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SJC-13847

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 526105 vs. SEX
OFFENDER REGISTRY BOARD.

Suffolk. May 6, 2026. - August 18, 2026.

Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges,
Dewar, & Wolohojian, JJ.

Sex Offender. Sex Offender Registration and Community
Notification Act. Evidence, Sex offender, Expert opinion.
Administrative Law, Agency's interpretation of regulation,
Decision. Practice, Civil, Sex offender, Judgment on the
pleadings.

Civil action commenced in the Superior Court Department on
May 12, 2023.

The case was heard by Robert B. Gordon, J., on motions for
judgment on the pleadings.

The Supreme Judicial Court granted an application for
direct appellate review.

Ilse Nehring for the plaintiff.
Roxann B.C. Greenaway for the defendant.
Elizabeth Caddick, for Committee for Public Counsel
Services, amicus curiae, submitted a brief.

KAFKER, J. In this case, as in Doe, Sex Offender Registry Bd. No. 527962 v. Sex Offender Registry Bd., 496 Mass. 543 (2025) (Doe No. 527962), we are asked to decide whether, based on the state of relevant empirical evidence, due process permits the fact that there were multiple sex offenses committed prior to arrest or conviction to be considered in assessing a sex offender's future dangerousness pursuant to factor thirty-seven of the Sex Offender Registry Board's (SORB's) regulations. In Doe No. 527962, we declined to reach the question, citing "the limited and late-filed record on this issue, and the Legislature's express requirement that the number of offenses be considered in determining dangerousness." Id. at 544. In this case, unlike in Doe No. 527962, the issue was raised below, but nevertheless the record remains insufficient for us to decide the constitutional question. However, this deficiency is attributable, at least in part, to the SORB hearing officer's denial of a request for funds for an expert to testify regarding the "up-to-date research" about repetitive sexual behavior and an offender's degree of dangerousness in the event of reoffense, and the application of factor thirty-seven to the plaintiff based on such offenses.

Given the novel unanswered question presented regarding the application of factor thirty-seven to multiple offenses in these circumstances, and the potential relevance of expert testimony

to resolve these questions, the denial of funds for an expert constituted an abuse of discretion. Accordingly, we order that the matter be remanded to SORB for further proceedings consistent with this opinion.¹

Background. We summarize the facts drawn from the hearing examiner's findings.

In 2016, police responded to a middle school following a report that an eleven year old student had reported being sexually abused by her stepfather, John Doe, Sex Offender Registry Board No. 526105 (Doe), then thirty years of age. She disclosed that on one occasion he had awoken her and made her touch his penis, on a second occasion he had touched her private area, and on a third occasion he had attempted to pull her pants down while she slept. Doe denied the allegations.

In 2017, a jury convicted Doe of two counts of indecent assault and battery on a child under the age of fourteen, see G. L. c. 265, § 13B, and he was sentenced to serve two and one-half years in a house of correction, to be followed by two years of probation. These convictions triggered Doe's obligation to register as a sex offender. See G. L. c. 6, § 178K (2) (b).

¹ We acknowledge the amicus brief submitted by the Committee for Public Counsel Services.

Over the following years, SORB classified Doe no fewer than six times, each resulting in Doe's being classified as a level two sex offender.² The initial classification was objected to by Doe, requiring a de novo hearing. The second classification was vacated during the pendency of Doe's appeal because a recording malfunction had made a transcript of the hearing unavailable. The third was required to be amended by the Superior Court following our decision in Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643, 662-663 (2019) (requiring distinct finding regarding need for Internet dissemination). The fourth was vacated after SORB conceded on appeal before the Appeals Court that the hearing examiner had misapplied regulatory factor two, which requires findings of both repetitive and compulsive behavior when applied to risk of reoffense; Doe had been shown to have engaged in repetitive, but not compulsive behavior. See Doe, Sex Offender Registry Bd. No. 526105 v. Sex Offender Registry Bd., 100 Mass. App. Ct. 1122 (2022) (unpublished memorandum and order). See also Doe, Sex Offender Registry Bd. No. 6729 v. Sex Offender Registry Bd., 490 Mass. 759, 765-766 (2022) (Doe No. 6729) ("a person [who] offends, gets caught[,] and then goes on to reoffend again,

² For an overview of the SORB classification process, see Doe No. 527962, 496 Mass. at 544-545 ("The board uses a numbered list of nonexhaustive factors to place offenders according to a three-tiered system . . .").

