SJC-13646

GREGORY RAFTERY vs. STATE BOARD OF RETIREMENT.

Suffolk. April 9, 2025. - August 7, 2025.

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

State Police. State Board of Retirement. Pension. Retirement. Police, Retirement. Public Employment, Retirement, Forfeiture of pension, Forfeiture of retirement benefits. Constitutional Law, Excessive fines clause, Cruel and unusual punishment. Practice, Civil, Action in nature of certiorari. Words, "Excessive fines."

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on June 14, 2024.

The case was reported by Wendlandt, J.

Thomas R. Kiley (Jon J. Cubetus also present) for the plaintiff.

Katherine M. Fahey, Assistant Attorney General, for the defendant.

Michael Walsh, for estate of Caroline Walsh, amicus curiae, submitted a brief.

Alycia M. Kennedy, Christa Douaihy, Gabriel L. Fonseca, & Taylor R. Largmann, for Springfield No One Leaves, amicus curiae, submitted a brief.

KAFKER, J. The plaintiff, Gregory Raftery, brings this action in the nature of certiorari seeking review of the State Board of Retirement's (retirement board's) decision that he must forfeit his pension benefits under G. L. c. 32, § 15 (4), which provides that in no event shall any member of the State retirement system receive a retirement allowance "after final conviction of a criminal offense involving violation of the laws applicable to his office." A former trooper with the State police, the plaintiff faced Federal criminal charges after he falsely reported working over 700 overtime hours, received over $50,000 in unearned overtime pay, and attempted to conceal his conduct by issuing falsified motor vehicle citations. The plaintiff retired from the State police in March 2018, four months before he pleaded guilty in Federal District Court to one count of embezzlement from an agency receiving Federal funds, in violation of 18 U.S.C. § 666(a)(1)(A).

The plaintiff challenges the pension forfeiture under art. 26 of the Massachusetts Declaration of Rights as both an excessive fine and cruel or unusual punishment. We conclude that the forfeiture is a fine but not an excessive one under art. 26's excessive fines provision. In so concluding, we adopt, for the purposes of art. 26 of our State Constitution, the United States Supreme Court's multifactor excessive fines

analysis under the Eighth Amendment to the United States Constitution.

As for the plaintiff's cruel or unusual punishment argument, we determine that it is without merit. Even assuming, without deciding, that the cruel or unusual punishment provision of art. 26, which we have historically applied only to terms and conditions of incarceration or other forms of physical punishment, applies to fines, including fines that have not been found to be excessive, the forfeiture here is not cruel or unusual. For the reasons stated infra, we affirm the decision of the District Court judge and the retirement board's conclusion.[1]

1. Background. a. Facts. We recite the material, undisputed facts from the record, reserving certain facts for our discussion. See Carroll v. Select Bd. of Norwell, 493 Mass. 178, 179 (2024).

The plaintiff served as a State police trooper from May 1996 until his retirement in March 2018. In 2015 and 2016, the plaintiff was assigned to Troop E, a troop responsible for patrolling the Massachusetts Turnpike. Members of Troop E were eligible to earn overtime pay by working details under two State

[1] We acknowledge the amicus brief submitted by Springfield No One Leaves and the amicus brief in support of the plaintiff submitted by the estate of Caroline Walsh.

police initiatives: the Accident Injury Reduction Effort (AIRE) and the X-Team program (X-Team). The AIRE and X-Team programs sought to reduce accidents and injuries on the Massachusetts Turnpike via increased patrols targeting speeding motorists and aggressive driving.

The Massachusetts Department of Transportation funded these State police programs using Federal grants provided by the United States Department of Transportation. The State police paid the plaintiff, at a rate of approximately seventy-five dollars per hour, for over one hundred AIRE shifts and at least seven X-Team shifts in 2015. In 2016, the State police paid the plaintiff for over 150 AIRE shifts and at least one X-Team shift.

In truth, the plaintiff regularly did not complete or did not show up for these overtime shifts and submitted falsified motor vehicle citations to hide his conduct. Federal investigators determined that the plaintiff was "not present or not working" for over 397 hours of his reported AIRE shifts and 3.75 hours of his reported X-Team shifts in 2016. The plaintiff was similarly "not present or not working" for 287 hours of his reported AIRE shifts and forty-two hours of his reported X-Team shifts in 2015. The State police suffered a $51,337.50 loss in overtime payments made to the plaintiff for unworked hours.

The plaintiff pleaded guilty to one count of embezzlement from an agency receiving Federal funds, in violation of 18 U.S.C. § 666(a)(1)(A), in July 2018. A Federal District Court judge sentenced the plaintiff to a term of three months' imprisonment, followed by one year of supervised release. The plaintiff was also ordered to pay $51,337.50 in restitution and a one hundred dollar special assessment.

When the plaintiff began working for the State police in 1996, he became a member of the State employees' retirement system (SERS). He retired from the State police at age forty-seven in March 2018, several months prior to his guilty plea in the Federal criminal case against him. As of his effective retirement date, the plaintiff had twenty-one years, nine months, and twenty-five days of creditable service. The plaintiff began receiving his retirement allowance from SERS, estimated at $72,205 per year, in June 2018.

The plaintiff's SERS annuity reserve account[2] on his retirement date totaled $169,324.05, consisting of $164,505.20 in contributions made by the plaintiff during his SERS

[2] While he was actively employed by the State police, both the regular deductions from the plaintiff's pay and any additional deductions, plus regular interest, were deposited in an annuity savings account. See G. L. c. 32, § 22 (1) (a). When the plaintiff's retirement allowance took effect, this cumulative amount was transferred from the annuity savings account to an annuity reserve account. See G. L. c. 32, § 22 (2) (a).

membership plus interest earned on those deposits. An actuary for the Public Employee Retirement Administration Commission (PERAC) estimated that the total present value of the plaintiff's future retirement benefits equaled $1.025 million.

In March 2019, after the plaintiff was sentenced in Federal District Court, the retirement board suspended payment of the plaintiff's retirement benefits pending the outcome of a hearing "to consider whether any action should be taken in connection with [the plaintiff's] rights or benefits in accordance with G. L. c. 32 or any other applicable laws." From the date of the plaintiff's retirement to the date of this suspension, SERS issued $85,995.93 in retirement allowance and other associated benefits to the plaintiff.

