

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

RICHARD DICARLO,
Plaintiff

v.

STATE OF RHODE ISLAND
Defendants

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C.A. No. PM-13-5062

DECISION

HURST, J. Richard DiCarlo (DiCarlo), an indigent sexual offender, appeals a March 4, 2014 decision of the Superior Court Drug Court Magistrate (Drug Court Magistrate) affirming the classification of DiCarlo’s risk to reoffend that the Sex Offender Board of Review (the Board) had recommended pursuant to chapter 37.1 of title 11, the Sexual Offender Registration and Community Notification Act (hereinafter, SORCNA). He also appeals the Drug Court Magistrate’s subsequent denial of his request for court-appointed counsel to represent him on appeal. Jurisdiction is pursuant to G.L. 1956 § 8-2-39.2(j).

I

Facts and Travel

On May 26, 2006, a grand jury indicted Richard DiCarlo on two counts of first degree child molestation, three counts of second degree child molestation, and one count of third degree sexual assault.¹ On July 30, 2007, after trial by jury, DiCarlo was acquitted on both charges of first degree child molestation and found guilty on all three counts of second degree child molestation. He was sentenced on November 9, 2007, to twenty years of imprisonment at the

¹ The charge of third degree sexual assault was dismissed pursuant to Super. R. Crim. P. 48A.

Adult Corrections Institution, with 8 years to serve and 12 years suspended with probation. Due to the nature of his crimes, DiCarlo automatically was required to register as a sex offender with the local police upon his release from prison pursuant to G.L. 1956 § 11-37.1-3. Accordingly, he was referred to the Rhode Island Parole Board's Sex Offender Community Notification Unit (the Unit) for investigation. Thereafter, the Board classified DiCarlo's risk to reoffend pursuant to § 11-37.1-6(2)(i) and the Rhode Island Parole Board Sex Offender Community Notification Guidelines (the Guidelines).

As part of its review process, the Unit interviewed DiCarlo and, pursuant to § 11-37.1-12(b)(5), the Board obtained the following material: the Superior Court criminal case file in State v. DiCarlo, P1-2006-1787A; DiCarlo's Rhode Island Corrections Department presentment; reports of the Rhode Island Department of Children Youth and their Families; State of Rhode Island BCI/NCIC records; and records of State of Rhode Island Superior Court proceedings brought in connection with DiCarlo's driving while he was on a suspended driver's license. Based upon this material and the information contained in it, the Board applied accepted actuarial risk assessment tools (STATIC-99, STATIC 2002, and STABLE 2007) to calculate DiCarlo's risk scores. Each actuarial risk assessment tool placed DiCarlo in the low risk category. The Board also considered the mandatory "SEX OFFENDER RISK OF RE-OFFENSE ASSESSMENT FACTORS" contained in the Guidelines. See R.I. Admin.Code 49-2-1 APPENDIX, ADDENDUM 1.²

² According to the Guidelines, "Each risk of re-offense assessment shall be made on the basis of the facts of each individual case, after review of appropriate documentation." R.I. Admin. Code 49-2-1 APPENDIX, ADDENDUM 1. The Guidelines list fifteen categorized factors that "should be considered in conjunction with those facts that have already been articulated in RI General Laws § 11-37.1-1." Id. Accordingly, under the category entitled commission of the sexual offense, the Board must consider the offender's actuarial risk score, degree of violence, other significant crime considerations, degree of sexual intrusion, and victim selection

After considering the Guideline's mandatory risk factors in this case, and even though all of his actuarial and risk assessment instrument scores had placed him in the low risk category, the Board issued a seven-page written Risk Assessment Report on July 25, 2013, in which it assessed DiCarlo as having a moderate risk to reoffend under § 11-37.1-16. Accordingly, the Board recommended that DiCarlo be classified as a Level II offender.

It is evident from the Risk Assessment Report that in applying the Guidelines' mandatory assessment factors, the Board considered police narratives and victim statements concerning the nature of DiCarlo's alleged contact with the victim. See Risk Assessment Report at 3; see also § 11-37.1-6.³ Thus, in describing the offense, the Board "note[d]" that

"The victim reported that she fell asleep on her mother and Richard's bed and when she woke up her pants were down and the subject had his [h]ead between her legs licking her vagina. The victim further related that there had been numerous times when she woke up and found the subject's fingers inside her vagina." Risk Assessment Report at 3.

characteristics. See id. With respect to the prior history category, the Board considers the offender's known nature and history of sexual aggression; other criminal history; substance abuse history; and presence of psychosis, mental retardation or behavioral disorder. See id. The support system category requires consideration of factors such as as the degree of family support of offender accountability and safety; personal, employment and educational stability; incarceration community supervision record; and external controls. See id. Finally, the factors that the Board must consider under the category concerning treatment/psychotherapy progress include the offender's participation in a sex offender specific treatment program; and his/her response to sex offender specific treatment/admission of guilt, acceptance of responsibility for crimes, commitment to ongoing safety, recovery and sex offender treatment. See id.

³ Section 11-37.1-6 requires "the agency having supervisory responsibility" over an offender to "refer the person to the sex offender board of review, together with any reports and documentation that may be helpful to the board, for a determination as to the level of risk an offender poses to the community" Sec. 11-37.1-6(1)(c) (emphasis added). After receiving any such referral, SORCNA specifically requires the Board to "conduct the validated risk assessment, review other material approved by agency having supervisory responsibility and assign a risk of re-offense level to the offender." Sec. 11-37.1-6(c)(2)(i).

In addition, with respect to the “Degree of sexual intrusion” factor, the Board stated that “the victim reported digital penetration (finger/vaginal), oral sex, and sexual contact with breasts and buttocks.” Id. However, although these hearsay allegations, if proven, necessarily would have constituted first-degree child sexual molestation, the jury presumably did not find the supporting evidence to be credible when it acquitted DiCarlo of such charges.⁴

Pursuant to § 11-37.1-13, the Unit sent DiCarlo a letter notifying him that the Board was satisfied that his risk of re-offense was moderate, 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 § 11-37.1-13; see also R.I. Admin. Code 49-2-1, Sec. 3.8. DiCarlo timely filed a request with this Court on August 3, 2013, to review the Board’s classification. Pursuant to SORCNA, the attorney general provided DiCarlo with “copies of all papers, documents and other materials which formed the basis for the determination of the level and manner of community notification” Sec. 11-37.1-14(4). The materials consisted of the notes from DiCarlo’s interview; the STATIC-99, STATIC 2002, and STABLE 2007; and the materials obtained by the Board pursuant to § 11-37.1-12(b)(5).

The matter was duly assigned to the Drug Court Magistrate pursuant to G.L. 1956 § 8-2-39.2(f), which specifically empowers the Superior Court Drug Court Magistrate to “hear and

⁴ To be found guilty of first-degree child molestation, the state is must prove that the accused “engage[d] in sexual penetration with a person fourteen (14) years of age or under.” Sec. 11-37-8.1. Sexual penetration is defined as “sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person’s body or by any object into the genital or anal openings of another person’s body, or the victim’s own body upon the accused’s instruction, but emission of semen is not required.” Sec. 11-37-1 (8).

decide as a superior court justice all matters that may come before the superior court pursuant to chapter 37.1 of title 11 ‘Sexual Offender Registration and Community Notification.’” Sec. 8-2-39.2(f).

The Drug Court Magistrate held a hearing on February 4, 2014. At that time, DiCarlo was represented by court-appointed counsel, pursuant to §§ 11-37.1-13(3) and 11-37.1-14(3).

At the hearing, the Drug Court Magistrate permitted both parties to present arguments and evidence. Accordingly, pursuant to § 11-37.1-15(a)(2), DiCarlo presented testimony and submitted a memorandum with various accompanying exhibits, including an affidavit in which he maintained his innocence, as well as affidavits attesting to the petitioner’s character from a niece, a neighbor, the petitioner’s father, the petitioner’s brother, and three friends. DiCarlo also presented an analysis of recidivism, information on the STATIC-99⁵ test regarding how age factors into the calculation, and a study discussing improved assessment of sexual offenders. The Drug Court Magistrate also had before him all of the papers, documents and other materials that had been produced by the attorney general as having formed the basis of the Board’s determination, including those containing the hearsay statements that are at issue in this appeal

After reviewing all of the evidence, the Drug Court Magistrate issued a detailed bench ruling on March 4, 2014 (Bench Decision). The Drug Court Magistrate held fast to the statutory framework including the standard of review that governed his task. In doing so, he determined that the State had established a prima facie case as required by § 11-37.1-16(b).⁶ See Bench

⁵ The STATIC-99 is an actuarial measure of risk for sexual offense recidivism and is regarded as a moderate predictor of sexual re-offense potential. See State v. Dennis, 29 A3d 445, 447 (R.I. 2011) (stating that the STATIC-99 is “recognized as [a] validated risk assessment tool[]”).

⁶ For purposes of section 11–37.1–16, subsection (b), a “prima facie case” means
“(1) A validated risk assessment tool has been used to determine
the risk of re-offense; [and]

Decision at 11. He then applied the statutory criteria to DiCarlo's appeal, noting that DiCarlo was required to prove by a preponderance of the evidence that the Board's determination on either the level of notification or the manner in which it is proposed to be accomplished is not in compliance with Chapter 37.1 or the Guidelines adopted pursuant to that chapter. See Bench Decision at 11-12. Consistent with the Board's discretionary function, and like SORCNA itself, the Guidelines largely concern themselves with the practical and procedural aspects of determining an offender's risk of re-offending, the notification process, and the limitations on an offender's challenge to the Board's determination and recommendations. The Drug Court Magistrate made detailed findings of fact concerning the Board's compliance with SORCNA's terms and the Guidelines. Ultimately, the Drug Court Magistrate affirmed the Board's determination classifying DiCarlo as a Level II offender. Id. at 16.

