STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 6, 2017]

STATE OF RHODE ISLAND	:	
	:	
VS.	:	**Case No. PM-2014-6062**
	:	
THOMAS YATES EXLEY	:	

DECISION

MONTALBANO, J. Before this Court is Thomas Yates Exley's (Mr. Exley) appeal of the order of a Superior Court Magistrate (the Magistrate), dated March 28, 2017 and submitted May 10, 2017, affirming the sex offender classification determined by the Rhode Island Sex Offender Board of Review (the Board). The Board classified Mr. Exley as a Level II sex offender for the purposes of the Rhode Island Sexual Offender Registration and Community Notification Act (the Act), G.L. 1956 § 11-37.1-1. On appeal, Mr. Exley asserts that he should have been classified as a Level I sex offender. Jurisdiction is pursuant to G.L. 1956 § 8-2-39.2(j).

I

Facts

The facts of the underlying offense are set forth in the Board's Risk Assessment Report. The Risk Assessment Report indicates that on December 4, 2006, a seventeen-year-old victim residing in Marin County, California, notified her therapist of inappropriate sexual touching by her father. (Risk Assessment Report 3.) The victim was identified as Mr. Exley's biological daughter. *Id.* at 3.

On December 8, 2006, the victim was taken to a rehabilitation center and remained in the program for forty-five days. *Id.* Thereafter, on January 12, 2007, the victim gave a written statement detailing the sexual assault. *Id.* The victim reported that Mr. Exley's inappropriate sexual conduct

included "digital penetration, masturbation of himself and the victim, attempted sexual intercourse, and ultimately forced oral copulation of the victim." *Id.* The incidents occurred in the family home, a hotel room, and on a commercial airplane. *Id.* at 3-4. The victim reported that the incidents occurred four to five times a week over three to four months. *Id.*

On March 18, 2009, Mr. Exley submitted a guilty plea to one count of forced oral copulation with his biological daughter. (Risk Assessment Report 3.) The Marin County Superior Court in California sentenced Mr. Exley to six years in the state prison system, as well as five years parole with GPS and lifetime registration. Mr. Exley was released on July 22, 2014. Soon after his release, Mr. Exley relocated to Rhode Island, where he now permanently resides with his current wife. *Id.* at 4. Mr. Exley will remain under Adult Parole Supervision and GPS until July 22, 2019. *Id.*

Upon his arrival in the state, Mr. Exley timely registered as a sex offender as required by § 11-37.1-3. (Risk Assessment Report 3.) On July 25, 2014, pursuant to § 11-37.1-12 and the Rhode Island Parole Board Sexual Offender Community Notification Guidelines (the Guidelines), Mr. Exley reported to the Board in order to receive a sex offender classification to reflect his level of risk to the community. On September 25, 2014, pursuant to § 11-37.1-6(1)(b), the Board completed the Risk Assessment Report to determine Mr. Exley's level of risk to reoffend, and determined that Mr. Exley was a Level II sex offender and at moderate risk to reoffend. *Id.* at 1.

II

Travel

Mr. Exley timely appealed the Board's Level II classification to a Magistrate of the Superior Court in compliance with § 11-37.1-14. In response, the State moved to affirm the Board's Level II classification.

The Magistrate conducted a hearing on the appeal on March 28, 2017. Thereafter, on May 9, 2017, the Magistrate issued his Decision on the record affirming the Board's Level II classification. The Magistrate's Order dated March 28, 2017 was entered May 10, 2017. Mr. Exley timely appealed the Magistrate's Order to this Court on May 23, 2017, pursuant to § 8-2-39.2(j). Mr. Exley filed his appellate memorandum (Exley's Appellate Mem.) on October 3, 2017, and the State filed its memorandum (State's Mem.) on November 7, 2017. Oral arguments took place on November 7, 2017.

III

Standard of Review

A

Review of a Magistrate's Decision

A Superior Court Justice's review of a decision of a magistrate is governed by § 8-2-11.1(d). Section 8-2-11.1(d) provides, in pertinent part:

> "A party aggrieved by an order entered by the . . . 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 court shall, by rules of procedure, establish procedures for review of orders entered by the . . . magistrate, and for enforcement of contempt adjudications of the . . . magistrate." Sec. 8-2-11.1(d).