A hearing was held in July 2019 before a retirement board hearing officer. In March 2022, the hearing officer recommended the retirement board find that, pursuant to G. L. c. 32, § 15 (4),[3] neither the plaintiff nor his beneficiaries were

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[3] General Laws c. 32, § 15 (4), provides:

> "In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of [§§ 1-28], inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the

entitled to receive any retirement benefits[4] because the plaintiff was "convicted of criminal offenses involving violations of law applicable to his office or position." She further recommended that the retirement board return the plaintiff's accumulated total deductions to him, less interest, the gross value of the retirement benefits received by the plaintiff prior to suspension, and any Federal income tax or insurance payments made on his and his beneficiaries' behalf since the plaintiff's retirement date. The retirement board adopted the hearing officer's findings of fact and recommendations in full and notified the plaintiff of its decision in May 2022.

b. Procedural history. The plaintiff timely sought judicial review of the retirement board's decision in the State District Court under G. L. c. 32, § 16 (3). The plaintiff did not contest the factual basis of the retirement board's decision. He instead raised two constitutional claims: (1) the mandatory forfeiture of the plaintiff's retirement benefits

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rate of regular interest for the purpose of calculating accumulated total deductions shall be zero."

[4] In his findings of fact, the District Court judge noted that the $1.025 million total present value of the plaintiff's future retirement benefits is "exclusive of health insurance." Although the judge "recognize[d] those health insurance benefits to be significant," their monetary value was "not established" in the record before him. We are likewise limited in our analysis.

violated the excessive fines provisions of both art. 26 and the Eighth Amendment; and (2) the mandatory forfeiture also violated art. 26's cruel or unusual punishment provision.[5]

The plaintiff and the retirement board filed an agreed-upon record and presented oral arguments on the merits at a hearing in December 2023. The District Court judge, treating each party's filing of proposed findings of facts and conclusions of law as cross motions for judgment on the pleadings, entered judgment on behalf of the retirement board in April 2024. Pursuant to G. L. c. 32, § 16 (3) (a), the District Court's decision was final.

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[5] The plaintiff first raised these constitutional claims before the retirement board hearing officer in July 2019. Citing decisions from this court and the Appeals Court, the hearing officer concluded that the retirement board lacked the authority to address these questions beyond making a specific finding regarding the value of the forfeiture at issue. Cf. Hartford Acc. & Indem. Co. v. Commissioner of Ins., 407 Mass. 23, 28 (1990) (Commissioner of Insurance not able to hear and decide facial or "as applied" constitutional challenges absent express statutory grant of authority or authority reasonably implied from over-all statutory scheme). See Maher v. Justices of the Quincy Div. of the Dist. Court Dep't, 67 Mass. App. Ct. 612, 619 (2006), S.C., 452 Mass. 517 (2008), cert. denied, 556 U.S. 1166 (2009) ("It is for the courts, not administrative agencies, to decide the constitutionality of statutes"). PERAC's actuarial assessment of the total present value of the plaintiff's retirement benefits, noted supra, constituted such a finding. See MacLean v. State Bd. of Retirement, 432 Mass. 339, 348 n.11 (2000) ("In any forfeiture case it would be helpful for the judge to make a finding of the total value of the forfeiture involved").

The plaintiff then commenced an action in the nature of certiorari in this court under G. L. c. 249, § 4, in which he again challenged the forfeiture under art. 26 but did not press his Eighth Amendment challenge. The single justice reserved and reported the petition to the full court. As reported, the scope of the issue before us is as follows:

> "[The plaintiff] contends that, in the circumstances of this case, total forfeiture of his pension and health insurance constitutes an excessive fine and cruel or unusual punishment in violation of [art.] 26 of the Massachusetts Constitution, which, he argues, should be interpreted to provide greater protection than the Eighth Amendment to the United States Constitution."

2. Discussion. a. Standard of review. "Certiorari is a limited procedure reserved for correction of substantial errors of law apparent on the record created before a judicial or quasi judicial tribunal" (quotation omitted). Abner A. v. Massachusetts Interscholastic Athletic Ass'n, 490 Mass. 538, 546 (2022), quoting Langan v. Board of Registration in Med., 477 Mass. 1023, 1025 (2017). "We may 'correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the plaintiff . . . [and] may rectify only those errors of law which have resulted in manifest injustice to the plaintiff or which have adversely affected the real interests of the general public.'" State Bd. of Retirement v. Finneran, 476 Mass. 714, 719 (2017), quoting Garney v.

Massachusetts Teachers' Retirement Sys., 469 Mass. 384, 388 (2014).

When deciding an action in the nature of certiorari, "the standard of review may vary according to the nature of the action for which review is sought." Abner A., 490 Mass. at 546, quoting Forsyth Sch. for Dental Hygienists v. Board of Registration in Dentistry, 404 Mass. 211, 217 (1989). Constitutional claims present questions of law, which we review de novo. See, e.g., Adoption of Patty, 489 Mass. 630, 637 (2022) (mother's due process claim brought on Federal and State constitutional grounds reviewed de novo); Verizon New England Inc. v. Assessors of Boston, 475 Mass. 826, 826, 834 (2016) (Appellate Tax Board decision on constitutionality of "split" tax rate under State Constitution reviewed de novo). See also Bulger v. Contributory Retirement Appeal Bd., 447 Mass. 651, 657 (2006) ("We exercise de novo review of legal questions . . . and we must overturn agency decisions that are not consistent with governing law"). We therefore review de novo the plaintiff's as-applied constitutional challenge to G. L. c. 32, § 15 (4), under art. 26.

b. Article 26. The plaintiff contends that the "text, history and purpose" of art. 26 renders the total forfeiture of his pension an excessive fine within the meaning of art. 26's second provision and its infliction a cruel or unusual

punishment within the meaning of art. 26's third provision. We disagree. A careful review of the text, history, and case law regarding art. 26 demonstrates that the pension forfeiture here is neither an excessive fine nor, assuming arguendo that the third provision applies to fines of the type at issue here, a cruel or unusual punishment.