. . . may be found not only to be repetitive but also compulsive" [quotation omitted]). The fifth was vacated because it had issued without a new hearing, in contravention of the Appeals Court's order on remand.

The sixth classification, which is the subject of this appeal, took place after a de novo hearing that occurred on January 26, 2023. In the lead-up to that hearing and again at the hearing, Doe moved for funds for an expert, specifically requesting

"funds for the expert to:

"(1) Testify at the hearing to the application of factor [thirty-seven] to the [plaintiff's] facts. See [803 Code Mass. Regs. § 1.33(37)(a) (2016)] (Other Information Related to the Nature of Sexual Behavior) ('[T]he Board shall consider any information that it deems useful in determining risk of reoffense and degree of dangerousness posed by any offender.').

"(2) Testify at the hearing to 'information' . . . about, and move into evidence, if any,

". . .

"(b) The up-to-date research regarding repetitive sexual behavior, where there is no evidence of prior sex offenses or compulsive behavior, and an offender's degree of dangerousness in the event of reoffense."

The hearing examiner denied the request on the ground that the expert's testimony would not be unique to Doe. Following the hearing, the hearing examiner issued a decision stating that he had found by clear and convincing evidence that Doe "pose[d] a moderate risk to re-offend and a moderate degree of

dangerousness such that a public safety interest is served by public and Internet access to his sex offender registry information." See G. L. c. 6, § 178K (2) (b). The hearing examiner found that the fact that Doe had committed multiple sexual assaults bore on his degree of dangerousness -- one of the topics for which Doe had requested, and been denied, funds for an expert. The decision ordered Doe to register as a level two sex offender.

Doe sought judicial review in the Superior Court. See G. L. c. 30A, § 14. After a hearing, a Superior Court judge denied Doe's motion for judgment on the pleadings and affirmed the hearing examiner's decision, including the hearing examiner's denial of funds for an expert. Doe timely appealed, and we granted Doe's application for direct appellate review.

Discussion. We "may set aside or modify the board's classification decision where it determines that the decision is in excess of the board's statutory authority . . . , is based on an error of law, is not supported by substantial evidence, or is an arbitrary and capricious abuse of discretion" (citation omitted). Doe No. 527962, 496 Mass. at 547. The decision of a SORB hearing examiner to deny expert funds is reviewed for abuse of discretion. See Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 610 (2013) (Doe No. 205614).

In analyzing this question, we begin with Doe No. 527962, where we were asked to conclude "that the lack of empirical data establishing a connection between multiple offenses and degree of dangerousness is sufficient to invalidate the board's use of such on constitutional grounds." Doe No. 527962, 496 Mass. at 549. We answered as follows:

"We decline to take that analytical leap when the issue of empirical support for a link between multiple offenses and degree of dangerousness has not been adequately raised or litigated in the instant case, and the number of offenses is an express required consideration to determine dangerousness according to the act."

Id. We further contrasted the circumstances in that case to those present in a prior case known as

"the factor two litigation, [where] the parties had the opportunity to consider and contest the evidence submitted, after which the Superior Court judge made factual findings regarding the relevant science and rendered a well-supported decision on the basis of the board's application of factor two [concluding that factor two could not be applied absent evidence of compulsive as well as repetitive behavior]. None of that occurred [in Doe No. 527962]." (Citation omitted.)

Id. at 549-550. Although Doe's counsel did not have the benefit of our decision in Doe No. 527962, when she requested expert funds here, she presciently anticipated the issues we left unresolved in that case, and the necessity of expert evidence to assist in the inquiry. We analyze the request for expert funds with this background in mind.

