13 and 8-2-39.2(j); Germane, 971 A.2d at 578. Once a state provides a right to an appeal, due process and equal protection prohibit it from creating arbitrary or unreasoned distinctions that may effectively deprive indigents of that right when a protected liberty interest is at stake. See Halbert, 545 U.S. at 610; M.L.B., 519 U.S. at 110; see also In Matter of D.L., 797 A.2d at 175 (where statute provided for counsel at initial hearing but was silent about counsel on appeal, court held that meaningful opportunity for review on appeal required appointment of appellate counsel); Merryfield, 241 P.3d at 580 (where statute provided those offenders who were deemed sexual predators with a right to counsel for annual review of their sexual predator status, court found that it would create unreasoned distinction in violation of equal protection to deny counsel to sexual predator filing collateral attack). This Court has a genuine concern that without the assistance of counsel, Mr. Leon's right of appeal under § 8-2-39.2(j) "may be more formal than real." Halbert, 545 U.S. at 620. Providing counsel to Mr. Leon for his appeal to this Court undeniably creates an additional expense for the State, but the assistance of counsel will likely make the appeal more focused and easier to comprehend. See Halbert, 545 U.S. at 623 (assistance of counsel makes appeals easier to comprehend). Thus, the assistance of counsel may

better enable this Court to make an expeditious and informed ruling in this matter. See Germane, 971 A.2d at 582 ("state has an . . . interest in expediting the risk level assessment and judicial review processes").

III

Conclusion

This Court finds that Mr. Leon is entitled to appointed counsel on appeal to ensure that the requirements of due process and equal protection are satisfied.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE: State of Rhode Island v. Evan Leon

CASE NO: PM 12-1859

COURT: Providence Superior Court

DATE DECISION FILED: March 12, 2013

JUSTICE/MAGISTRATE: Presiding Justice Gibney

ATTORNEYS:

For Respondent: Alison DeCosta, Esq.

For Petitioner: Katherine Godin, Esq.