Rule 2.9(h) of the Superior Court Rules of Practice presently governs the review. The Rule provides:

> "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 magistrate. The justice, however, need not formally conduct a new hearing and may consider the record developed before the magistrate, making his or her own determination based on that record whether there is competent evidence upon which the magistrate's judgment, order or decree rests. The justice may also receive further evidence,

> recall witnesses or recommit the matter with instructions." R.P. 2.9(h).

If the record indicates that competent evidence supports the magistrate's findings, the Court "shall not substitute [its] view of the evidence for [the magistrate's] even though a contrary conclusion could have been reached." *State v. Dennis*, 29 A.3d 445, 450 (R.I. 2011) (citing *Tim Hennigan Co. v. Anthony A. Nunes, Inc.*, 437 A.2d 1355, 1357 (R.I. 1981)). The record on appeal includes "[t]he original papers and exhibits filed with the Superior Court, the transcript of the proceedings, and the docket entries." R.P. 2.9(f).

B

Review of an Appeal of Sex Offender Review Board Level Classification

On appeal, the State has the burden of presenting "a *prima facie* case that justifies the proposed level of and manner of notification." Sec. 11-37.1-16(a). The State must prove two "prongs" in order to establish a *prima facie* case: first, that "[a] validated risk assessment tool has been used to determine the risk of re-offense," and second, that "[r]easonable means have been used to collect the information used in the validated assessment tool." *Dennis*, 29 A.3d at 449, citing § 11-37.1-16(b)(1)-(2). The Superior Court must affirm the classification level determined by the Board 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 is 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). Accordingly, an individual on appeal is afforded the opportunity to challenge the State's *prima facie* case by presenting evidence and testimony. *State v. Germane*, 971 A.2d 555, 580-81 (R.I. 2009).

IV

Analysis

A

Review of the Record of Mr. Exley's Appeal to the Magistrate

On appeal to the Magistrate, Mr. Exley essentially made three arguments: first, that the Board had not considered all available evidence in reaching its results; second, that both Mr. Exley's psychological profile and his good behavior during the two and one-half years since his release provided further evidence that a Level II classification was inappropriate; and third, that the Board's inaccurate classification has affected his ability to contribute to the community through philanthropy. Prior to the hearing before the Magistrate, Mr. Exley submitted a six-page memorandum prepared by counsel and numerous exhibits, including psychological assessments from Dr. Plaud and three other psychologists as well as verification of his completion of a treatment program for sex offenders (Appellant's Ex. A), ten affidavits from family members (Appellant's Ex. B), fourteen affidavits from friends and business associates (Appellant's Ex. C), letters of recommendation from individuals who associated with Mr. Exley in prison (Appellant's Ex. D), and documentation of church and philanthropic associations and donations made by Mr. Exley (Appellant's Ex. E). Mr. Exley also presented two witnesses to testify on his behalf: Dr. Joseph Plaud (Dr. Plaud), a clinical psychologist, and Gina Catalano (Ms. Catalano), Mr. Exley's current wife. (Hr'g Tr. 4-7, May 9, 2017).

In support of its motion to affirm, the State submitted a number of exhibits: Mr. Exley's appeal request (State's Ex. 1), the Risk Assessment Report (State's Ex. 2), the Static 99-R, Static-2002, and Stable-2007 rubrics conducted as part of the State's Risk Assessment Report (State's Exs. 3, 3a, and 3b, respectively), a letter from the Rhode Island Parole Board to the Board's investigator

(State's Ex. 6), Mr. Exley's criminal record from the National Crime Information Center (State's Ex. 7), a thirteen-page interview between Mr. Exley and the sex offender unit conducted on July 31, 2014 (State's Ex.4), an eight-page Marin County probation report for Mr. Exley (State's Ex. 5), a California Department of Corrections Notice and Conditions of Parole document (State's Ex. 6), and Mr. Exley's Notice of Community Notification.[1]