We begin first with an overview of the plaintiff's argument and our response. The thrust of the plaintiff's argument is his assertion that, writ large, the text, history, and purpose of art. 26 counsel in favor of more expansive protections versus those provided by the Eighth Amendment. As a general matter, this is a proposition with which we have expressed agreement, at least with respect to the cruel or unusual punishment provision. See, e.g., Commonwealth v. Sharma, 488 Mass. 85, 89 (2021) (art. 26 "affords a defendant greater protections than the Eighth Amendment"); Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 668-671 (2013), S.C., 471 Mass. 12 (2015). But, in his proposed interpretation, the plaintiff erroneously elides the excessive fines provision with the cruel or unusual punishment provision.

We conclude that the three provisions of art. 26 provide separate protections against different abuses and therefore require their own distinct analyses and applications. As the pension forfeiture in this case clearly falls within the

protections of the excessive fines provision, we apply it in the first instance.

We further conclude that the United States Supreme Court's standard for evaluating excessive fines under the Eighth Amendment reflects our own understanding of the essential standards for evaluating disproportionality under the excessive fines provision of art. 26. We therefore adopt the Court's reasoning due to its persuasive value, while emphasizing that we may further refine our art. 26 excessive fines jurisprudence in appropriate circumstances. See Michigan v. Long, 463 U.S. 1032, 1041 (1983) ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its . . . opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached"). Applying this standard and addressing the plaintiff's arguments, we discern nothing in the text, history, or case law regarding art. 26 that suggests the forfeiture here is an excessive fine.

As for art. 26's cruel or unusual punishment provision, nowhere does the plaintiff explain how the text and history of art. 26 support its application to the forfeiture at issue when that provision has been consistently applied to terms and conditions of incarceration, not fines. While he highlights

differences between the text of art. 26 and that of the Eighth Amendment -- that is, between "cruel or unusual" punishment and "cruel and unusual" punishment -- and the underlying political theories of John Adams and James Madison, he does not offer a theory as to why these differences compel a result here under art. 26 that is different from that under the Eighth Amendment. Most importantly, the plaintiff does not meaningfully address the high standards we have set for cruel or unusual punishment, under which a punishment is unconstitutional "if it is so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity" (quotation and citation omitted). Commonwealth v. Mattis, 493 Mass. 216, 221 (2024). Therefore, even if we were to assume, without deciding, that art. 26's cruel or unusual punishment provision, in addition to art. 26's excessive fines provision, applies to the forfeiture in the instant case, we conclude that such a forfeiture is not cruel or unusual.

i. Text. A. Tripartite structure of art. 26. We begin our analysis with the text of art. 26., which provides: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." Art. 26 of the Massachusetts Declaration of Rights. By its terms, art. 26 thus contains three distinct provisions and protections, addressing three different abuses:

(1) protection against excessive bail; (2) protection against excessive fines; and (3) protection against cruel or unusual punishment.

These three distinct protections are further confirmed by the text of comparable constitutional provisions, ratified by other States at around the time of the adoption of the Massachusetts Constitution in 1780, that contain the same provisions and differentiate between the same three rights.[6] See, e.g., Del. Declaration of Rights of 1776, § 16 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted"); Md. Declaration of Rights of 1776, art. 22 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted . . ."); N.C. Declaration of Rights of 1776, art. 10 ("That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted"); Va. Declaration of Rights of 1776, § 9 ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

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[6] See S.E. Morison, A History of the Constitution of Massachusetts 22-23 (1917) (fourteen of Massachusetts Declaration of Rights's thirty articles "almost identical with the Pennsylvania Declaration, and many of these were taken from the Virginia Bill of Rights of 1776. Others are found in the early constitutions of Maryland, North Carolina, and Delaware").

The text of the Eighth Amendment, ratified as part of the Federal Bill of Rights in 1791, also shares art. 26's tripartite textual structure: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This is perhaps unsurprising, as the Supreme Court has observed that "it is clear that the Eighth Amendment was 'based directly on Art. I, § 9, of the Virginia Declaration of Rights,'" itself a facsimile of the language of the English Bill of Rights.[7] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989), quoting Solem v. Helm, 463 U.S. 277, 285 n.10 (1983).

As art. 26's provisions and the rights contained therein are distinguished by the constitutional text, we analyze them separately as well.[8] We begin with the excessive fines provision, including our understanding of the provision's history and purpose.

B. Meaning of "fines" and "excessive" under art. 26.

1. Fines. There is no question that the pension forfeiture at

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[7] Ratified in 1689, the English Bill of Rights provided "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." English Bill of Rights, 1688, 1 W. & M., c. 2, § 10, in 3 Eng. Stat. at Large 441 (1689).

[8] The meaning of art. 26's excessive bail provision is, of course, not at issue here. We therefore limit our analysis to the excessive fines provision and, solely to address the plaintiff's argument, the cruel or unusual punishment provision.

issue constitutes a fine both under art. 26 and, although not expressly argued here, under the Eighth Amendment. The only issue is whether the forfeiture is excessive.

As explained by the Supreme Court and this court, "[t]he Excessive Fines Clause [of the Eighth Amendment] . . . limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense. . . . Forfeitures -- payments in kind -- are thus 'fines' if they constitute punishment for an offense." (Quotations omitted.) Public Employee Retirement Admin. Comm'n v. Bettencourt, 474 Mass. 60, 65 (2016), quoting United States v. Bajakajian, 524 U.S. 321, 328 (1998). Indeed, we have previously concluded that a pension forfeiture statutorily triggered by a public employee's conviction of a criminal offense involving a violation of the laws applicable to the employee's office fits within this definition of "fine." Bettencourt, supra at 71 (pension forfeiture required by G. L. c. 32, § 15 [4], is a "fine" within meaning of Eighth Amendment because it "involve[s] an 'extraction of payments' and is punitive").[9] History also

[9] Given the common origins of the excessive fines clauses of the Eighth Amendment and art. 26, we readily conclude from this case law that pension forfeitures are also "fines" under art. 26. See discussion supra.

informs and supports this understanding of "fines."[10] We therefore turn to the meaning of "excessive."