DiCarlo filed a timely appeal seeking review of the Drug Court Magistrate's decision by a justice of this Court pursuant to § 8-2-39.2(j). In essence, DiCarlo challenges all aspects of the Board's determination and recommendation, as well as the Drug Court Magistrate's failure to correct said determination and recommendation. He is seeking a full, de novo determination of what he claims to be errors of law and violations of his constitutional rights by both the Board and the Drug Court Magistrate. He also seeks findings and conclusions of law that would have the effect of reclassifying him as a Level I offender. In addition, DiCarlo filed a motion for appointment of counsel, a motion to proceed in forma pauperis, and an accompanying affidavit of indigency.

“(2) Reasonable means have been used to collect the information used in the validated assessment tool.” Dennis, 29 A.3d at 448 (R.I. 2011) (quoting § 11-37.1-16(b)).

Consistent with previous decisions of the Superior Court, this Court initially remanded the matter to the Drug Court Magistrate for determination of court-appointed counsel. See Rhode Island v. Leon, 2013 WL 1089005, at *7 (R.I. Super. Mar. 12, 2013) (deciding that there is no per se right to an attorney on appeal of a Drug Court Magistrate’s decision affirming or denying the Board’s classification); see also Rhode Island v. Robinson, 2013 WL 5303143, at *3 (R.I. Super. Sept. 17, 2013) (deciding that “the Drug Court Magistrate, who is most familiar with the facts and circumstances of each case, should determine on a case-by-case basis whether due process and equal protection require an indigent offender to continue to receive the assistance of counsel on appeal to the Superior Court”).

On April 15, 2014, on remand, the Drug Court Magistrate dutifully re-examined his own order and decision and, upon determining that any appeal to a Superior Court justice would merely “rehash” the same facts and information, denied DiCarlo’s motion for court-appointed counsel. DiCarlo promptly appealed that determination to this Court pursuant to § 8-2-39.2(j); thus, once again, confronting this Court with the same questions and issues presented by his initial appeal and his right to counsel for purposes of his appeal.

II

The Drug Court Magistrate’s Denial of the Motion for Court-Appointed Counsel

A threshold issue is whether DiCarlo is entitled to appointed counsel to pursue an appeal from the Drug Court Magistrate. Section 11-37.1-13(3) explicitly states that in connection with an offender’s challenge to tier two and three classifications, “[t]he 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(3). Upon receipt of any such challenge, § 11-37.1-14 then explicitly mandates “the superior court or the family

court” to “[a]ppoint counsel for the applicant if he or she cannot afford one[.]” Sec. 11-37.1-14(3). The language of these two sections has remained essentially unchanged since being enacted in 1996. See P.L. 1996, ch. 104, § 1.

However, § 8-2-39.2(j) is silent as to whether litigants seeking Superior Court review of a Drug Court Magistrate’s decision under SORCNA are entitled to court-appointed counsel. Given this silence, the Court now must determine whether the legislature’s failure to explicitly confer a right to counsel in connection with a Section 8-2-39.2(j) review affects the existing right to counsel contained in § 11-37.1-13(3).

The rules of statutory construction are well-settled. It is axiomatic “that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Duffy v. Estate of Scire, 111 A.3d 358, 363 (R.I. 2015) (quoting (Tanner v. Town Council of East Greenwich, 880 A.2d 784, 796 (R.I. 2005))). However, “[i]t is an equally fundamental maxim of statutory construction that statutory language should not be viewed in isolation.” In re Brown, 903 A.2d 147, 149 (R.I. 2006).

It is clear that SORCNA and § 8-2-39.2 are in pari materia. See Horn v. S. Union Co., 927 A.2d 292, 294, n.5 (R.I. 2007) (defining “[t]he in pari materia canon of statutory interpretation . . . as being a principle according to which ‘statutes on the same subject * * * are, when enacted by the same jurisdiction, to be read in relation to each other’”) (quoting Reed Dickerson, The Interpretation and Application of Statutes 233 (1975)); see also Narragansett Food Services, Inc. v. Rhode Island Dept. of Labor, 420 A.2d 805, 807 (R.I. 1980) (stating “that statutes are in pari materia if they relate to the same subject matter and are not inconsistent with one another”). “It is an especially well-settled principle of statutory construction that when, as

here, “[the Court is] faced with statutory provisions that are in pari materia, [it] construe[s] them in a manner that attempts to harmonize them and that is consistent with their general objective scope.” Horn, 927 A.2d at 293 and 295 (declaring that RICRA and FEPA “are complementary employment discrimination statutes”).

Another “well-established tenet of statutory interpretation posits that the Legislature is presumed to know the state of existing law when it enacts or amends a statute.” Simeone v. Charron, 762 A.2d 442, 446 (R.I. 2000) (quoting Providence Journal Co. v. Rodgers, 711 A.2d 1131, 1134 (R.I. 1998)) (internal quotations omitted). Thus, when the General Assembly amended § 8-2-39.2 to provide an additional level of review, it was charged with the knowledge that SORCNA already provided indigent petitioners with access to appointed counsel to appeal their classifications. See e.g., Horn, 927 A.2d at 296 (stating “we may take it as a given that, when the General Assembly enacted the RICRA in 1990, it did so with knowledge of the explicit one-year limitations period that is contained in the FEPA; and there is no reason to conclude that it thought that some other time period would be appropriate for employment discrimination actions under the RICRA.”); Shelter Harbor Fire Dist. v. Vacca, 835 A.2d 446, 449 (R.I. 2003) (holding “the Legislature was charged with the knowledge that [the contested] amendment would result in an expansion of property eligible for tax-exempt status . . .”).

Furthermore, although the General Assembly has amended § 11-37.1-13 since § 8-2-39.2 was adopted in 2007, it has never altered the language mandating the “right to be represented by counsel.” Sec. 11-37.1-13; P.L. 2010, ch. 103, § 1; P.L. 2010, ch. 109, § 1. Nor has it altered the legislative directive that the Superior Court “[a]ppoint counsel for the applicant if he or she cannot afford one[.]” Sec. 11-37.1-14(3); see Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996) (“It is well settled that when the language of a statute is

clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.”).

Considering that the General Assembly altered neither SORCNA’s express right to counsel,⁷ nor its mandate that the Superior Court appoint that counsel,⁸ and given § 8-2-39.2’s silence with respect to whether litigants are entitled to court-appointed counsel for SORCNA appeals from the Drug Court Magistrate, the Court concludes that harmonization of these two statutes can best be achieved by interpreting § 11-37.1-13(3) to include the right to appointed counsel to pursue said appeals. See Providence Journal Co. v. Kane, 577 A.2d 661, 664 (R.I. 1990) (finding that “[w]hen faced with statutory language that is clear and unambiguous, [the Court] may not interpret or change the express intention of the Legislature”); see also Alessi v. Bowen Court Condo., 44 A.3d 736, 740 (R.I. 2012) (“In matters of statutory interpretation our ultimate goal is to give effect to the purpose of the act as intended by the Legislature.”).

Just as importantly, this Court’s conclusion regarding the legislative mandate set forth in § 11-37.1-13(3) is consistent with an equal protection analysis. Three elements are evaluated when deciding the due process that should be accorded to an indigent civil litigant’s right to counsel on appeal; namely, “the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.” Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N. C., 452 U.S. 18, 27 (1981) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). The Court “must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.” Lassiter, 452 U.S. at 27; see also Halbert v. Mich., 545 U.S. 605, 610 (2005) (stating that in criminal “first appeals as of right,

⁷ See § 11-37.1-13.

⁸ See § 11-37.1-14(3).

States must appoint counsel to represent indigent defendants . . . [;] however, . . . [they] need not appoint counsel to aid a poor person in discretionary appeals to the State’s highest court . . .”) (internal citation and quotations omitted).

Regarding the nature of the interests at stake, when the Board labels a defendant as a Level II or III offender, this Court notes that our Supreme Court has found Rhode Island’s Sexual Offender Registration and Notification Act to burden a protected liberty interest. See State v. Germane, 971 A.2d 555, 578 (R.I. 2009) (finding that an “individual’s status as a convicted sex offender, together with information concerning his risk to reoffend” could potentially “expos[e] the offender to such consequences as vigilantism, police surveillance, community ostracism, and the foreclosure of employment or associational opportunities”) (emphasis in original); see also Leon, 2013 WL 1089005, at *5 (“[T]he requirements of §§ 11-37.1 et seq. may subject offenders to a wide range of serious consequences . . .”). Thus, according to Germane, sexual offender risk assessments impact liberty interests protected by procedural due process. See Germane, 971 A.2d at 578. Here, the Board has declared DiCarlo a Level II offender, a distinction that carries with it both a social stigma and mandatory registration requirements. Accordingly, as sex offender registration implicates a protected liberty interest, a right to counsel attaches.

Furthermore, leaving it to the Drug Court Magistrate to make a final determination concerning the right to counsel on appeal, and thereby forcing a litigant to proceed pro se, would render his or her opportunity to be heard meaningless. Indeed, “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.” Leon, 2013 WL 1089005, at *8 (citing Campbell v. State, 56 A.3d 448

(R.I. 2012)); see also Ross v. Moffitt, 417 U.S. 600, 612 (1974) (“The State cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all, by virtue of his indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal.”) (internal citation and quotations omitted).

Here, DiCarlo has been afforded both a specific right to be heard and a general right to counsel. However, without the assistance of counsel, “any real chance he may have had of showing that his appeal has hidden merit is deprived [of] him when the court decides on an ex parte examination of the record that the assistance of counsel is not required.” Douglas v. Cal., 372 U.S. 353, 356 (1963).