1

The State's *Prima Facie* Case

After hearing the testimony and reviewing the documents submitted by both Mr. Exley and the State, the Magistrate determined that the State successfully presented a *prima facie* case supporting Mr. Exley's classification as a Level II sex offender. (Hr'g Tr. 13, May 9, 2017.) In his May 9, 2017 bench Decision, the Magistrate stated that the Board met the first prong of its burden by using three "nationally recognized [and] well-established risk assessment tools"—the Static-99/R test, the Static-2002 test, and the Stable-2007 tests[2]—in its assessment of Mr. Exley's risk of recidivism. *Id.*

Our Supreme Court has recognized the Static and Stable tests used by the Board in this case as nationally recognized "validated assessment tools," a fact the Magistrate noted when determining that the State had met the first prong of the *prima facie* case. *See Dennis*, 29 A.3d at 447.

With regards to the second prong of the State's *prima facie* case, the Magistrate determined that the Board used reasonable means to collect the information contained in the assessment report,

[1] The State's final four exhibits were confidential documents that were not numbered.

[2] The Static-99/R is "an actuarial measure of risk for sexual offense recidivism," the data from which was derived from a survey of data from 2,398 sex offenders in Canada. (Risk Assessment Report 1.) According to the creators of both the Static-99/R and Static-2002 tests, the Static-2002 "represents a conceptual overhaul" to the Static-99/R. Static-99/R FAQ, STATIC 99 CLEARINGHOUSE, http://static99.org/pdfdocs/faq.pdf. The Stable-2007 is "a specialized tool designed to assess and track changes in risk by assessing changeable risk factors." (Risk Assessment Report 2.)

noting that the Board reviewed other relevant documents, including Mr. Exley's Marin County probation and parole records, and conducted a thirteen-page interview with Mr. Exley. (Hr'g Tr. 13, May 9, 2017.)

The information relied upon by the Board is consistent with the requirements of the Act. In each case, as required by § 11-37.1-6(2)(i), the Board "shall review other material provided by the agency having supervisory responsibility" over the offender, in addition to using the results of the validated risk assessment to make its determination. The approach mandated by the statute is consistent with the "express recommendation" of the creators of the STATIC-99 risk assessment, "who stated that 'a prudent evaluator will always consider other external factors which may influence risk in either direction.'" *Germane*, 971 A.2d at 585, *quoting* Harris, Phenix, Hanson & Thorton, *Introduction* to STATIC 99 CODING RULES, REVISED – 2003 at 3 (*available at* http://static99.org-/pdfdocs/static-99-coding-rules_e.pdf (2003)). Additionally, the Board's Guidelines, promulgated under §§ 11-37.1-1 *et seq*. charge the Board to consider a total of fifteen factors in four categories.[3]

[3] The four categories are as follows:

- "Factors concerning the commission of the sexual offense," which include the actuarial risk score, degree of violence of the offense, other significant crime considerations, degree of sexual intrusion, and victim selection characteristics;
- "Factors concerning prior history," which include the known nature and history of a sex offender's sexual aggressions, other criminal history, substance abuse history, and the "presence of psychosis, mental retardation, or behavioral disorder";
- "Factors concerning support systems," which include the "degree of family support of offender accountability and safety; the personal, employment, and educational stability of the offender; the offender's incarceration community supervision record, which includes access to potential victims and external controls such as probation and parole status; and
- "Factors concerning treatment/psychotherapy progress," which include participation in sex offender specific treatment program, and the offender's response to the treatment, including his or her admission of guilt, acceptance of responsibility for crimes, and commitment to ongoing safety, recovery, and treatment. SEX OFFENDER COMMUNITY NOTIFICATION GUIDELINES, State of Rhode Island and Providence Plantations, *available at*

Here, the record shows that the Board reviewed and relied upon documents provided by the Rhode Island Parole Unit, including Mr. Exley's criminal record, his institutional probation, and his parole supervision. (Risk Assessment Report 3.) Additionally, the Board conducted its own interview with and assessment of Mr. Exley. *Id.* The Board then used this information to consider the relevant factors mandated by the Guidelines under each of the four categories. *Id.* at 3-5. Accordingly, after *de novo* consideration, this Court accepts in whole that portion of the Magistrate's Decision holding that the State met its *prima facie* case by showing that a validated risk assessment tool was used to determine Mr. Exley's risk of re-offense; that the Board used reasonable means to collect the information used in the validated risk assessment tool; and, that the Board appropriately considered additional material which was provided by the agency having supervisory responsibility. This Court further determines that competent evidence in the record supports this portion of the Magistrate's Decision.