II. Excessive. Only the application of "excessive," and not the term's plain meaning under either art. 26 or the Eighth Amendment, is in dispute. English language dictionaries contemporaneous with the ratification of the State Constitution defined "excessive" as, inter alia, that which "goes beyond any due measure or moderate bounds, either of heat, cold, value, labour, [etc.]," T. Dyche & W. Pardon, A New General English Dictionary (unpaginated) (16th ed. 1777); "exceedingness, the going beyond bounds," N. Bailey, The New Universal Etymological English Dictionary (unpaginated) (7th ed. 1776); and that which is "beyond the common proportion of quantity or bulk," S. Johnson, A Dictionary of the English Language (unpaginated)

[10] The definition of "fines" in the late Eighteenth Century, as the Supreme Court indicated in its own explication of the term, is properly informed by such sources as Edward Coke's Institutes of the Laws of England and legal dictionaries contemporaneous with the drafting. See Browning-Ferris Indus. of Vt., Inc., 492 U.S. at 265, 265 n.6, quoting, e.g., E. Coke, The First Part of the Institutes of the Laws of England *126b (1628) (a "fine signifieth a percuniarie punishment for an offence, or a contempt committed against the king"), and 2 T. Cunningham, A New and Complete Law-Dictionary (unpaginated) (2d ed. 1771) ("fines for offences" are "amends, pecuniary punishment, or recompence for an offence committed against the King and his laws, or against the Lord of a manor").

(5th ed. 1773).[11] See Bajakajian, 524 U.S. at 335 (concluding, based on similar sources, that "excessive" "means surpassing the usual, the proper, or a normal measure of proportion").

The contemporary meaning and usage of "excessive" is effectively the same. See, e.g., American Heritage Dictionary of the English Language 618 (5th ed. 2018) (defining "excessive" as "[e]xceeding a normal, usual, reasonable, or proper limit"); Webster's Third New International Dictionary 792 (2002) (defining "excessive" as "exceeding the usual, proper, or normal"). Disproportionality is thus the textual lodestar of both the Eighth Amendment's excessive fines clause and art. 26's excessive fines provision. See Bajakajian, 524 U.S. at 334; Bettencourt, 474 Mass. at 72. The common history and purpose of art. 26 and the Eighth Amendment are again informative and further confirm that disproportionality is at the heart of both excessive fines clauses.[12]

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[11] We note that various editions of these dictionaries, among others, have been relied upon by the Supreme Court in discerning the original meaning of the Federal Constitution. See Maggs, A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution, 82 Geo. Wash. L. Rev. 358, 382-393 (2014).

[12] The clauses' history and purpose, particularly the disproportionality principle, can be traced back at least to the Magna Carta. See Magna Carta of 1215, § 20 (H. Summerson et al. trans., The Magna Carta Project) ("A free man is not to be amerced for a small offence except in proportion to the nature of the offence, and for a great offence he is to be amerced in

accordance with its magnitude . . ."); Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand. L. Rev. 1233, 1251 & n.107 (1987) ("body of medieval law" developed to prevent excessive financial punishments in Saxon legal system, with Coke, and even Bracton and Glanvill centuries prior, considering such protection part of preexisting common law). See also Bajakajian, 524 U.S. at 335 (amercements were "the medieval predecessors of fines"). Seventeenth Century English legal reformers, in response to the abuse of penal fines by the Star Chamber and its progeny, included in the 1689 English Bill of Rights a right against excessive fines fashioned after that of the Magna Carta. See, e.g., Earl of Devonshire's Case, 11 State Tr. 1367, 1372 (H.L. 1689), cited in Bajakajian, supra. Writing around the eve of the Revolutionary War, Blackstone would later observe the continued primacy of the Magna Carta's emphasis on proportionality as a guidepost for the imposition of punitive fines. See, e.g., 4 W. Blackstone, Commentaries *371 ("the . . . quantity of [fines] must frequently vary, from the aggravations or otherwise of the offence").

In the Seventeenth and Eighteenth Centuries, this proportionality-driven right of protection from excessive fines was transplanted to, and took root in, colonial America. See, e.g., Mariland's Grevances Wiy The Have Taken Op Arms [sic] (c. 1690), reprinted in 8 J.S. Hist. 392, 401 (1942) (citing imposition of excessive fines "[c]ontrary to [M]agna Charta" as one of many grievances spurring on Maryland's Protestant Revolution); N.Y. Charter of Liberties and Privileges § 16 (1683) ("A freeman shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the greatness thereof, saving to him his freehold"); Pa. Frame of Government § XVIII (1682) ("all fines shall be moderate and saving men's contenements . . . or wainage"). Massachusetts was no exception. See, e.g., J. Dummer, A Defence of the New England Charters 16-17 (1721) (writing, as Massachusetts native and colonial agent in opposition to Parliament's revocation of New England colonies' original charters, that "[t]he Subjects Abroad claim the Privilege of Magna Charta, which says that no Man shall be fin'd above the Nature of his Offence"). The works of Coke and Blackstone were influential in this regard. See Alschuler, Rediscovering Blackstone, 145 U. Pa. L. Rev. 1, 15 (1996) (Blackstone's Commentaries "taught American Revolutionaries their rights . . . [and] influenced the deliberations of the Constitutional Convention"); Yandle, Sir Edward Coke and the Struggle for a New Constitutional Order, 4

With this understanding of the text and history as our backdrop, we now turn to the case law applying the disproportionality principle.

ii. Proper test for analyzing disproportionality under art. 26's excessive fines provision. The Supreme Court first examined whether a punitive forfeiture was excessive under the Eighth Amendment in its 1998 Bajakajian decision. See Bajakajian, 524 U.S. at 334. There, the Court stated that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." Id. It then held "that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Id.

The Court began its analysis by acknowledging that "[t]he text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry." Id. at 335. Such text and history, however, provided the Court with insufficient "guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be 'excessive.'" Id.

Const. Pol. Econ. 263, 265 (1993) (Coke's works "were of key influence on America's patriots and founding fathers").

To answer that question, the Court turned to its precedent involving the Eighth Amendment's cruel and unusual punishment clause, starting with two considerations viewed by the Court as particularly relevant: (1) "judgments about the appropriate punishment for an offense belong in the first instance to the legislature"; and (2) "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." Id. at 336. As both principles "counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense," the Court adopted "the standard of gross disproportionality" articulated in the Court's Eighth Amendment cruel and unusual punishment jurisprudence. Id., citing Solem, 463 U.S. at 288, and Rummel v. Estelle, 445 U.S. 263, 271 (1980).