Indeed, our Supreme Court has declared that in the context of post-conviction relief applications, proceeding via a pro se plaintiff to be “a waste of valuable judicial manpower and an inefficient method of seriously treating the substantive merits of applications” Shatney v. State, 755 A.2d 130, 136 (R.I. 2000) (quoting Commonwealth v. Harris, 553 A.2d 428, 433 (Pa. Super. Ct. 1989)); see also Campbell, 56 A.3d at 458 (restating same quotation). Furthermore, this Court notes the important role court-appointed counsel plays in streamlining any appeals process. See Campbell, 56 A.3d at 458 (“Counsel’s ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention * * * .”) (quoting Shatney, 755 A.2d 136; Harris, 553 A.2d at 433). On the other hand, a pro se petitioner may find the selective and particular review process confusing because at this stage of review, factual issues are rarely in dispute; thus, appointed-counsel would be in the best position to efficiently and effectively present nuanced legal arguments. Finally, the mandatory appointment of counsel would help to promote judicial efficiency and economy.

The Pennsylvania decision in Harris, a case cited with approval in Campbell, 56 A.3d at 458 and Shatney, 755 A.2d at 136, involved an indigent applicant’s request for court-appointed counsel on his post-conviction relief appeal. See Harris, 553 A.2d at 432. Under Pennsylvania law, an applicant for post-conviction relief “has the right to the assistance of court-appointed counsel if petitioner is indigent, unless a previous petition involving the same issue or issues has been finally determined adversely to the petitioner and he either was afforded the opportunity to have counsel appointed or was represented in proceedings thereon.” Id. (internal quotations omitted). The Harris Court recognized that such a system could be subject to abuse; however, the court emphasized that “appointment of counsel serves administrative as well as substantive interests.” Id. at 433. The Court further stated:

“[T]he mandatory appointment requirement is a salutary one and best comports with efficient judicial administration and serious consideration of a prisoner’s claims. Counsel’s ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention It is a waste of valuable judicial manpower and an inefficient method of seriously treating the substantive merits of applications for post-conviction relief to proceed without counsel for the applicants who have filed pro se Exploration of the legal grounds for complaint, investigation of the underlying facts, and more articulate statement of claims are functions of an advocate that are inappropriate for a judge, or his staff.” Id. (emphasis in original; internal citations and quotations omitted); see also Campbell, 56 A.3d at 460-61; Shatney, 755 A.2d at 136.

The Pennsylvania Court went on to note that “[t]he importance of court-appointed counsel’s role in facilitating the efficient administration of justice cannot be overstated.” Harris, at 433. The Court then observed that appointed counsel

“may assist the efficient administration of justice by assisting the petitioner to separate the grain from the chaff, i.e. . . . by helping petitioner identify, prepare, and present any arguable claims. Counsel can ensure that all arguable claims are presented in a single petition, and also ensure that the petition is presented in an

orderly professional manner conducive to meaningful appellate review. In this way, a full and fair hearing is guaranteed to petitioner's claims, while at the same time limited judicial resources are conserved.” Id.

This Court, like our Supreme Court in Shatney and Campbell, finds the rationale in Harris persuasive. See Shatney, 755 A.2d at 136; Campbell, 56 A.3d at 458. As was recognized in Germane, “the state has an . . . interest in expediting the risk level assessment and judicial review processes.” Germane, 971 A.2d at 582.

Thus, based upon the nature of the review and the significant liberty interest at stake, the Court finds that a meaningful opportunity to be heard cannot be accomplished without the assistance of counsel in SORCNA appeals to the Superior Court. Appointed counsel is best able to assist the appellant with the applicable standards of review and to ensure that all facets of the appeal are presented in an organized and coherent manner. Furthermore, a full and effective appeal guarantees that the petitioner’s significant liberty interest is fully protected. Accordingly, even if § 11-37.1-13(3) could not be harmonized with § 8-2-39.2 to include the right to appointed counsel upon appeal from the Drug Court Magistrate, which it can, providing an indigent petitioner with counsel in conjunction with the Superior Court review would comport with the guarantees of due process and equal protection. Finally, the mandatory appointment of counsel would help to promote judicial efficiency and economy by expediting the appeals process.

Accordingly, this Court granted DiCarlo’s motion to proceed in forma pauperis and for the appointment of private counsel to represent him for purposes of his appeal to a justice of the Superior Court from the March 4, 2014 decision of the Drug Court Magistrate. Plainly, an indigent sexual offender, classified as a Level II or Level III offender, is entitled to court-appointed counsel.

III

DiCarlo's Appeal of the Drug Court Magistrate's March 4, 2014 Decision

Although his arguments are crafted to respond to the statutory framework and legislatively mandated standard of review that limits the Drug Court Magistrate's and this Court's review of his classification, DiCarlo essentially challenges all aspects of the Board's determination and recommendation and is appealing the Drug Court Magistrate's failure to correct those errors. As also previously indicated, he seeks a full, de novo review of the decisions of both the Board and the Drug Court Magistrate, asserting what he claims to be errors of law and violations of his constitutional rights. He also seeks new findings and conclusions of law that would have the effect of reclassifying him as a Level I offender.

On May 18, 2015, this Court conducted a hearing on the appeal during which it permitted DiCarlo an opportunity to testify on his own behalf, present evidence, including his witnesses' affidavits. After hearing his offer of proof, this Court did not permit DiCarlo's other witnesses to testify. All but one of them had previously provided affidavits to the Drug Court Magistrate, and it was readily apparent that the witnesses' testimony was irrelevant to the question of whether the Board's decision on either the level of notification or the manner in which it was proposed to be accomplished was not in compliance with Chapter 37.1 or the Guidelines adopted pursuant to it. See § 11-37.1-16(c) ("Upon presentation of a prima facie case, the court shall affirm the determination of the level and nature of the community notification, unless it is persuaded by a preponderance of the evidence that the determination on either the level of notification of the manner in which it is proposed to be accomplished is not in compliance with this chapter or the guidelines adopted pursuant to this chapter."). It also was cumulative and primarily in the nature of character evidence.

In connection with §§ 11-37.1-15 and 11-37.1-16, DiCarlo does not dispute that the Board used validated risk assessment tools in calculating his risk to re-offend. Nor does he dispute that the Board, at least in part, used a reasonable means of collecting information used in the validated assessment tool, i.e. interviewing him. However, he contends that materials made available to the Board, pursuant to § 11-37.1-12(b)(5), contained invalid and inaccurate information, and that the Board erred in relying upon such information in assessing his risk to re-offend. In particular, DiCarlo contends that the Board erred by considering allegations of criminal conduct for which he either was never charged, or for which he was acquitted.

Thus, relying on his Fifth Amendment presumption of innocence and, implicitly, his Fourteenth Amendment right to due process, DiCarlo maintains that just as SORCNA precludes him from re-litigating his guilt or innocence—see § 11-37.1-15(c) (stating “[n]othing in this section should be construed to allow the applicant to relitigate the adjudication of guilt”)—the Board should have been precluded from basing its determination upon unproven facts and information. Presumably as a result of the Supreme Court’s holding in Germane, 971 A.2d at 555, 591 (R.I. 2009) (holding mere fact that Board’s recommended risk level classification differed from level predicted by validated risk assessment tools was insufficient to render SORCNA unconstitutional), DiCarlo has not directly challenged SORCNA’s constitutionality, even though SORCNA permitted the Board to rely on the hearsay statements at issue in this appeal.

A

Standard of Review

The procedure and standard of review that a Superior Court justice must utilize when considering a SORCNA appeal from a Drug Court Magistrate’s decision is unclear and

confusing. Litigants, including the attorney general, have cited to Super. Ct. Admin. Order No. 94-12 (Admin. Order 94-12), which is similar to Superior Court Rule of Practice 2.9 (Superior Court R.P. 2.9), as the appropriate standard of review. See e.g., “State’s Memorandum in Support of its Objection to the Petitioner’s Appeal of the Magistrate’s Decision” filed on May 11, 2015, at 2; State v. Beaulieu, C.A. No. PM-2012-2126 (filed Feb 26, 2013) (Gibney, J.).⁹ Thus, the issue that the Court must resolve is whether the pertinent language of Admin. Order No. 94-12 and/or Superior Court R.P. 2.9, should be applied to “procedures for reviews of orders entered by a Drug Court Magistrate . . . [.]” for SORCNA appeals. Sec. 8-2-39.2(j). The legislative and statutory history of the pertinent statutes and rules indicate that neither provision is applicable.

1

Legislative and Statutory History

In 1988, approximately eight years before the enactment of SORCNA, the General Assembly enacted § 8-2-39, thereby creating the position of “Special master.” See P.L. 1988, ch. 129, art. 25, § 1. The special master was

“empowered to hear all motions, pre-trial conferences, arraignments, probable cause hearings, bail hearings, bail and probation revocation hearings, and to review all such matters including, but not limited to the above, and to modify the terms and conditions of probation and other court-ordered monetary payments including, but not limited to, the extension of time for probation and court-ordered monetary payments as provided by law.” P.L. 1988, ch. 129, art. 25, § 1 (designated § 8-2-39 (c)).

Thus, the special master was empowered to hear relatively straightforward, contested evidentiary matters and to make evidence-based findings of fact and conclusions of law—as opposed to

⁹ Although the language of Superior Court R.P. 2.9 essentially tracks the language of Admin. Order 94-12 in its entirety, for purposes of this Decision, the Court is concerned only with the applicability, if any, of subsections (h) of those provisions with respect to SORCNA appeals.

sitting in review of highly discretionary, executive branch determinations made by a board or panel having special expertise such as the Sex Offender Board of Review.

According to P.L. 1988, ch. 129, art. 25, § 1 (e), a party who was aggrieved by an order entered by said special master was

“entitled to a review of the order by a justice of the relevant court. Unless otherwise provided in the rules of procedure of the court, such review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by a master, and for enforcement of contempt adjudications of a master.” P.L. 1988, ch. 129, art. 25, § 1 (designated § 8-2-39 (e)).

Obviously, this provision was not a model of clarity. Although the legislature affirmatively established a substantive standard of review for appeals of a special master’s order and required the Court to establish procedures for such review, it also seemingly authorized the Court to adopt its own substantive standard of review—simply by providing for such in its rules of procedure. P.L. 1988, ch. 129, art. 25, § 1 (designated § 8-2-39 (e)).