2

Mr. Exley's Argument that the Board Failed to Consider All Available Evidence

On appeal to the Magistrate, Mr. Exley first contended that the Board's assessment of his risk level was erroneous because it did not consider all information available at the time of the risk assessment and only reviewed the documents provided by the agency with supervisory authority over him. Specifically, Mr. Exley averred that the clinician who conducted the risk assessment should have reviewed "the plethora of risk assessments and mental and medical analyses" previously conducted by other mental health professionals. (Exley's Magistrate Appeal Mem. 2.) Mr. Exley alleged that, as a result, the scores for the Static-99R and Stable-2007 did not accurately represent his risk to reoffend. *Id.* at 1-2.

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http://www.paroleboard.ri.gov/guidelines/2015%20SOCN%20Guidelines%20-FINAL_APPROVED.pdf (approved December 5, 2015).

The Magistrate addressed Mr. Exley's argument regarding the allegedly erroneous scores by comparing the Board's scores to those provided by Dr. Plaud. The Magistrate noted that Dr. Plaud's psychological report gave Mr. Exley the same score on the Static-99R as did the evaluator for the Board. (Hr'g Tr. 14-15, May 9, 2017.) The Magistrate also noted that with an adjustment for age, the Board's Static-2002 assessment was "completely consistent" with the Static-2002 assessment conducted by Elia Bernou, which Mr. Exley submitted in support of his appeal. *Id.* at 15.

As our Supreme Court held in *Germane*, and as the Magistrate noted in his Decision, "low findings on the risk assessment tools do not necessitate a low Level I finding." (Hr'g Tr. 15, May 9, 2017) (citing *Germane*, 971 A.2d at 585). The Magistrate further stated that in order for Mr. Exley to receive the appropriate point reduction on the Static-99R test, he would need to show evidence of five to ten years of offense-free behavior in the community. (Hr'g Tr. 17, May 9, 2017.) Our Supreme Court has further held that the statutory language of the Act, "paired with the [Board's] guidelines, suggests that a sexual offender assessment should not take place in a vacuum or solely rest on the results of the risk assessment tools." *Dennis*, 29 A.3d at 451. Accordingly, "[t]he classification of an individual's future risk of sexual recidivism is not a one-size-fits-all application." *Id.* Consequently, after *de novo* consideration, this Court accepts in whole that portion of the Magistrate's Decision affirming the Board's risk assessment scores as accurately representing Mr. Exley's risk to reoffend, and further determines that competent evidence in the record supports this portion of the Magistrate's Decision.

3

Mr. Exley's Argument That His Post-Release Record and Psychological Profile Evidence a Low Likelihood of Reoffending

Before the Magistrate, Mr. Exley also argued via supporting exhibits and the testimony of his witnesses that his psychological profile and the fully compliant two and one-half years since his

release further indicated that he is unlikely to reoffend, thus a Level I classification would be more appropriate. (Exley's Magistrate Appeal Mem. 3-5.) More specifically, Mr. Exley cited a civil settlement he made with the victim and argued that this settlement established that he had assumed "full responsibility for [the incident]." *Id.* at 4-5. Mr. Exley also noted that he had not failed any of the drug and alcohol screenings imposed as a condition of his probation. *Id.* at 5-6.

The Magistrate acknowledged the specific additional materials provided by Mr. Exley which favorably benefited his petition, but also cited information in the additional evidence provided by Mr. Exley that had a tendency to support the Board's classification. While the Magistrate acknowledged that the passage of time had benefited Mr. Exley's petition, as did his completion of sex offender treatment, he also noted for the record Dr. Plaud's concession that "two and a half years is not a treasure trove of information." (Hr'g Tr. 16, May 9, 2017.)