In applying this standard to the forfeiture at bar, the Court considered several factors in determining the gravity of the offense: (1) the nature and circumstances of the offense; (2) whether the offense was related to other illegal conduct; (3) the maximum sentence that could have been imposed; and (4) the harm caused by the offense. See Bajakajian, 524 U.S. at 337-340. It then weighed these factors against the amount of the punitive forfeiture. Id. at 337.

We have had few opportunities to examine art. 26's excessive fines provision, and the existing case law we do have

sheds little interpretive light on how disproportionate the fine must be to be considered "excessive." In 1855, in a very brief decision, not uncommon at the time, we held that a statutory sentence of from twenty to thirty days' imprisonment and a ten dollar fine, plus prosecution costs, for a single, first offense of "unlawful sale of intoxicating liquor" passed muster under art. 26. See Commonwealth v. Hitchings, 5 Gray 482, 486 (1855). It is unclear under which provision of art. 26 this decision was rendered, and we offered no interpretation of the scope of art. 26's protection. See id.

Seventy-five years later, in a decision relied on by the plaintiff in the instant case, we rejected a challenge to a statutory penalty for illegal gaming, under which a convicted person was required to "'forfeit double the value of such money' won by gaming." Commonwealth v. Novak, 272 Mass. 113, 115 (1930), quoting G. L. c. 271, § 1. Our decision, however, appears to have turned on the Legislature's constitutional ability to set such a penalty, rather than an assessment of the penalty's excessiveness in a constitutional sense. See id. ("The Legislature had the power to fix the penalty; there is nothing contrary to our Constitution in fixing the penalty as was done in the statute . . .").

We more recently dealt with an Eighth Amendment challenge to a mandatory pension forfeiture in Bettencourt, 474 Mass. at

61-62, 72. In that case, we were asked to determine whether the forfeiture of a former police officer's retirement benefits after the officer was found guilty of twenty-one misdemeanor counts of unauthorized access to a computer system, in violation of G. L. c. 266, § 120F, was excessive under the Eighth Amendment. See id. We articulated the requisite criteria as follows:

> "The amount of the forfeiture is the first issue to consider. . . . Turning to the gravity of the underlying offenses that triggered the forfeiture, we are called upon to gauge the degree of Bettencourt's culpability and, in that regard, to consider the nature and circumstances of his offenses, whether they were related to any other illegal activities, the aggregate maximum sentence that could have been imposed, and the harm resulting from them."

Id. at 72. See Bajakajian, 524 U.S. at 337; Maher v. Retirement Bd. of Quincy, 452 Mass. 517, 523 (2008), cert. denied, 556 U.S. 1166 (2009) (applying Bajakajian to pension forfeiture challenge by city's chief plumbing and gas inspector after his convictions for violating G. L. c. 266, §§ 18, 20, and 127); MacLean v. State Bd. of Retirement, 432 Mass. 339, 348-350 (2000) (applying Bajakajian to pension forfeiture challenge by State employee after his conviction for two violations of G. L. c. 268A, § 7).

Using the Bajakajian factors, we concluded that the "complete forfeiture" of the defendant's retirement benefits "in excess of $659,000 . . . was not proportional to the gravity of the underlying offenses" and therefore violated the excessive

fines clause of the Eighth Amendment. Bettencourt, 474 Mass. at 75. In our analysis, we noted that the defendant's crimes occurred during a single event and resulted in no gain to him "other than the satisfaction of his curiosity"; were unrelated to any other illegal activity;[13] were punishable, per count, by only thirty days' imprisonment and no more than a $1,000 fine; and neither harmed the public fisc nor "warrant[ed] concern about protection of the public." See id. at 73-74.

iii. Summation. Having reviewed the relevant text, history, and case law regarding the excessive fines clauses of art. 26 and the Eighth Amendment, we conclude that the disproportionality principle is central to the analysis of excessive fines under both the State and Federal Constitutions. We further conclude that the Supreme Court's multifactor test for evaluating disproportionality under the Eighth Amendment also provides a sound basis for evaluating disproportionality under art. 26.

Accordingly, we adopt the Court's Eighth Amendment excessive fines criteria, as outlined in Bajakajian and applied by this court in Bettencourt, as persuasive authority and as the

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[13] We observed that the defendant "had no prior criminal record" and that "there [was] nothing before us suggesting that he had engaged in any criminal or illegal misconduct besides this one episode of accessing the computer files without authority." Bettencourt, 474 Mass. at 73.

proper analysis under art. 26's excessive fines provision. We emphasize, however, that we may further refine our art. 26 excessive fines jurisprudence when appropriate.[14] See Kligler v. Attorney Gen., 491 Mass. 38, 60 (2022) ("we part ways with

[14] We note, for example, that neither the Supreme Court nor this court has been required to address or resolve whether the excessiveness inquiry should consider if a fine is so great that it threatens a person's livelihood -- in other words, whether payment of the fine assessed would leave a person destitute. See Timbs v. Indiana, 586 U.S. 146, 152 (2019) (observing that Court in Bajakajian took no position "whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine"). But see United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008) (test for gross disproportionality of punitive forfeiture "should also consider whether forfeiture would deprive the defendant of his or her livelihood"). This is also an issue that has been discussed in the historical texts referenced supra and in legal-historical scholarship. See, e.g., 2 T. Cunningham, A New and Complete Law-Dictionary (unpaginated) (2d ed. 1771) (noting, under definition of "fines for offences," that "amercements . . . were always held too grievous and excessive, if they deprived the offender of the means of his livelihood"); 4 W. Blackstone, Commentaries *373 ("it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood"); Magna Carta of 1215, § 20 (H. Summerson et al. trans., The Magna Carta Project) ("A free man . . . is to be amerced in accordance with [his offense's] magnitude, saving to him his livelihood . . ."). See also, e.g., S. Johnson, A Dictionary of the English Language (unpaginated) (5th ed. 1773) (defining "livelihood" as one's "[s]upport of life; maintenance; means of living"). See generally Colgan, Reviving the Excessive Fines Clause, 102 Calif. L. Rev. 277 (2014); Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, 40 Vand. L. Rev. 1233 (1987); McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833 (2013). This case does not necessitate a resolution of this issue, as the plaintiff has acknowledged in an affidavit that he is "gainfully employed" and is "not destitute."

previously adopted Federal standards if they do not provide the degree of protection required by our State Constitution"); Commonwealth v. Gonsalves, 429 Mass. 658, 668 (1999) (nature of federalism "requires that . . . State Constitutions be strong and independent repositories of authority in order to protect the rights of their citizens").

iv. Application. Having concluded that the factors set out in the Supreme Court's Eighth Amendment excessive fines jurisprudence apply to art. 26 as well, we now apply them in the instant case.