In 1991, the General Assembly substituted the term “Special master” with “General master.” See P.L. 1991, ch. 44, art. 73, § 1.

Thereafter, in 1992, the General Assembly enacted G.L. 1956 § 11-37-16 (repealed), entitled “Registration of sex offenders.” See P.L. 1992, ch. 196, § 1. Under that provision, designated sexual offenders were required to register by operation of law. Id. However, unlike SORCNA, § 11-37-16 did not classify sexual offenders and did not require public notification. See § 11-37-16 (repealed). Furthermore, registration under that provision was for a limited period of time, and failure to register constituted only a misdemeanor. Compare § 11-37-16(g) (“Any person required to register under this section who violates any of its provisions is guilty of

a misdemeanor . . .”) with § 11-37.1-10(a) (“Any person who is required to register . . . who knowingly fails to do so, shall be guilty of a felony . . .”).

On July 1, 1994, the Presiding Justice of the Superior Court (Rodgers, P.J.) accepted what arguably was the legislature’s invitation to vary its directive that “such review shall be on the record and appellate in nature,” see P.L. 1991, ch. 44, art. 73, § 1, and issued Admin. Order No. 94-12 to establish the procedure for appealing from a Master of the Superior Court. Said order governed the procedure for how such appeals should be taken; namely, the contents of the appeal notice; service of the notice of appeal; the record on appeal; and the assignment of the appeal to a Superior Court Justice. See Admin. Order No. 94-12. Importantly, however, Admin. Order No. 94-12 also contained a new standard of review that was a substantial departure from the legislature’s directive that the review be “appellate in nature.” See P.L. 1991, ch. 44, art. 73, § 1 (designated § 8-2-39 (e)).

Admin. Order No. 94-12 provides in pertinent part:

“The Superior Court justice shall make a *de novo* determination of those portions to which the appeal is directed and may accept, reject or modify, in whole or in part, the judgment, order or decree of the Master. The justice, however, need not formally conduct a new hearing and may consider the record developed before the Master, making his or her own determination based on that record whether there is competent evidence upon which the Master’s judgment, order or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter to the master with instructions.” Admin. Order No. 94-12(h).

Thus, the new standard called for a full, de novo determination of all aspects of the appeal—as opposed to only the master’s conclusions of law that were based upon the record before him or her. It also permitted the Superior Court justice to convene a hearing and expand the record. Finally, it permitted the Superior Court justice to modify the master’s determination.

One year later, in 1995, the Rhode Island Supreme Court promulgated Superior Court R.P. 2.9, entitled “Proceeding on appeal from master,” which contained, in pertinent part, identical language to that of Admin. Order No. 94-12. Thus, similar to Admin. Order No. 94-12, Superior Court R.P. 2.9 was at odds with the legislative directive that the review of a master be on the record and appellate in nature. Compare P.L. 1991, ch. 44, art. 73, § 1 (designated § 8-2-39 (e)) with Admin. Order No. 94-12(h) and Superior Court R.P. 2.9(h). Nevertheless, this new procedure and standard of review basically survived without conflict because, as a practical matter, it was applied somewhat loosely by the reviewing justices. For example, although the Superior Court justice may have had the benefit of a transcript of a master’s findings and decision, the time constraints and other factors attendant to bail hearings, probation violation hearings, probable cause hearings, and the like often limited the availability of the transcript of the hearing itself. Thus the Superior Court justice often convened a new hearing, evidentiary or otherwise, heard the matter afresh, and from there, determined whether or not the magistrate’s findings and decision were in accord with the evidence that was presented to the Superior Court justice. If they were, then the Superior Court justice would affirm the magistrate’s decision. If not, the Superior Court justice would issue a new decision or order.¹⁰

In 1996, the General Assembly enacted SORCNA. See P.L. 1996, ch. 104, § 1. In doing so, the General Assembly repealed the sex offender registration provisions contained in § 11-37-16. See P.L. 1996, ch. 104, §§ 2-3. In its “EXPLANATION BY THE LEGISLATIVE COUNCIL OF AN ACT RELATING TO SEXUALLY VIOLENT PREDATORS[,]” the lawmakers declared: “[t]his act would establish a registration and address verification system for sexual offenders . . . [,] would establish . . . a state board composed of experts . . . who would

¹⁰ Although masters since have been replaced by magistrates, this review process essentially has remained unchanged to this day.

make recommendations to the sentencing court as to whether or not a person, so convicted, was a sexually violent predator[,] . . . [and] would provide for a system of community notification of sexual offenders.” P.L. 1996, ch. 104.

The newly enacted SORCNA provided for the promulgation of regulations to “provide for three (3) levels of notification depending upon the degree of the risk of re-offense.” P.L. 1996, ch. 104, § 1 (designated § 11-37.1-12(C)). Accordingly, if an offender’s risk of re-offense was classified as low, then only “law enforcement agencies likely to encounter the person registered shall be notified.” P.L. 1996, ch. 104, § 1 (designated § 11-37.1-12(C)(2)(a)).

However, for offenders who were classified as having a moderate (tier two) or high (tier three) risk of re-offense, SORCNA required more than just notification of law enforcement agencies. See P.L. 1996, ch. 104, § 1 (designated as §§ 11-37.1-12(C)(2)(b) and (c), and § 11-37.1-13). Thus, for moderate risk offenders, SORCNA also required notification to be given to schools or organizations which were “actually in charge of, or in control of women or children and which [were] likely to encounter the person registered[.]” See P.L. 1996, ch. 104, § 1 (designated §§ 11-37.1-12(C)(2)(b)). With respect to high risk offenders, SORCNA further required notification be given to “members of the public likely to encounter the person registered” P.L. 1996, ch. 104, § 1 (designated as § 11-37.1-12(C)(2)(c)).

Sexual offenders who were classified as having a tier two or tier three risk of re-offense were informed in writing and afforded at least ten days to contest that determination in the Superior Court. See P.L. 1996, ch. 104, § 1 (designated § 11-37.1-13). If an offender chose not to contest his or her classification, then the statutory notification automatically went into effect as a matter of law. See *id.* Conversely, the “[f]iling [of] an application for review effectively suspend[ed] the legal effect of the board’s determination.” Germane, 971 A.2d at 579.

Furthermore, sexual offenders subject to the Act who knowingly failed to register would now be guilty of a felony. See P.L. 1996, ch. 104, § 1 (designated § 11-37.1-10(A)).

Notably, SORCNA limited the offender's ability to challenge the Board's determination and recommendation to "the criminal calendar judge of the superior court for the county in which the person . . . resides or intends to reside upon release . . .". See P.L. 1996, ch. 104, § 1 (designated § 11-37.1-13(B)). It then required that court to conduct a hearing at which the State had the burden of going forward by presenting "a prima facie case that justifie[d] the proposed level of and manner of notification." P.L. 1996, ch. 104, § 1 (designated § 11-37.1-16). Thereafter, the offender had the burden of persuading the court, "by a preponderance of the evidence that the determination on either the level of notification of the manner in which it [wa]s proposed to be accomplished [wa]s not in compliance with this chapter or the guidelines adopted hereunder." Id. (designated § 11-37.1-16(B)(6)). If the offender failed to prove non-compliance with what were, essentially, procedural requirements, the Court was required to affirm the Board's determination thus judicially subjecting the offender to the level and manner of notification recommended. Id. Thus, the General Assembly tightly constrained the offender's ability to challenge the Board's determinations and recommendations.

Meanwhile, in 1997, the General Assembly enacted § 8-2-39.1 to re-create the position of "Special Master." See P.L. 1997, ch. 30, art. 1, § 21. The "duties, responsibilities, powers and benefits" attendant with the position were governed by § 8-2-39. See id. As a result, appeals from either the general master or special master were governed by the same confusing aggrievement provision set forth above. See supra at 18. In 1998, the General Assembly amended both § 8-2-39 and § 8-2-39.1 to substitute the terms "general master" and "special

master” with the terms “general magistrate” and “special magistrate.” See P.L. 1998, ch. 442, § 1. Substantively, however, these provisions remained unchanged. See id.

In 1999, the General Assembly amended § 11-37.1-13 and § 11-37.1-14 of SORCNA to differentiate between adult offenders and juvenile offenders for purposes of seeking review of the Board’s classification. See P.L. 1999, ch. 255, § 1. Under these provisions, adult offenders were required to file an application for review with the Superior Court, and juvenile offenders were required to seek review in the Family Court. See P.L. 1999, ch. 255, § 1 (designated § 11-37.1-13(B)). Thus SORCNA mandated the Superior Court to act upon adult offenders’ applications and the Family Court to act upon juvenile offenders’ applications. Id.

Effective July 10, 2003, the Rhode Island Attorney General promulgated Rhode Island Parole Board Sex Offender Community Notification Unit Guidelines to be used by the Sex Offender Board of Review. Consistent with SORCNA, the Guidelines largely concerned themselves with the practical and procedural aspects of determining an offender’s risk of re-offending, the notification process, and the limitations on an offender’s challenge to the Board’s determination and recommendations.

In 2004, approximately eight years after enacting SORCNA, the General Assembly enacted § 8-2-39.2 to establish the position of Drug Court Magistrate. See P.L. 2004, ch. 595, art. 19, § 1. The statute did not delineate the specific powers and duties attendant to that position; rather, it simply stated that “[t]he powers and duties of the Drug Court Magistrate shall be prescribed in the order appointing him or her.” Id.