"[B]ased on the facts presented in an individual case," SORB "has discretion to grant funds to an indigent sex offender for an expert witness or report." Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 773-775 (2008) (Doe No. 89230) (noting that "the accuracy of the classification decision may well be enhanced by the addition to the evidentiary record of additional expert evidence"). The exercise of that discretion is informed in the first instance by the regulations that SORB has promulgated on the topic, which require that an offender's motion for expert funds

"1. identify a condition or circumstance special to the sex offender and explain how that condition is connected to his or her risk of reoffense or level of dangerousness;

"2. identify the particular type of Expert Witness who would provide testimony to assist the Hearing Examiner in his or her understanding and analysis; and

"3. include supporting documentation or affidavits verifying the specific condition or circumstance that the offender suffers from."

803 Code Mass. Regs. § 1.16(4) (a) (2016). According to the regulations, SORB may deny motions that do not meet those three requirements and will deny motions seeking an expert to offer only "a general opinion on the sex offender's risk to reoffend and degree of dangerousness." 803 Code Mass. Regs. § 1.16(4) (b).

There is no doubt that Doe's motion met the second and third regulatory requirements. It specified that Doe sought a

psychiatrist or psychologist with expertise in assessing sex offender dangerousness, and included a detailed affidavit from Doe's counsel, which appended two relevant scientific articles, as well as supporting materials addressing the history of the case and evolution of the regulatory factors in question.

The hearing examiner, however, faulted Doe on the first requirement, denying his motion because "[h]aving an expert to testify at the hearing regarding the application of [f]actor [thirty-seven] to [Doe's] facts is not unique to [Doe] and does not meet the burden for expert evaluation and testimony."³ In upholding the hearing officer's decision, the Superior Court judge relied on this reasoning as well as the statutory language that states that among the criminal history factors to be considered in determining risk and degree of dangerousness are "the number, date and nature of prior offenses." G. L. c. 6, § 178K (1) (b) (iii).

After reviewing Doe's motion and supporting documents, we conclude that the denial of funds constituted an abuse of discretion. "Doe's request did not demonstrate simply a generic need for an expert witness," or constitute a "general motion" to

³ SORB's factor thirty-seven states that "the Board shall consider any information that it deems useful in determining risk of reoffense and degree of dangerousness posed by any offender." 803 Code Mass. Regs. § 1.33(37) (a).

opine on dangerousness (quotation omitted). Doe No. 205614, 466 Mass. at 610. Rather, Doe requested expert funds for two particular purposes: (1) to challenge a specific, indeed novel, application of a single factor, thirty-seven, to his particular circumstances; and (2) to provide "[t]he up-to-date research regarding . . . [degree of dangerousness], where there is no evidence of prior sex offenses or compulsive behavior." See Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd., 470 Mass. 102, 111 (2014) (Doe No. 68549) (identifying when expert testimony properly allowed). Contrast Doe, Sex Offender Registry Bd. No. 339940 v. Sex Offender Registry Bd., 488 Mass. 15, 29-30 (2021) (Doe No. 339940) (request for funds properly denied where it failed to explain connection to risk of reoffense or dangerousness and supplied no research or evidence of connection).

Denying such a request constitutes an abuse of discretion for a number of reasons. Prior to 2019, commission of multiple sex offenses had often been applied under factor two, toward a greater risk of reoffense, and not factor thirty-seven, toward a greater degree of dangerousness. See Doe No. 6729, 490 Mass. at 765-766. In fact, Doe had experience with this firsthand, as SORB had applied factor two in that manner (but not factor thirty-seven) in multiple decisions classifying him as a level two offender.

The Superior Court subsequently declared that application of factor two to multiple offenses without compulsive behavior was not supported by empirical evidence and therefore violated due process. See Doe No. 6729, 490 Mass. at 765-766. SORB did not contest that conclusion, see id. at 765 n.6, and accordingly conceded before the Appeals Court that the hearing examiner erred in his application of factor two to Doe's fourth classification.

On remand from the Appeals Court, SORB issued Doe's fifth classification decision -- erroneously, as it was done without a new hearing -- and in that decision SORB stated that it would now consider Doe's multiple offenses in determining dangerousness through application of factor thirty-seven. It would do so even though there were no empirical studies included in the guidelines supporting the application of repetitive behavior to support dangerousness. See Doe No. 68549, 470 Mass. at 111 ("particularly valuable" to have expert testimony explain "significant, relevant research" not captured by regulatory factors). All of this procedural and legal history was explained in full in Doe's request for funds.