The Magistrate read into the record a number of quotations from the Appellant's Exhibits indicating Mr. Exley's history of minimizing or distorting his actions. *Id.* at 17-18. Specifically, the Magistrate cited an observation from Creative Therapies, the organization which provided Mr. Exley's sex offender treatment program: "Despite taking the full responsibility of his behavior, he continued with some distortions and minimizations." (Appellant's Ex. A, Dr. Plaud's Report at 11.) The Magistrate also took note of the following quote from the investigator's interview with Mr. Exley, which the Board used in its Risk Assessment Report: "She was about 90 percent of the family problem. She was running them up. She was throwing potential away, all the way to drugs . . . what else was there, kill her. I was lucky I didn't kill myself. I was just out of rationale." (Hr'g Tr. 17, May 9, 2017.) The Magistrate also took note of a comment from the same interview where Mr. Exley suggested there was a "significant financial gain for the victim in all of this." *Id.* at 18.

Finally, the Magistrate cited a number of supporting affidavits which included comments that appeared to minimize the severity of Mr. Exley's offense.[4] *Id.* at 19-20.

This Court is persuaded, as was the Magistrate, that Mr. Exley's reliance on the aforementioned affidavits contradicts his contention that he has taken full responsibility for his criminal behavior. Moreover, both the psychological assessments conducted by the Board and by Dr. Plaud concluded that Mr. Exley engaged in victim-blaming. *See* Risk Assessment Report 4-5; Appellant's Ex. A, Report of Dr. Plaud at 11. Accordingly, after *de novo* consideration, this Court accepts that portion of the Magistrate's Decision with regard to Mr. Exley's likelihood to reoffend in whole, and further determines that competent evidence in the record supports this portion of the Magistrate's Decision.

4

Mr. Exley's Argument that the Board's Level II Classification Has Negatively Affected His Ability to Contribute to the Community through Philanthropy

Finally, through the testimony of Ms. Catalano at the March 28, 2017 hearing before the

[4] In his bench Decision, the Magistrate cited the following quotations from Appellant's Exhibits B and C:

- From the affidavit of Mr. Exley's father: "his offense was committed, not with a little girl, but with his fully developed 16 year old daughter and only with her." (Appellant's Ex. B.)
- From the affidavit of Mr. Exley's brother-in-law: "Yates's breakdown in 2006 was limited to the inexplicable offense involving his eldest daughter." (Appellant's Ex. B.)
- From the affidavit of Mr. Exley's nephew: "Yates does not pose a threat to anyone or anything. Yates was never a danger on the streets. He was never violent." (Appellant's Ex. B.)
- From the affidavit of a business colleague: "[H]e would not ask his daughter to testify, so that she would not be forced to go through cross examination. [H]e was willing to admit his guilt, so she could avoid that additional pain." (Appellant's Ex. C.)
- From the affidavit of Frank Nigro: Mr. Exley was "unjustly accused." (Appellant's Ex. C.)

Magistrate, Mr. Exley made the argument that the Level II notification requirements had hampered his ability to more fully participate in philanthropic activities. (Hr'g Tr. 58, Mar. 28, 2017.) Both during the hearing and in his bench Decision, the Magistrate emphasized the purpose of the notification statute: not to punish convicted sex offenders, but to "[provide] public notice to protect society from the threat of a recidiv[ist] sex offender." Hr'g Tr. 23, May 9, 2017; *See also* Hr'g Tr. 58-59, Mar. 28, 2017. Our Supreme Court has termed the Act a "nonpunitive, civil regulatory scheme":

> "It is evident that the purpose of the Registration Act is not to punish the offending [individual], but rather to protect the safety and general welfare of the public. Supplying the names and addresses of sex offenders to law enforcement agencies enables the agencies to deal more successfully with the serious problem of recidivist sex offenders . . . . [T]he proceeding remains rehabilitative, rather than punitive. *Germane*, 971 A.2d at 593 (citing *In re Richard A.*, 946 A.2d 204, 213 (R.I. 2008)).