In 2005, the General Assembly amended § 8-2-39.2 to more specifically provide for the Drug Court Magistrate’s duties and powers. See P.L. 2005, ch. 343, § 1. Unlike general magistrates, who held limited general powers and whose decisions were subject to review by a

Superior Court justice, the Drug Court Magistrate was granted specialized powers in specialized areas, and would sit as a Superior Court justice when making a decision on such matters. Compare § 8-39-2 with P.L. 2005, ch. 343, § 1 (designated § 8-2-39.2(b) and § 8-2-39.2 (c)). In this context, the General Assembly specifically provided that “[t]he Drug Court Magistrate shall be empowered to hear and decide as a superior court justice all matters that may come before the superior court pursuant to chapter 11–37.1 ‘Sexual Offender Registration and Community Notification.’” P.L. 2005, ch. 343, § 1 (designated § 8-2-39.2 (c)) (emphasis added).¹¹ Thus, for the first time, the legislature empowered a magistrate of the Superior Court, rather than a Title 8 justice, to sit in review of executive branch determinations issued by a board comprised of individuals having highly specialized experience and expertise. See id.¹²

When § 8-2-39.2 first granted the Drug Court Magistrate the power to sit as if a Title 8 Superior Court justice to hear and decide SORCNA appeals, the statute was silent with respect to how an individual could appeal from a decision of the Drug Court Magistrate. SORCNA provided no guidance on this issue; indeed, it did not even provide an express right of appeal to the Supreme Court. Nevertheless, the Supreme Court possessed authority to review challenges

¹¹ The General Assembly has not enacted a similar provision with respect to juvenile sexual offenders; thus, justices of the Family Court continue to review Board decisions concerning juvenile sexual offenders. See § 11-37.1-13(2) (directing juvenile offenders to file application for review in family court); § 11-37.1-14 (applying same standard to Superior Court and Family Court with regard to preliminary proceedings on objections to community notification); § 11-37.1-16 (directing the reviewing court to apply preponderance of the evidence standard to applicant’s evidence). See also In re Richard A., 946 A.2d 204, 214 (R.I. 2008) (holding that “the Registration Act is constitutional as applied to juveniles . . .”).

¹² The Board consists of

“eight (8) persons including experts in the field of the behavior and treatment of sexual offenders by reason of training and experience, victim’s rights advocates, and law enforcement representatives to the sex offender board of review. At least one member of the sex offender board of review shall be a qualified child/adolescent sex offender treatment specialist.” Sec. 8-37.1-6(1)(a).

to Sex Offender Board of Review classification determinations under the powers granted to it by the Rhode Island Constitution. See art. 10, sec. 2 of the Rhode Island Constitution (“The supreme court shall have final revisory and appellate jurisdiction upon all questions of law and equity.”); see also New Harbor Village, LLC v. Town of New Shoreham Zoning Bd. of Rev., 894 A.2d 901, 907 (R.I. 2006) (“There are two separate and distinct procedural vehicles that allow a party to obtain review by the Supreme Court—appeals and petitions for discretionary review. Appeals are taken as of right and are prescribed by law. A petition for discretionary review, as the name implies and in contrast to an appeal, is granted at the discretion of the Court.”) (footnote omitted.) Thus, historically, when a party was aggrieved by a decision of the Drug Court Magistrate, sitting as a Title 8 Superior Court justice, the Supreme Court would review that decision directly. See State v. Dennis, 29 A.3d 445, 448 (R.I. 2011) (indicating that the appeal came from decision of Drug Court Magistrate); Germane, 971 A.2d at 573 (same).

In directly reviewing decisions of the Drug Court Magistrate, the Supreme Court applied the same deferential standard of review it accorded to findings of fact in a nonjury civil proceeding. See Dennis, 29 A.3d at 450 (“This Court consistently has held that factual findings of a trial justice sitting without a jury are granted an extremely deferential standard of review.”); Germane, 971 A.2d at 573 (“We review with deference the factual findings made by a trial justice in a nonjury case.”). In applying that deferential standard, the Supreme Court declared:

“We shall not disturb the findings of the trial justice unless it is established that he or she misconceived or overlooked relevant and material evidence or was otherwise clearly wrong. Obviously, we employ a de novo standard of review to the trial justice’s conclusions of law. If the record indicates that competent evidence supports the trial justice’s findings, we shall not substitute our view of the evidence for [the trial justice’s] even though a contrary conclusion could have been reached.” Dennis, 29 A.3d at 450 (internal citations and quotations omitted).

In 2007, the General Assembly amended Section 8-2-39.2 to provide for additional Superior Court review of the Drug Court Magistrate’s decisions. See P.L. 2007, ch. 73, art. 3, § 6. This change in procedure appeared to be an attempt to bring appeals from decisions of the Drug Court Magistrate into conformity with already existing legislative directives governing appeals from the decisions of general and special magistrates. See §§ 8-2-39 and 8-2-39.1.¹³

As a result, § 8-2-39.2 now provided in pertinent part:

“A 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. Unless otherwise provided in the rules of procedure of the court, such review shall be on the record and appellate in nature. The Superior Court shall, by rules of procedure, establish procedures for reviews of orders entered by a Drug Court Magistrate, and for enforcement of contempt adjudications of a Drug Court Magistrate.” P.L. 2007, ch. 73, art. 3, § 6 (designated § 8-2-39.2 (f)) (emphasis added).¹⁴

The effect of this change was to insert an intermediary layer of review, by a Title 8 Superior Court justice, of decisions made by the specialized Drug Court Magistrate, who is sitting in the capacity of a Title 8 Superior Court justice when reviewing recommendations of a highly specialized executive branch board. In addition, the fact that the amendment tracked the language governing appeals from general and special magistrates—which, as previously stated,

¹³ Section 8-2-39(e), governing General Magistrates, provides:

“A party aggrieved by an order entered by the general magistrate shall be entitled to a review of the order by a justice of the relevant court. Unless otherwise provided in the rules of procedure of the court, such review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by a general magistrate, and for enforcement of contempt adjudications of a general magistrate.”
Sec. 8-2-39(e).

Section 8-2-39.1, governing Special Magistrates, provides: “The special magistrate shall have the duties, responsibilities, powers and benefits as authorized in section 8-2-39.” Sec. 8-2-39.1.

¹⁴ Section 8-2-39.2(f) is now designated as § 8-2-39.2(j) in accordance with P.L. 2012, ch. 401, § 1.

arguably extended authority to the Court to adopt its own substantive standard for review—the legislature had now created confusion as to the proper standard of review to be used by the Superior Court in SORCNA appeals.

On October 14, 2014, the Supreme Court promulgated rules governing electronic filing. In doing so, it also amended various rules, including Superior Court R.P. 2.9. At that time, the Supreme Court presumably was aware that “Drug Court Magistrate” is a specified designation for a specialized position. Presumably, the Court also was aware that amended § 8-2-39.2—which required the Court to establish procedures specific to appeals from Drug Court Magistrate’s decisions, including SORCNA cases—arguably had invited the Court to adopt its own substantive standard of review. Notwithstanding these presumptions, however, the Supreme Court did not promulgate any provisions specific to the specialized position of Drug Court Magistrate when it amended Superior Court R.P. 2.9. Instead, when the Court amended R.P. 2.9, it simply substituted the generic term “master” with the term “magistrate.” Superior Court R.P. 2.9.

Amid this confusion, the first question now facing the Court is whether the language contained in sections (h) of Admin. Order No. 94-12 and/or Superior Court R.P. 2.9, should be applied to “procedures for reviews of orders entered by a Drug Court Magistrate . . . [,]” for Sex Offender Community Notification appeals. Sec. 8-2-39.2(j).

**Superior Court Administrative Order No. 94-12(h) and
Superior Court Rule of Practice 2.9(h) Are Inapplicable**

For the reasons set forth below, the Court concludes that Superior Court R.P. 2.9(h) (and Admin. Order No. 94-12(h)) does not govern Superior Court review of orders entered by the Drug Court Magistrate when hearing SORCNA appeals.

First, although Superior Court R.P. 2.9(h) applies to “magistrates” in general, application of fundamental tenets of statutory construction render the rule would inapplicable to SORCNA appeals from the specialized position of Drug Court Magistrate. See e.g., G.L. 1956 § 43-3-26 (stating that where two conflicting statutory provisions cannot be reconciled, the special provision prevails as an exception to the general provision).¹⁵

However, assuming arguendo that the Supreme Court did intend Superior Court R.P. 2.9(h) to apply to SORCNA appeals from the Drug Court Magistrate, it remains questionable whether the legislature had intended such a result. This is because predecessor Superior Court R.P. 2.9(h) was in effect at the time the legislature both created the position of Drug Court Magistrate and when it adopted SORCNA; thus, the legislature is presumed to have been aware of the Rule’s existence. See Simeone, 762 A.2d at 446 (“A well-established tenet of statutory interpretation posits that the Legislature is ‘presumed to know the state of existing law when it enacts or amends a statute.’”) (quoting Providence Journal Co., 711 A.2d at 1134). Yet, the

¹⁵ Section 43-3-26 provides:

“Wherever a general provision shall be in conflict with a special provision relating to the same or to a similar subject, the two (2) provisions shall be construed, if possible, so that effect may be given to both; and in those cases, if effect cannot be given to both, the special provision shall prevail and shall be construed as an exception to the general provision.” Sec. 43-3-26.

legislature’s command in § 8-2-39.2, was prospective and spoke in terms of rules of procedure, not rules of practice. See § 8-2-39.2(j) (“The superior court shall, by rules of procedure, establish procedures for reviews of orders entered by a Drug Court Magistrate”) (emphases added).

In addition, the legislature, presumably, also was aware that the standard of review applied by the Supreme Court to SORCNA appeals from the Drug Court Magistrate was the deferential standard of review it accorded to findings of fact in a nonjury civil proceeding, and that the Court employed a de novo standard of review to the Drug Court Magistrate’s conclusions of law only. See Dennis, 29 A.3d at 450 (stating “factual findings of a trial justice sitting without a jury are granted an extremely deferential standard of review . . . Obviously, we employ a de novo standard of review to the trial justice’s conclusions of law”); Germane, 971 A.2d at 573 (“We review with deference the factual findings made by a trial justice in a nonjury case.”) However, Superior Court R.P. 2.9(h) accords no such deference when it broadly directs and purports to permit the Title 8 Superior Court justice to make a de novo determination or re-determination of any aspects of the magistrate’s decision to which the appeal is directed—as opposed to a de novo review of the Drug Court Magistrate’s conclusions of law alone.