The estimated total present value of the plaintiff's forfeited future retirement pension benefits equaled $1.025 million, plus an indeterminate value of associated health benefits.[15] We note, too, that the plaintiff is entitled, under G. L. c. 32, § 15 (4), to reimbursement in the amount of his accumulated total deductions, excluding interest. To assess the constitutionality of the plaintiff's forfeiture under art. 26's excessive fines provision, we must weigh the forfeiture value against the gravity of the plaintiff's offense, as determined by the application of the four factors described supra.

[15] As indicated supra, the fact finder could not discern from the record the value of the health insurance to which the plaintiff was entitled as part of his retirement benefits.

A. The nature and circumstances of the offense. The plaintiff pleaded guilty to one count of embezzlement from an agency receiving Federal funds, in violation of 18 U.S.C. § 666(a)(1)(A). In his factual findings, the District Court judge concluded that the plaintiff's embezzlement scheme spanned a two-year period, in which the plaintiff falsely reported over 700 overtime hours and received over $50,000 in unearned overtime pay. He did so while serving as a senior law enforcement officer with the State police, a position that he also leveraged to conceal his theft by issuing falsified motor vehicle citations based on the State police's internal records.

Such actions go far beyond a single lapse in judgment. Cf. Bettencourt, 474 Mass. at 73 (defendant's pension reinstated where he was convicted of misdemeanors related to his "snooping" on fellow officers' private information during single shift). Instead, the plaintiff engaged in a prolonged fraud upon his employer and did so from a position of trust. See, e.g., MacLean, 432 Mass. at 341 & n.4, 348 (misdemeanor convictions for multiyear schemes involving marketing of investments to other government employees and public entity's payments to misdemeanant's wife "serious" for purposes of pension forfeiture); Flaherty v. Justices of the Haverhill Div. of the Dist. Court Dep't of the Trial Court, 83 Mass. App. Ct. 120, 124, cert. denied, 571 U.S. 889 (2013), overruled in part on

other grounds by DiMasi v. State Bd. of Retirement, 474 Mass. 194, 204 n.13 (2016) (larceny occurring over three years, "with continuing, separate acts of theft," was "no solitary lapse in judgment"). The serious nature of the plaintiff's criminal conduct is apparent.

B. Whether the offense was related to any other illegal activities. The plaintiff was charged with only one offense for the long-running embezzlement scheme at issue in this case. As the fact finder, the District Court judge found "no allegation or evidence that [the plaintiff's] convicted conduct relates to any other individual wrongdoing." The retirement board does not dispute this finding on appeal. Deciding this case as we do, we need not consider the issue further and assume for the purposes of our analysis that the plaintiff's offense of conviction was not related to any other illegal activities.

C. The aggregate maximum sentence that could have been imposed. For violating 18 U.S.C. § 666(a)(1)(A), the plaintiff faced a significant maximum potential sentence: ten years in prison; three years of supervised release; a maximum fine of $250,000 or twice the gross gain or loss, whichever is greater; a mandatory special assessment of one hundred dollars; restitution; and forfeiture to the extent charged in the indictment. Based on a variety of factors not relevant here, the plaintiff was sentenced to three months' imprisonment, one

year of supervised release, full restitution in the amount of $51,337.50, and the statutory one hundred dollar special assessment.

Although the plaintiff's sentence was decidedly below the statutory maximum, it is the maximum potential penalty that is the focus of our inquiry, rather than the actual penalty imposed. See Bettencourt, 474 Mass. at 73, quoting Maher, 452 Mass. at 524 n.12 ("the maximum punishment authorized by the Legislature is the determinative factor"). Compare, e.g., Bettencourt, supra at 74 (aggregate maximum penalty of 630 days' imprisonment and $21,000 fine for twenty-one misdemeanor convictions did "not indicate a substantial level of culpability for purposes" of excessive fines analysis), with Maher, supra at 518, 524 (although defendant sentenced only to unsupervised probation and payment of less than $1,000 in restitution and fines, maximum penalties spanning two and one-half to ten years' imprisonment subject of proportionality inquiry).

The potential maximum sentence in this case is very similar to the potential maximum sentence faced by the appellant in Finneran. See Finneran, 476 Mass. at 724 (Federal obstruction of justice conviction carrying up to ten years' imprisonment, a $250,000 fine, three years of supervised release, five years of probation, and one hundred dollar special assessment). There, we concluded that the maximum penalty to which the appellant

could be subject "distinguish[ed] his crime from the circumstances of Bettencourt," discussed supra, and militated against finding his pension forfeiture disproportionate. See id. The same holds true here.

D. The harm resulting from the offense. In considering the harm caused by the plaintiff's crime, the plaintiff emphasizes the disparity between the actual monetary harm in this case and the total forfeiture amount and urges us to take into account that he has "already paid his debt to society" via full restitution and service of his prison sentence.[16]

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[16] The plaintiff also argues that the "all-or-nothing" approach of G. L. c. 32, § 15 (4), which is unusual in its severity compared to forfeiture laws in other States, prevents an appropriate undertaking of the requisite proportionality analysis. The District Court judge who affirmed the retirement board's decision as to the plaintiff's pension expressed a similar sentiment:

> "The all or nothing condition [of § 15 (4)] restricts the [c]ourt . . . in that it does not allow for the attempted application of measure, degree or balance. It precludes the ability to find true proportionality and the option to allow for a less than total forfeiture. It offers a bludgeon where a more precise instrument would be appropriate."

After our decision in Bettencourt, a special commission convened by the Legislature made various recommendations regarding pension forfeiture reform in a report filed in 2017. See St. 2016, c. 133, § 151; Report of the Special Commission on Pension Forfeiture (May 18, 2017), 2017 Senate Doc. No. 2074. We are not aware of any resulting change to the statute.