The Magistrate's analysis of the purpose of the Act is consistent with the Supreme Court's interpretation of the Act. The purpose of the hearing on appeal is to provide a petitioner with the opportunity to introduce evidence to "cure" any deficiencies in the Board's Risk Assessment process. *Germane*, 971 A.2d at 589-90. However, it is not uncommon for the Magistrate or Superior Court judge to determine that some of the supporting evidence from a petitioner may, in fact, support the Board's original determination. *See, e.g., Germane*, 971 A.2d at 589-90 (upholding the Board's Level III classification of petitioner in question based on all evidence provided); *State v. Swift*, No. PM-08-2850, 2013 WL 399240, at *8-10 (R.I. Super. Jan. 28, 2013) (affirming petitioner's classification as a Level III offender based on the Risk Assessment Report as well as additional evidence from petitioner). Accordingly, after *de novo* consideration, this Court accepts in whole that portion of the Magistrate's Decision upholding the Board's determination to classify Mr. Exley as a

Level II sex offender, and further determines that competent evidence in the record supports this portion of the Magistrate's Decision.

B

Mr. Exley's Arguments on Appeal to the Superior Court

On appeal to the Superior Court, Mr. Exley reasserts two of the arguments he made in his appeal to the Magistrate: first, that the Board and its investigator erred in failing to review "the plethora of risk assessments and mental and medical analyses done by other medical and mental health professionals" (Exley's Appellate Mem. 3); and that the Board's erroneous point assignments and incorrect use of the risk assessment tools cannot be used to validate the decision of the Board. *Id.* at 3-5. The Court has addressed these arguments at Sections IV(A)(1) and IV(A)(2) *ante*, and after a *de novo* review, has accepted those portions of the Magistrate's Decision in whole, and has determined that competent evidence in the record supports those portions of the Magistrate's Decision.

In his appeal of the Magistrate's Decision and Order, Mr. Exley advances several new arguments to this Court. First, he provided uncontroverted evidence in the form of Dr. Plaud's testimony and the written documentation which rebutted the State's *prima facie* case. Specifically, Mr. Exley contends that the Magistrate "ignored" Dr. Plaud's ultimate opinion on the risk to reoffend. (Exley's Appellate Mem. 6-7.) He further argues that the Magistrate ignored Dr. Plaud's testimony relating to crimes of incest and recidivism. *Id.* at 7. In his November 7, 2017 oral argument before this Court, Mr. Exley cited Dr. Plaud's opinion that the tests used by the State to ascertain Mr. Exley's risk of recidivism "are not really valid in an incest case." (Hr'g Tr. 3, Nov. 7, 2017.) In addition, in his appellate memorandum, Mr. Exley sought to rebut the State's cross-

examination of Dr. Plaud in which counsel for the State questioned Dr. Plaud about the fees he received for his expert testimony in sex offender cases. (Exley's Appellate Mem. 5.)

Finally, during his November 7, 2017 oral argument before this Court, Mr. Exley argued that the Magistrate failed to give appropriate weight to the evidence he presented which he suggests indicated that he had complied with the terms of his probation, and that the Magistrate also failed to give appropriate weight to the evidence Mr. Exley presented which, he contends, indicated that the stressors that precipitated his criminal offense were no longer in existence. (Hr'g Tr. 4, Nov. 7, 2017.)

Mr. Exley also addressed one of the claims asserted in the State's appellate memorandum at the November 7, 2017 oral argument. There, the State argued that Ms. Catalano's testimony before the Magistrate that she would always inform young women coming into to their home of Mr. Exley's sex offender status was an indication that Ms. Catalano harbored a genuine concern that Mr. Exley would offend again. (State's Appellate Mem. 9.) Counsel for Mr. Exley rebutted the State's argument during his November 7, 2017 oral argument by asserting that the purpose of Ms. Catalano's policy of informing those visiting their home of Mr. Exley's sex offender status was to be open about his past. (Hr'g Tr. 8, Nov. 7, 2017.)

1

Mr. Exley's Argument that the Magistrate Failed to Give the Proper Weight to Dr. Plaud's Testimony

The gravamen of Mr. Exley's argument before this Court is that Dr. Plaud's testimony was uncontested at the Magistrate level. (Exley's Appellate Mem. 5.) In making this assertion, Mr. Exley misconstrues the nature of appellate review of the Board's classification. An appellate review by the Magistrate requires a review of the record *in camera*, including those materials submitted by the State which "formed the basis for the determination of the level and manner of community

notification." Secs. 11-37.1-14 and 1-15. Indeed, the Magistrate may rely on "documentary presentations" in making his determination. Sec. 11-37.1-15.