Thus, considering the legislative presumptions about the law as it existed when the legislature enacted § 8-2-39.2, it is doubtful that either the legislature, or the Supreme Court when it simply replaced the term “master” with the term “magistrate,” actually intended Superior Court R.P. 2.9(h) to apply to Superior Court review of the Drug Court Magistrate in SORCNA appeals. Indeed, any such application necessarily would fly in the face of the standard of review previously applied by the Supreme Court and the legislature to such appeals.

In addition, even if the Supreme Court intended Superior Court R.P. 2.9(h) to apply to SORCNA appeals from the Drug Court Magistrate, this Court nonetheless concludes that Superior Court R.P. 2.9(h) (and Admin. Order No. 94-12(h)), in fact, would not govern Superior Court review of such appeals. Section 8-2-39.2 specifically provides that “A 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. Sec. 8-2-39.2(j) (emphasis added).¹⁶ Although the General Assembly plainly authorized the promulgation of rules of procedure for review of Drug Court Magistrate orders, § 8-2-39.2 fell short of authorizing a rule that would permit “a de novo determination of those portions to which the [SORCNA] appeal is directed” See Superior Court R.P. 2.9(h) (emphasis added). However, contrary to the clear legislative directive of § 8-2-39.2(j)—that the Superior Court justice’s review “shall be on the record and appellate in nature”—Superior Court R.P. 2.9(h) actually permits the Superior Court justice to “conduct a new hearing[,]” and to “receive further evidence recall witnesses or recommit the matter with instruction.” Superior Court R.P. 2.9(h). Just as importantly, the practical effect of any such new hearing necessarily would render irrelevant the issue of “whether there is competent evidence upon which the magistrate’s judgment, order or decree rests.” Id. Thus, in situations where, as in the instant case, the sex offender has challenged the entirety of the Board’s determination and the Drug Court Magistrate’s failure to correct it, the Title 8 Superior Court justice likely would have to make new findings of fact and conclusions of law concerning the Board’s determination and the Drug Court Magistrate’s analysis of it—rather than conducting an

¹⁶ While the Court’s analysis in this portion of the Decision refers only to Superior Court R.P. 2.9(h), the reasoning and conclusions would apply with equal force to the almost identical language contained in Admin. Order 94-12(h).

appellate review, on the record, of the Drug Court Magistrate’s findings with respect to the Board’s compliance with SORCNA and the Guidelines.

In further support of this conclusion, this Court observes that Rule 82 of the Superior Court Rules of Civil Procedure provides: “These rules shall not be construed to extend or limit the jurisdiction of the Superior Court or the venue of actions therein.” Super. R. Civ. P. 82. Yet, by ordering “a de novo determination[,]” and authorizing a new hearing and expanded record—instead of a deferential appellate review—one practical effect of applying Superior Court R.P. 2.9(h) to a Title 8 Superior Court justice’s review of a SORCNA decision would be to expand the Superior Court’s jurisdiction in violation of Super. R. Civ. P. 82.¹⁷ Although “[i]t is well established that in situations in which a statute and a rule approved by the Rhode Island Supreme Court are in conflict, the court rule prevails[;]” it equally is well established “that procedural rule-making authority may not be used to expand a court’s jurisdiction.” State v. Robinson, 972 A.2d 150, 158 (R.I. 2009). Thus, even though “[r]ule-making power allows courts to govern their internal matters; it does not allow a court to promulgate a rule that intrudes upon substantive legislative matters such as the expansion of the jurisdiction of the [court].” Robinson, 972 A.2d at 158. Specifically,

“[a]n authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act * * * authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of . . . [the] court[.]” Id. (quoting U.S. v. Sherwood, 312 U.S. 584, 589–90 (1941)).

¹⁷ Whether or not Superior Court R.P. 2.9 might constitute an impermissible expansion of the Superior Court’s jurisdiction as it pertains to review of a general magistrate’s decision or order is beyond the scope of this Decision.

As such, the rule-making power of a court “‘must be confined to regulating the pleading, practice and procedure therein’ and . . . [cannot] ‘be extended to categories not reasonably comprehended by those terms.’” Robinson, 972 A.2d at 159-60 (quoting Dyer v. Keefe, 97 R.I. 418, 423, 198 A.2d 159, 162 (1964)).

Equally important, the term “rule of procedure” is defined as “[a] judicial rule or manner for carrying on a civil lawsuit or criminal prosecution.” Black’s Law Dictionary 1532 (10th ed. 2014). The term “practice” is defined as “[t]he procedural methods and rules used in a court of law[.]” Id. at 1362. Conversely, a standard of review is defined as “[t]he criterion by which an appellate court exercising appellate jurisdiction measures the constitutionality of a statute or the propriety of an order, finding, or judgment entered by a lower court.” Id. at 1624. However, with respect to SORCNA appeals, rather than regulating the pleading, practice and procedure of said appeals, Superior Court R.P. 2.9(h) would allow the Court to leap-frog over § 8-2-39.2’s mandate that appeals from the highly specialized Drug Court Magistrate be “appellate in nature.” Considering that § 8-2-39.2 provides for Superior Court review that is appellate in nature, and considering that neither § 8-2-39.2, nor SORCNA, permits de novo review of the Drug Court Magistrate’s findings made pursuant to §§ 11-37.1-15 and 11-37.1-16, this Court also concludes that any application of Superior Court R.P. 2.9(h) with respect to SORCNA appeals would, for this reason, too, amount to an impermissible expansion of the Superior Court’s jurisdiction.

Plainly, application of Superior Court R.P. 2.9(h) in SCORNA cases would dispense with the legislatively mandated standard of review contained in §§ 11-37.1-15 and 11-37.1-16, permit a new hearing and the introduction of new evidence in the case of adult offenders, and allow a full, de novo re-determination of appellate issues other than the Drug Court Magistrate’s conclusions of law. This could effectively result in the Title 8 Superior Court justice’s deciding

the offender's risk of re-offending and thereby supplanting the highly specialized Board's sexual offender classification determination. From all of this, the Court concludes that the Supreme Court did not intend Superior Court R.P. 2.9(h) to apply to SORCNA appeals from the Drug Court Magistrate and—even if the Supreme Court had so intended—this Court also concludes that such application would contravene the intent of the legislature, which was to provide for appellate review of the Drug Court Magistrate's decisions.

3

Inapplicability of the Post-Conviction Relief Statute

The most helpful framework for this Court's review of a challenge in which unlawful restraint is alleged ordinarily would have been that of post-conviction relief, pursuant to chapter 9.1 of title 10, entitled Post Conviction Remedy ("the PCR Act"). See Higham v. State, 45 A.3d 1180, 1184 (R.I. 2012) ("Statute and case law provide that a post-conviction relief proceeding is the proper vehicle for raising limited objections to parole board proceedings."). However, such relief is not available in SORCNA cases due to the fact that the PCR Act clearly and unambiguously authorizes the Court only to apply that statute to Parole Board proceedings rather than to all parole determinations. And, the law is well settled that the role of the judiciary is to interpret and apply statutes and not to legislate. See Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (stating "our judicial role is to interpret and apply statutes and not to legislate * * *") (citing Lacey v. Reitsma, 899 A.2d 455, 458 (R.I. 2006)); see also Wayne Distrib. Co., v. R.I. Comm'n Human Rights, 673 A.2d 457, 460 (R.I. 1996) ("Where there is no ambiguity, [the Court is] not privileged to legislate, by inclusion, words which are not found in the statute."). Thus, even though sex offender classification proceedings can be readily regarded as a component of a defendant's sentence, the PCR Act does not apply to SORCNA appeals because

§ 10-9.1-1(b) clearly states that, “Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction of sentence.” Sec. 10-9.1-1(b).

However, notwithstanding the inapplicability of the PCR Act to SORCNA appeals, this Court would be remiss if it failed to generally discuss that statute for completeness’ sake. Indeed, if this Court were to apply a post-conviction relief framework to DiCarlo’s appeal, the Court very well might grant DiCarlo the relief he seeks for the reasons discussed in sections A-4, B, and C hereof.

First, had the legislature sanctioned similar proceedings in SORCNA cases, at a minimum, this would have permitted this Superior Court justice to undertake a limited review to decide the scope of any due process rights available to the offender and, if so, whether those rights had been abridged. See State v. Ouimette, 117 R.I. 361, 369 and 371, 367 A.2d 704, 709 and 710 (1976) (recognizing that even though “[t]he Parole Board, because of its special expertise, has been granted an extraordinarily broad amount of discretion to make decisions regarding parole release[,]” the Court did “not believe that it should entirely be exempt from judicial review”); see also Higham, 45 A.3d at 1183 (“When reviewing the denial of postconviction relief, this Court affords great deference to the hearing justice’s findings of fact and will not disturb his or her ruling absent clear error or a showing that the [hearing] justice overlooked or misconceived material evidence.”) (quoting Brown v. State, 32 A.3d 901, 907 (R.I. 2011)) (internal quotations omitted).

Thus, a post-conviction relief framework would respond to the array of legal and constitutional issues potentially raised by sex offender notification appeals and provide the offender with a meaningful hearing, as required by Dennis, 29 A.3d at 448 and Germane, 971

A.2d at 580, yet, at the same time, it would permit the Superior Court justice, where appropriate, to decide the matter summarily. See § 10-9.1-6(b) (allowing the Court to dismiss the application for enumerated reasons); § 10-9.1-6(c) (permitting the Court to “grant a motion by either party for summary disposition of the application when it appears . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law”).