Before us, SORB states that it "did not present any research studies in support of the application of [f]actor [thirty-seven] as it relates to Doe's dangerousness based upon his repetitive sexual offending, because such research does not

exist." That SORB says there is no relevant research is not sufficient grounds to deny Doe the opportunity to prove or disprove that assertion, or to prove whether existing research can be subject to further expert analysis to provide insight into the question whether repetitive behavior can or cannot be correlated to future dangerousness. See Doe No. 205614, 466 Mass. at 606 ("There is a circularity, and an irony, in SORB's argument that the guidelines apply with equal force to males and females simply because SORB has declared that to be the case in promulgating its regulations, which are themselves based on research conducted almost exclusively on male subjects"). It is SORB, not Doe, that bears the burden to justify its application of the regulatory factors, and "to ensure that its guidelines are, in fact, based on the available literature" (quotation and citation omitted). Id. at 605, 608. See Doe, Sex Offender Registry Bd. No. 234076 v. Sex Offender Registry Bd., 484 Mass. 666, 672 (2020) ("the development of evolving research is among the reasons that a hearing examiner is empowered [by statute] to consider 'any information useful'" to classification determination [citation omitted]). Given the recent partial invalidation of the application of factor two in circumstances showing repetitive but not compulsive behavior due to lack of empirical evidence, and the apparent switch to consideration of the same behavior via factor thirty-seven, Doe's request

sufficiently identified "circumstance[s] special to [him]" as to justify granting him expert funds. 803 Code Mass. Regs.

§ 1.16(4)(a)(1). It was an abuse of discretion for the hearing examiner to conclude otherwise. See Doe No. 205614, supra at 610.

We also emphasize that the expert testimony need not be "unique" to the plaintiff in the sense that the testimony would bear only on a characteristic distinct to the plaintiff and no others. In Doe No. 205614, for example, the expert testimony requested and allowed applied to women offenders in general as well as the specific plaintiff. See Doe No. 205614, 466 Mass. at 606-608. Likewise, the expert testimony that explained the difference between compulsive and merely repetitive behavior in terms of proving risk of reoffense was not specific to a particular plaintiff but rather expert evidence of value more generally. See Doe No. 6729, 490 Mass. at 765-766. "Special" to the plaintiff in the regulation permitting funds for an expert does not mean unique to the plaintiff. It means the request for expert assistance cannot be just generic or general as discussed in the case law. See, e.g., Doe No. 205614, supra at 610; Doe No. 89230, 452 Mass. at 775.

Finally, the statutory language directing SORB to consider "the number, date and nature of prior offenses" "in determining . . . degree of dangerousness" as well as risk of reoffense,

G. L. c. 6, § 178K (1) (b) (iii), is not dispositive of the question whether expert funds should have been allowed to permit Doe to challenge whether consideration of multiple offenses under factor thirty-seven in these circumstances is supported by the research. Such expert testimony could be used to challenge the constitutionality of the statutory directive as applied. See Doe No. 6729, 490 Mass. at 765-766. As the constitutional issue was properly raised here, and expert assistance was sought to develop a factual record to demonstrate that consideration of the number of offenses alone in determining dangerousness pursuant to factor thirty-seven was not supported by the empirical research, funds for an expert should have been allowed. See Doe No. 339940, 488 Mass. at 20 (although agency cannot declare own regulations unconstitutional, "it can and should make the factual findings necessary to address the constitutional question" and create "appropriate record" for reviewing court). The denial of such funds was an abuse of discretion.

Conclusion. For the foregoing reasons, SORB's decision to classify Doe as a level two sex offender must be vacated and the decision to deny Doe's request for expert funds reversed. Therefore, the Superior Court judgment is vacated, and a new judgment shall enter remanding the matter to SORB for entry of

an order granting Doe's request for expert funds, and for further proceedings consistent with this opinion.

So ordered.