In this case, the State submitted the Board's Risk Assessment Report on appeal, and the Magistrate closely analyzed the report to determine whether or not the State had presented a *prima facie* case. (Hr'g Tr. 8-13, May 9, 2017.) The Magistrate then viewed the evidence presented by Mr. Exley, including Dr. Plaud's testimony, in the context of whether Mr. Exley had rebutted the State's *prima facie* case by a preponderance of the evidence. *Id.* at 14-21.

Moreover, Mr. Exley's claim that the Magistrate "ignored" the evidence he presented on appeal is simply not supported in the record. (Exley's Appellate Mem. 5.) In his May 9, 2017 Decision, the Magistrate relies extensively on Dr. Plaud's testimony in reaching his conclusions. Indeed, the Magistrate recognized that both Dr. Plaud's report and testimony were helpful to Mr. Exley's position, but concluded that on its own "it does not carry the day." (Hr'g Tr. 18, May 9, 2017.) Even assuming *arguendo* that the evidence presented was uncontested, the Magistrate nevertheless found ample evidence within the documents and testimony proffered by Mr. Exley supporting his decision to affirm the Board's finding. *See, e.g.*, Section IV(A)(2) *ante* (discussing the consistency of risk assessment scores between the risk assessments conducted by the Board's investigator and the psychological evaluations Mr. Exley presented); Hr'g Tr. 19-20, May 9, 2017 (the Magistrate's analysis of the affidavits presented by Mr. Exley).

Furthermore, Mr. Exley's argument before this Court on November 7, 2017 suggesting that Dr. Plaud found the risk assessment tools used by the State could not be validated in cases of incest is not supported by the evidence before the Magistrate. Although Dr. Plaud did opine that the risk of recidivism was lower for offenders who committed "first degree father/daughter biological incest," at no point in his testimony or written report did Dr. Plaud claim the Static 99-R, Static-

2002, and Stable-2007 tests could not be validated in cases of incest. (Hr'g Tr. 15, Mar. 28, 2017.) Instead, Dr. Plaud stated in his report that "Mr. Exley's sexual reoffense risk should . . . be understood in context of research demonstrating that within-the-family offenders, especially involving father-daughter incest offenders, are generally at significantly lower risk to reoffend when compared with other sexual offenders." (Appellant's Ex. A at 2.)

As part of his thorough review of Dr. Plaud's written report and oral testimony, the Magistrate also squarely addressed Dr. Plaud's testimony regarding lower rates of recidivism for offenders committing father-daughter incest offenses. In his decision, the Magistrate noted that he "was not particularly moved" by Dr. Plaud's "incest argument" as that factor was "properly considered by the board . . . and helped create [Mr. Exley's] low test scores." (Hr'g Tr. 18, May 9, 2017.) A review of the State's Risk Assessment Report indicates that the Board considered the research on the variance in sexual recidivism rates associated with scores on the Static-99, Static-2002, and Stable-2007 tests. *See* State's Ex. 2 at 1-2, 5-7 (summarizing the literature regarding the proper use of additional factors beyond the test scores to determine an accurate recidivism rate for each offender); *Id.* at 2.

Finally, Mr. Exley's reference to the State's cross-examination of Dr. Plaud regarding the fee he received as an expert witness is of no consequence to this appeal. The Magistrate's Decision does not refer to this portion of the State's cross-examination, but rather acknowledges that both Dr. Plaud's testimony and the fact that Mr. Exley completed a therapy program were helpful to his appeal. (Hr'g Tr. 8-13, May 9, 2017.) Accordingly, after *de novo* consideration, this Court accepts in whole those portions of the Magistrate's Decision concluding that, despite being helpful to Mr. Exley's appeal, Dr. Plaud's report and testimony did not effectively rebut the State's *prima facie*

case. This Court further determines that competent evidence in the record supports those portions of the Magistrate's Decision.