In addition, the PCR Act makes provision for an evidentiary hearing. See § 10-9.1-7 (“The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may, if deemed appropriate, order the applicant be brought before it for the hearing.”). Therefore, because sex offender notification constitutes a restraint on liberty that arises as the result of a conviction,¹⁸ the appropriateness of the PCR Act as a potential remedy is evident. See U.S. v. Hinckley, 550 F.3d 926, 945 n.6 (10th Cir. 2008) (recognizing that sex offender registration is quasi-criminal, quasi-regulatory); Holden v. State, 190 P.3d 725, 730 (Alaska App. 2008) (recognizing that although sexual offender registration is quasi-criminal, “when a criminal case involves civil or quasi-civil supplemental or ancillary proceedings, these proceedings ‘are really part and parcel’ of the underlying criminal proceeding”) (quoting Webber v. Webber, 706

¹⁸ Section 11-37.1-2(c)1 defines conviction to mean and include

“any instance where:

“(i) A judgment of conviction has been entered against any person for any offense specified in subsection (e) or (k) of this section, regardless of whether an appeal is pending; or

“(ii) There has been a finding of guilty for any offense specified in subsection (e) or (k) of this section, regardless of whether an appeal is pending; or

“(iii) There has been a plea of guilty or nolo contendere for any offense specified in subsection (e) or (k) of this section, regardless of whether an appeal is pending; or

“(iv) There has been an admission of sufficient facts or a finding of delinquency for any offense specified in subsection (e) or (k) of this section, regardless of whether or not an appeal is pending.” Sec. 11-37.1-2(c)(1).

P.2d 329, 333 (Alaska App. 1985); see also P.L. 1996, ch. 104 (“EXPLANATION BY THE LEGISLATIVE COUNCIL OF AN ACT RELATING TO SEXUALLY VIOLENT PREDATORS”) (explaining that Board would “make recommendations to the sentencing court as to whether or not a person, so convicted, was a sexually violent predator”) (emphasis added).

Furthermore, due to the constraints and limitations imposed by §§ 11-37.1-15 and 11-37.1-16 upon the Drug Court Magistrate’s review and determination, it would not be until an offender was provided with the equivalent of a § 10-9.1-1 hearing before a Superior Court justice that he or she would have the opportunity to challenge the Board’s determination and classification recommendation by presenting evidence and arguments on issues other than whether the Board’s determination on either the level of notification or the manner in which it is proposed to be accomplished is not in compliance with Chapter 37.1 or the Guidelines adopted pursuant to that chapter. See 11-37.1-16(c); see also Dennis, 29 A.3d at 450 (concluding that “the defendant [in Germane] was provided with a meaningful hearing because there was a full evidentiary hearing before the Superior Court”); Germane, 971 A.2d at 580 (holding “that all sexual offenders who opt to appeal their risk level classifications as determined by the board of review must be afforded an opportunity to be heard before the Superior Court; moreover, such hearings must be meaningful”) (emphasis in original).

Finally, and of particular relevance to DiCarlo’s case, § 10-9.1-1 requires that all rules of evidence apply; whereas, Chapter 37.1 has no such requirement. Indeed, as written, Chapter 37.1 anticipates that the Board will rely upon hearsay, including potentially unreliable hearsay.

Notwithstanding the fact that this Court’s review of a SORCNA appeal would best be facilitated by the type of framework already established by PCR Act, for the previously stated reasons, this Court does not have the authority to apply such a framework to the instant matter.

The Deferential Standard of Review

Understandably, DiCarlo followed seemingly established precedent when he brought his appeal pursuant to SORCNA and Admin. Order No. 94-12(h)/Superior Court R.P. 2.9(h). Similarly, the State relied upon Admin. Order No. 94-12(h) in making its arguments. However, with Superior Court R.P. 2.9(h) (and Admin. Order 94-12(h)) and the PCR Act now out of the picture, this Court is left with deciding DiCarlo's challenge by applying the same deferential standard of review accorded by the Supreme Court when it previously reviewed sex offender notification cases. See Dennis, 29 A.3d at 450; Germane, 971 A.2d at 573.

As previously noted, DiCarlo raises the Board's obvious reliance on the complaining witness' hearsay statements—as contained in the police reports included in the materials that formed the basis of the Board's determination—concerning criminal conduct for which he was acquitted: first degree child molestation. He contends that the Board did not use reasonable means for collecting this information, see § 11-37.1-16(2) (requiring the state to prove that “reasonable means [were] used to collect the information used in the validated assessment tool”, and, further, that it erred when it relied on these unproven allegations. Importantly, DiCarlo points to other scores placed him in the low-risk category Level I.

Addendum 1 of the Guidelines, entitled “Sex Offenders Risk of Re-Offense Assessment Factors,” sets out 15 factors that the Board must consider when assessing risk of re-offense. One of the factors is “DEGREE OF SEXUAL INTRUSION Including, but not limited to, the type or nature of the offender's contact with the victim, types of penetration of the victim.” See Sexual Offender Community Notification Guidelines, APPENDIX, ADDENDUM 1 at 26. In addition, section 11-37.1-6(1)(b) requires the Board to assess the risk of re-offense of each offender

referred to it. In order to make its assessment, the Parole Board's Sex Offender Board of Review, pursuant to § 11-37.1-12(b)(5), specifically was granted access to

“all relevant records and information in the possession of any state official or agency having a duty under § 11-37.1-5(a)(1) through (6) relating to juvenile and adult offenders under review by the sex offender review board, including, but not limited to, police reports, prosecutors [sic] statements of probable cause, pre-sentence investigations and reports, complete judgments and sentences, current classification referrals, juvenile and adult criminal history records, violation and disciplinary reports, all psychological evaluations and psychiatric evaluations, psychiatric hospital records, sex offender evaluations and treatment reports, substance abuse evaluations and treatment reports to the extent allowed by federal law.” Sec. 11-37.1-12 (b)(5).

Given the nature and sources of the sanctioned materials and the nature of the information generally contained therein, the legislature plainly intended the Board to draw upon unproven hearsay allegations when considering the factors relevant to re-offense. And, by relying on the legislatively authorized access to the § 11-37.1-12 (b)(5) materials, the Board plainly used what the legislature deemed to be reasonable means “to collect the information used in the validated assessment tool.” Sec. 11-37.1-16(b)(2).

Against that backdrop, the Drug Court Magistrate was well aware that “[u]pon presentation of a prima facie case, the court shall affirm the determination of the level and nature of the community notification, unless it is persuaded by a preponderance of the evidence that the determination on either the level of notification or the manner in which it was proposed to be accomplished is not in compliance with this chapter or the guidelines adopted pursuant to this chapter.” Sec. 11-37.1-16(c). Therefore, as the Drug Court Magistrate correctly determined, the Board complied with SORCNA's terms and the relevant Guidelines when, in addition to considering DiCarlo's conviction of second degree child molestation, it considered the reports and other materials that contained his victim's statements regarding type and/or nature of his

contact with her, as well as the types of penetration in which he engaged. Indeed, even had DiCarlo raised the issue of whether the Board could rely on the complaining witness' hearsay statements concerning criminal conduct for which he was acquitted, the constraints imposed by the legislature when it adopted § 11-37.1-16(c) seemingly would have prevented the Drug Court Magistrate from reaching this question of law.

However, the over-arching question was whether DiCarlo's rights were abridged when the Board considered allegations of sexual penetration for which DiCarlo was acquitted—a question that was not presented to, or considered by, the Drug Court Magistrate due to the framework within which he and the parties understandably believed they should be proceeding. Thus, application of a deferential standard of review necessarily will fall short in DiCarlo's case precisely because the Drug Court Magistrate's findings were consistent with the evidence presented to him, and he committed no error of law when he so carefully adhered to the legislatively mandated framework and standard of review.

Indeed, although DiCarlo now raises new legal arguments not presented to the Drug Court Magistrate, the State does not object to these arguments, noting that “all of the information the Petitioner uses to make these arguments were all previously reviewed by the Drug Court Magistrate when he affirmed the Board's Decision.” (State's Mem. in Supp. of its Obj. to the Pet'r's Appeal of the Magistrate's Decision at 6). Thus, the State seems to recognize that, in light of the legislative constraints imposed on the Drug Court Magistrate's review, these new arguments would have been unavailing in the face of the Board's technical compliance with SORCNA and its Guidelines—notwithstanding that the statutory mandates that govern the

parties' respective burdens and limit the Drug Court Magistrate's review of DiCarlo's application effectively deprived DiCarlo of due process and a meaningful hearing.¹⁹

B

The Board Improperly Relied Upon Hearsay Allegations Concerning Conduct for Which DiCarlo Was Acquitted

Regardless of whether the Board and the Drug Court Magistrate adhered to SORCNA's mandates and relevant Guidelines, and putting aside the deferential standard of review, it is evident to this Court that the Board improperly relied upon hearsay allegations concerning conduct for which DiCarlo was acquitted. Accordingly, this Court feels compelled to address the question.

It is well settled that even in administrative or other civil proceedings, hearsay is permitted only when it is reliable and because a hearing officer is capable of assessing its inherent reliability. DePasquale v. Hamilton, 599 A.2d 314, 317 (R.I. 1991) ("An expert administrative tribunal concerned with advancing the public welfare should not be rigidly governed by rules of evidence designed for juries."); see also Foster-Glocester Reg'l Sch. Comm., 854 A.2d 1008, 1018 (R.I. 2004) ("Presumably, a hearing officer with 'substantial expertise in matters falling within his or her agency's jurisdiction' should be able to judge whether the evidence offered is trustworthy, credible, and probative, regardless of whether it is hearsay.") (citing DePasquale, 599 A.2d at 316).

¹⁹ In applying the deferential standard accorded to nonjury civil proceedings, the Supreme Court observed that the Board's classification of a sexual offender was subject to a meaningful hearing by the Drug Court Magistrate upon application. See Germane, 971 A.2d at 580 (holding "that all sexual offenders who opt to appeal their risk level classifications as determined by the board of review must be afforded an opportunity to be heard before the Superior Court; moreover, such hearings must be meaningful") (emphasis in original).