As the Supreme Court emphasized in Bajakajian, 524 U.S. at 336, "judgments about the appropriate punishment for an offense

Our case law on pension forfeiture has not accepted restitution and satisfaction of a criminal judgment as sufficient to fulfill the purposes of the pension forfeiture statute. See, e.g., Maher, 452 Mass. at 518-519, 525 ($576,000 pension forfeited in connection with breaking into and entering a city building, for which public employee served six-month probation term, made $393 of restitution for damage to door through which he broke in, and paid $500 fine). In MacLean, 432 Mass. at 349, we explained that penalties may go beyond restitution to achieve their deterrent purpose:

> "There is little deterrence in simple disgorgement of ill-gotten gain on being caught. Deterrence requires more, a penalty that places the violator in a position worse than he would have occupied before his violation. . . . [A] penalty matching or exceeding any improper gain has greater deterrent value, and may be necessary and proper to enforce the law."

See Finneran, 476 Mass. at 717-718, 724 (approving pension forfeiture of $433,400 in connection with obstruction of justice conviction, in which public employee took no money, served eighteen-month probation term, and paid $25,000 fine). To limit

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belong in the first instance to the legislature." Furthermore, as the Court explained, precise proportionality is not possible. Id. We therefore cannot conclude that, on its face, the approach adopted by the Legislature in G. L. c. 32, § 15 (4), is unconstitutional. Unless its application is grossly disproportionate, the wisdom of an "all-or-nothing" pension forfeiture scheme versus a more graduated approach is a question "for the Legislature to decide, not the court." Commonwealth v. Wassilie, 482 Mass. 562, 576 (2019).

the creditable harm in this case only to the actual amount of overtime pay illegally obtained by the plaintiff would be to devalue the true gravity of the offense. See DiMasi, 474 Mass. at 196 (pension forfeiture under § 15 [4] "intended to deter misconduct by public employees, protect the public fisc, and preserve respect for government service").

The harm caused by the plaintiff's actions was significant. The plaintiff clearly harmed the public fisc by embezzling more than $51,000 of taxpayer money. See DiMasi, 474 Mass. at 196 (purpose of forfeiture statute includes protection of public fisc). By avoiding his responsibilities as an on-duty law enforcement officer while doing so, he also deprived the public of 729 hours of police services meant to improve motorist safety. Cf. Bisignani v. Justices of the Lynn Div. of the Dist. Court Dep't of Trial Court, 100 Mass. App. Ct. 618, 625 (2022) (harm caused by municipal employee included community deprivation of "the benefits of the competitive bidding process" and potential that work would be done by contractors not statutorily qualified). The plaintiff also fabricated motor vehicle citations to conceal his theft, further dishonoring his responsibilities as a State police trooper. All these actions constituted a significant breach of the public trust. See State Bd. of Retirement v. Bulger, 446 Mass. 169, 173-174 (2006)

(public trust in administration of justice undermined by clerk-magistrate's convictions of perjury and obstruction of justice).

Taken together, the Bettencourt factors lead us to conclude that the amount of the plaintiff's pension forfeiture is not grossly disproportionate relative to his offense. The forfeiture therefore does not violate art. 26's excessive fines provision.

v. Cruel or unusual punishment. The plaintiff also contends that that the forfeiture violates art. 26's cruel or unusual punishment provision. As a threshold matter, it is not clear whether or, if so, how art. 26's cruel or unusual punishment provision applies to punitive fines. Neither this court, nor the Supreme Court in the cognate Eighth Amendment context, has provided clear guidance in this regard.

On the rare occasions on which the Supreme Court has had opportunity to interpret the Eighth Amendment with respect to fines and forfeitures, it has done so under the excessive fines clause. See, e.g., Bajakajian, 524 U.S. at 327-328, 334. In Alexander v. United States, 509 U.S. 544, 558 (1993), the Court distinguished between the operative zones of the cruel and unusual punishment clause and the excessive fines clause in its assessment of a forfeiture imposed on a convicted person, in addition to a prison term and a $100,000 fine. There, the Court wrote:

> "Petitioner also argues that the forfeiture order . . . violates the Eighth Amendment, either as a 'cruel and unusual punishment' or as an 'excessive fine.' The Court of Appeals . . . failed to distinguish between these two components of petitioner's Eighth Amendment challenge. Instead, the court lumped the two together . . . . Unlike the Cruel and Unusual Punishments Clause, which is concerned with matters such as the duration or conditions of confinement, the Excessive Fines Clause limits the government's power to extract payments, whether in case or in kind, as punishment for some offense." (Footnote, alteration, quotation, and citations omitted; emphases added.)

Id. See Austin v. United States, 509 U.S. 602, 610-611 (1993) (decided on same day as Alexander and offering same explanation of excessive fines clause's distinctive function). As summarized in Alexander, a review of the Court's cruel and unusual punishment jurisprudence shows that it concerns capital punishment, abusive physical force, incarceration, and the like, but not fines. See, e.g., Bucklew v. Precythe, 587 U.S. 119, 132-134 (2019) (methods of execution); Miller v. Alabama, 567 U.S. 460, 465 (2012) (mandatory life sentence without parole for juvenile homicide offenders); Hudson v. McMillian, 503 U.S. 1, 6-7 (1992) (prison officials' use of excessive physical force); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (deliberate indifference to prisoners' serious medical needs).

Our art. 26 jurisprudence demonstrates a similar distinction. A survey of cases in which we have opined on art. 26's cruel or unusual punishment provision centers primarily on the length and conditions of confinement. See, e.g., Michaud v.

Sheriff of Essex County, 390 Mass. 523, 534 (1983) (grossly unsanitary conditions of confinement unconstitutional); Commonwealth v. Jackson, 369 Mass. 904, 910 (1976) ("Although punishment may be cruel and unusual not only in manner but length, a heavy burden is on the sentenced defendant to establish that the punishment is disproportionate to the offense for which he is convicted" [quotation and citation omitted]). Such contours of incarceration, or physical abuse associated therewith, are clearly the provision's foremost concern.

Moreover, to the extent we have determined that the scope of art. 26's protections exceeds that of the Eighth Amendment, as the plaintiff urges us to do here, we have done so only under art. 26's cruel or unusual punishment provision and only with respect to incarceration, particularly life sentences without the possibility of parole for juveniles and young adults, and capital punishment. See, e.g., Mattis, 493 Mass. at 221, 234-235 (sentence of life without parole for emerging adult offenders); Diatchenko, 466 Mass. at 671 (imposition of sentence of life without parole for juvenile offenders, whether mandatory or discretionary); District Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648, 661, 665 (1980) (capital punishment). Such interpretations are in keeping with the "evolving standards of decency" from which we draw art. 26's meaning (citation omitted). Mattis, supra at 234. Michaud, 390 Mass. at 533.