2

Mr. Exley's Argument that the Magistrate Failed to Consider that the Precipitating Stressors Leading to Mr. Exley's Criminal Offense Are No Longer Present

At his November 7, 2017 oral argument before this Court, Mr. Exley averred that the only question before the Court in a sex offender leveling appeal is "can this unique set of circumstances in the incest realm happen again"? (Hr'g Tr. 10, Nov. 7, 2017.) Mr. Exley argued that the Magistrate erred in failing to consider the evidence he presented indicating that the stressors that led to Mr. Exley's offense are no longer present. Mr. Exley concludes that because his criminal conviction involved incest and that none of the stressors which led to his criminal conviction are present in his life today, the only conclusion that can be drawn is that "he is as low a risk as a man in a coma." *Id.* at 10.

In suggesting that the question before the Court is limited to whether Mr. Exley will commit the same incest-specific offense again, Mr. Exley mischaracterizes the purpose of the registration and notification statute. Our Supreme Court has interpreted §§ 11-37.1-1 *et seq.* broadly to effectuate the State's "substantial interest in protecting **citizens** from the dangers posed by sex offenders deemed to be at high risk of re-offense." *Germane*, 971 A.2d at 582 (emphasis added); *See also State v. Flores*, 714 A.2d 581, 583 (R.I. 1998) (interpreting § 11-37.1-18 to require the appellant in *Flores* to register as a sex offender in order to avoid the "absurd result" of not requiring registration by the small subset of offenders who had committed acts of sexual assault prior to July 25, 1996 but were convicted after that date.) In this case, the Court finds that to construe § 11-37.1-18 as only requiring community notification where an offender was likely to reoffend against a particular individual or small class of individuals would produce an "absurd result" not intended by the legislature. *See*

Flores, 714 A.2d at 583 (citing *Kaya v. Partington*, 681 A.2d 256, 261 (R.I. 1996)). Consequently, the Court rejects Mr. Exley's narrow interpretation of the purpose of the statute. Therefore, after *de novo* consideration, this Court accepts in whole those portions of the Magistrate's Decision holding that the State met its *prima facie case*, and further determines that competent evidence in the record supports this portion of the Magistrate's Decision.

3

Mr. Exley's Argument that the Magistrate Made and Relied Upon an Improper Inference Based on Ms. Catalano's Testimony

At oral argument before this Court, counsel for Mr. Exley asserted that the State and the Magistrate drew an improper inference from Ms. Catalano's testimony at the March 28, 2017 Hearing before the Magistrate. (Hr'g Tr. 8, Nov. 7, 2017.) Ms. Catalano had testified that she informed all visitors to the family home of Mr. Exley's status as a sex offender. (Hr'g Tr. 48-49, Mar. 28, 2017.) Later during that same hearing, the Magistrate inquired as to the purpose of Ms. Catalano notifying visitors to their home of Mr. Exley's sex offender status. *Id.* at 56. Ms. Catalano responded that she wanted to inform visitors that she and Mr. Exley wanted to be "honest with them," and wanted to give their visitors the option to avoid having to be concerned about Mr. Exley's sex offender status. *Id.* at 56-57. Responding to Ms. Catalano's testimony, the Magistrate stated, "All right. You want to make sure people are aware." *Id.* at 57.

After reviewing the record of the March 28, 2017 hearing before the Magistrate, as well as the Magistrate's May 9, 2017 Decision, this Court finds that the Magistrate did not rely upon an improper inference with respect to Ms. Catalano's testimony. To the contrary, the Magistrate's comments following Ms. Catalano's testimony suggest to this Court that he accepted her stated reason for informing visiting individuals of Mr. Exley's sex offender status. As the Magistrate did not reference this portion of Ms. Catalano's testimony in his May 9, 2017 Decision, this Court finds

Mr. Exley's argument suggesting that the Magistrate drew and relied upon an improper inference from the testimony of Ms. Catalano is misplaced.

V

Conclusion

For the reasons set forth in this Decision, after *de novo* consideration of those portions to which the appeal of the Magistrate's May 9, 2017 Decision and the resulting Order of the Magistrate entered on May 10, 2017 are directed, this Court accepts the Decision and resulting Order of the Magistrate in whole and further determines that competent evidence in the record supports said Decision and Order.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	State of Rhode Island v. Thomas Yates Exley
CASE NO:	PM-2014-6062
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 6, 2017
JUSTICE/MAGISTRATE:	Montalbano, J.

ATTORNEYS:

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