Although the Rhode Island Supreme Court has determined SORCNA cases to be civil in nature, other courts have, in different contexts, regarded sex offender registration somewhat differently and have applied an even higher standard for considering the reliability of hearsay, particularly where the defendant was acquitted of companion charges.²⁰ In Delgado v. State, 125 So. 3d 180 (2013), the Florida Supreme Court found the State’s reliance on a charge underlying an acquittal was improper to show that the defendant was a sexually violent predator. In Delgado, as with the instant case, not only did the defendant dispute the charge, but the jury also acquitted him of it. Id. at 184. The court reasoned that there was nothing in the record which caused the state’s hearsay evidence regarding that charge to be reliable. Id. The court held that introduction of the evidence was so prejudicial, it tainted the entire proceeding. Id.

Similarly, in Lewis v. Superior Court, 169 Cal. App. 4th 70 (2008), when considering whether the defendant was required to register as a sex offender, the Court rejected the lower Court’s reliance on those aspects of the charges for which the court granted defendant’s motion for an acquittal based upon insufficient evidence because, as a result “there was no substantial evidence that [defendant] had used force upon the victim, that he had threatened her, or that the victim’s age and relationship to [defendant] was such that she was coerced into doing something she would not otherwise have done.” Id. at 79.

²⁰ In U.S. v. Hinckley, 550 F.3d 926 (10th Cir. 2008), the Tenth Circuit Court of Appeals recognized in a footnote that sex offender registration is quasi-criminal, quasi-regulatory. Id. at 945 n.5. An Ohio district court classified a registration scheme in which the offender level would be determined based solely on the underlying offense as “a quasi-criminal punishment.” G.B. v. Rogers, No. 1:08–CV–437, 2009 WL 1322451, at *5 (S.D. Ohio May 11, 2009). An Alaska appeals court stated, in dicta, that registration is quasi-criminal, but that case took a different approach where it focused on the overarching nature of the entire case rather than the specific instance of registration classification, holding that “when a criminal case involves civil or quasi-civil supplemental or ancillary proceedings, these proceedings ‘are really part and parcel’ of the underlying criminal proceeding.” Holden v. State, 190 P.3d 725, 730 (Alaska App. 2008) (quoting Webber v. Webber, 706 P.2d 329, 333 (Alaska App. 1985)).

Again, in People v. Arotin, 19 A.D.3d 845 (N.Y. App. Div. 2005), the New York court held that hearsay evidence was not so clear and convincing as to support a level III sex offender classification—a high standard that presumably is driven by the liberty interest at issue. Id. at 847. In that case, the Court also pointed out that “[t]he assessment found that defendant scored low on tests that measure the risk of sexual recidivism, but noted that defendants’ risk might be higher than indicated in the tests because of, inter alia, his denial of the acts underlying his conviction.” Id. at 846. However, the court held that “[w]hen considered in light of the absence of an indictment for such an act, defendant’s claim of innocence and the failure to include the plea colloquy, such hearsay evidence does not rise to the level of clear and convincing evidence.” Id. at 848 (internal citation omitted). What happened in Arotin is similar to what occurred in DiCarlo’s case, except DiCarlo actually was acquitted by a jury of the first degree child molestation charges.

The issue of penetration was noted twice in the Board’s report in connection with the nature of the crime. Although only one of 15 factors, it is evident from the report and the risk factors that the nature of the crime was an important, if not dominant, consideration in assessing the risk of re-offending. In addition, Board also factored in—obviously negatively—DiCarlo’s denial of responsibility for the all of the charges that had been brought against him, which would include his denial of the first degree child molestation charges for which he was acquitted. This denial was noted in connection with factors considering treatment progress. Plainly, the hearsay statements contained in the police narratives and witness statements played a material part in the Board’s otherwise low-risk assessment.

Accordingly, it seems obvious enough that the Board abridged DiCarlo’s right to due process when it considered impermissible hearsay and factual allegations for which DiCarlo was

acquitted and, further, that the facts relating to penetration considered were, on their face, so prejudicial and so pervasive that they tainted the Board's report. However, consistent with the analysis herein, this Court must nonetheless uphold the Drug Court Magistrate's March 4, 2014 decision and order because SORCNA permits the use of such hearsay, and the Drug Court Magistrate adhered to the legislatively mandated standard of review.

C

DiCarlo's Other Arguments

For purposes of discussion, but as a matter of dicta only, the Court now addresses DiCarlo's other arguments. Even assuming, arguendo, that Rule 2.9(h) (or, indeed, a Post-Conviction Relief framework) had applied, these other arguments would have been unavailing in light of the evidence adduced during the May 18, 2015 hearing—a hearing that, at the time, this Court presumed it was authorized to conduct.

DiCarlo quarrels, among other things, with the Board's determination that he scored a "1" with respect to his capacity for relationship stability—a risk factor for re-offending. The Board, in its STABLE 2007 Tally Sheet noted that DiCarlo was currently incarcerated and, because the Board's Risk Assessment Report is devoid of any factual analysis as to this point, DiCarlo reasonably takes the note to mean that his incarceration and obvious inability to conduct a relationship was a determining factor. DiCarlo points to his relationship with his own daughter and his ex-wife, and he faults the Board for seemingly not considering that relationship. However, according to his testimony during the May 18, 2015 hearing, he and they were estranged by the time his incarceration ended. DiCarlo also faults the Board for failing to consider his ten year relationship with his girlfriend whose daughter he was convicted of molesting over a period of approximately nine years. However, the core facts surrounding

DiCarlo's conviction of second degree child molestation are no longer in dispute, and it should be self-evident that engaging in long term sexual activity with a child while in a long term sexual relationship with the child's mother is a poor indicator of relationship stability.

DiCarlo also quarrels with the Board's determination that his six convictions of driving without a driver's license are indicators of impulsivity—another risk factor for re-offending. He takes issue with the notion that driving without a driver's license can be an indicator of impulsivity. Likewise, DiCarlo complains that the Board got it wrong concerning his drug use and that it misconstrued the interviewer's notes by taking them to mean that he was using drugs up to the time of his incarceration. However, in his testimony during the May 18, 2015 hearing, DiCarlo stated that when he went to prison, he went clean from cigarettes, liquor and "everything else." When asked what he meant by "everything else," he indicated he meant drugs. He also testified that he occasionally smoked "pot." Thus, his testimony verified the accuracy of the interviewer's impression and notes. Plainly, unlawful drug use and deliberately driving on a suspended license would indicate an inability to control one's self.

DiCarlo also complains that Board considered a 2004 DCYF investigation and a related simple assault charge that had been dismissed. However, the interviewer's notes indicate that DiCarlo acknowledged the incident—just as he did during his testimony before this justice. He testified that he was "horsing around" with the victim and hit her with a whiffle bat.

DiCarlo also complains of other transgressions on the part of the Board such as overlooking information concerning his employability, lack of violent history, and a minor miscalculation in his probationary supervision. He also faults the Drug Court Magistrate for failing to consider his witnesses' affidavits, which were plainly in the nature of character

references. A detailed discussion of these arguments is not warranted—suffice it to say they are unavailing.

IV

Conclusion

In spite the confusion it has spawned, § 8-2-39.2 clearly and unambiguously requires that this Court’s review of an order entered by a Drug Court Magistrate “shall be on the record and appellate in nature.” In addition, on direct appeal from decisions of the Drug Court Magistrate, the Supreme Court has applied the same deferential standard of review that it accords to findings of fact in a nonjury civil proceeding. See Dennis, 29 A.3d at 450. Therefore, until such time as the Supreme Court or the Legislature clarifies the confusion surrounding SORCNA, this Court is compelled to apply a deferential standard of review to a decision of the Drug Court Magistrate.

It is well settled that a lower court justice is expected to follow existing law—not attempt to re-define it, carve out exceptions, or create new standards. See Smiler, 911 A.2d at 1038 (“[W]e are cognizant of the fact that our judicial role is to interpret and apply statutes and not to legislate * * *.”) (citing Lacey, 899 A.2d at 458). Accordingly, this Court reviews the Drug Court Magistrate’s decision and findings pursuant to existing law—which law permitted the Board to consider unreliable hearsay and prevented the parties and the Drug Court Magistrate from raising and reaching legal questions raised by the hearsay statements and acquittal. See § 11-37.1-6(1)(b) (mandating the Board to “utilize . . . material approved by the parole board to determine the level of risk an offender poses to the community and to assist the sentencing court in determining if that person is a sexually violent predator”); § 11-37.1-6(2)(i) (mandating the Board to review the material provided by the supervising agency in determining an offender risk

of re-offense); § 11-37.1-6(1)(c) (mandating the supervisory agency to submit “any reports and documentation that may be helpful to the board” in making its determination).

In applying this deferential standard, this Court should “not disturb the findings of the [Drug Court Magistrate] unless it is established that he or she misconceived or overlooked relevant and material evidence or was otherwise clearly wrong.” Dennis, 29 A.3d at 450. The Court should “employ a de novo standard of review to the [Drug Court Magistrate’s] conclusions of law.” Id. Furthermore, “if the record indicates that competent evidence supports the [Drug Court Magistrate’s] findings, [the Court] shall not substitute [its] view of the evidence for [Drug Court Magistrate’s] even though a contrary conclusion could have been reached.” Id.

As previously indicated, it is plain from the record of the proceedings before the Drug Court Magistrate that he correctly determined that the Board had complied with SORCNA’s terms and the Guidelines adopted pursuant to it. Accordingly, this Court will not disturb the Drug Court Magistrate’s March 4, 2014 decision and order—notwithstanding that this Court might decide otherwise if permitted to act within the context of either Post-Conviction Relief or a legislatively permitted full, de novo review.

Accordingly, DiCarlo’s appeal from the Drug Court Magistrate’s March 4, 2014 decision determining him to be a Level 2 offender is denied. In addition, DiCarlo’s appeal from the Drug Court Magistrate’s April 15, 2014 denial of his motion to proceed in forma pauperis and for appointment of counsel for purposes of his appeal is granted.

The clerk is directed to forthwith enter final judgment.