The plaintiff does not bring to our attention any case in which we have definitively applied art. 26's cruel or unusual punishment provision to punitive fines, although he does attempt to cast as such our decisions in Commonwealth v. Intoxicating Liquors, 172 Mass. 311 (1899), and Novak, 272 Mass. 113. With respect to Intoxicating Liquors, the plaintiff anchors his interpretation to a single sentence, in which this court stated only that there was no "ground for saying that [a statutory] forfeiture [of improperly transported liquor] is to be regarded as in the nature of an excessive or unusual punishment." Intoxicating Liquors, supra at 316. This simple statement, without further analysis, is slim to no support for the plaintiff's assertion that this court has previously evaluated, or should now evaluate, punitive fines under the cruel or unusual punishment provision. Novak, discussed in part 2.b.ii, supra, similarly does not stand for such a proposition. See Novak, supra at 115-116.

The plaintiff's examination of the textual difference between art. 26's use of "cruel or unusual," as opposed to the Eighth Amendment's use of "cruel and unusual," also sheds no light on the question whether either formulation applies to fines as well as to the terms and conditions of incarceration. The same is true for his foray into the political theories of Adams and Madison and the respective drafting processes of the

Federal and State Constitutions. Finally, the history of cruel or unusual punishment clauses is, like the relevant case law, focused on terms and conditions of incarceration and other forms of abuse.[17]

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[17] Article 26, whether with respect to the excessive fines provision or the cruel or unusual punishments provision, engendered little to no recorded debate at Massachusetts's State constitutional convention. See Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay 41 (1832) (noting simply that "the 23d, 24th, 25th, 26th, 27th, 28th, and 29th [articles] . . . were severally accepted"). Cognizant again, however, of the largely shared legal-historical background of art. 26 and the Eighth Amendment, we note that the Eighth Amendment's cruel and unusual punishment clause was substantially framed in terms of physical, carceral, or capital punishment. See, e.g., 1 Annals of Congress 782-783 (1789) (J. Gales ed., 1834) ("Mr. Livermore -- . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?"); 3 Elliot's Debates 447-448 (2d ed. 1836) (as argued by Patrick Henry in favor of Bill of Rights: "What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment. But Congress . . . may introduce the practice of France, Spain, and Germany -- of torturing, to extort a confession of the crime"); 2 Elliot's Debates 111 (2d ed. 1836) (at Massachusetts convention to ratify Federal Constitution, advocacy to limit Congress in "inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline"). See also 4 W. Blackstone, Commentaries *370 (noting that "the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as favour of torture or cruelty").

Our art. 26 jurisprudence is certainly not entombed with Eighteenth Century standards of cruelty, but the cruel or unusual punishment provision's likely historical tether to punishments far afield from those more akin to the plaintiff's pension forfeiture is noteworthy.

Our sister courts have taken divergent approaches when faced with a similar question whether and how punitive fines fit the cruel or unusual punishment paradigm of their respective State constitutions. The Iowa Supreme Court, for example, has declined to apply the Iowa Constitution's cruel and unusual punishment clause to a mandatory minimum restitution amount. See State v. Richardson, 890 N.W.2d 609, 620 (Iowa 2017) (applying art. 1, § 17, of Iowa Constitution, which protects against "[e]xcessive bail," "excessive fines," and "cruel and unusual punishment"). In doing so, the court determined that, where the Iowa constitutional provision was "similarly worded" to the Eighth Amendment, its excessive fines provision "would be duplicative and unneeded" if the "cruel and unusual punishment clause also limited fines" and concluded that "the two constitutional clauses are not interchangeable." Id. at 620-621.

The Florida Supreme Court, as a contrasting example, has long recognized challenges to "statutorily authorized civil fine[s]" under the Florida Constitution's cruel and unusual punishment provision. See, e.g., State v. Champe, 373 So. 2d 874, 879 (Fla. 1979) (Florida Legislature is "free to set civil fines and penalties in amounts which are not so excessive as to be 'cruel' or 'unusual'"); Locklear v. Florida Fish & Wildlife Conservation Comm'n, 886 So. 2d 326, 329 (Fla. Dist. Ct. App.

2004) (statutory civil fine, under "[w]ell-settled Florida decisional authority," not "so excessive as to be cruel or unusual unless it is so great as to shock the conscience of reasonable men or is patently and unreasonably harsh or oppressive").

With the benefit of this review of the text, history, and case law, and the guidance it provides, we conclude that, to decide this case, we need not definitively resolve the question whether art. 26's cruel or unusual punishment provision applies to punitive fines. Even if we are to assume, without deciding, that it does apply, the plaintiff has provided no tenable argument to the effect that forfeiture of his pension would satisfy the cruel or unusual punishment provision's very high bar.

As with the excessive fines provision, the "touchstone of art. 26's proscription against cruel or unusual punishment is proportionality" (alterations omitted). Commonwealth v. Concepcion, 487 Mass. 77, 86, cert. denied, 142 S. Ct. 408 (2021), quoting Commonwealth v. Perez, 477 Mass. 677, 683 (2017), S.C., 480 Mass. 562 (2018). To succeed on a cruel or unusual punishment challenge under art. 26, it is the plaintiff's burden to demonstrate that the punishment is "so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity" (quotation and

citation omitted). Mattis, 493 Mass. at 221. See Commonwealth v. LaPlante, 482 Mass. 399, 403 (2019); Cepulonis v. Commonwealth, 384 Mass. 495, 497-498 (1981).

Here, where we have already determined that the plaintiff's pension forfeiture is not grossly disproportionate under the excessive fines provision, we discern no basis on which to conclude that that same forfeiture should be deemed so disproportionate as to violate the cruel or unusual punishment provision. Nor does the forfeiture "shock the conscience" given that the crime of which the plaintiff was convicted was serious and enmeshed with the work for which he would receive his pension.[18] Thus, assuming, without deciding, that the cruel or unusual punishment provision could apply to punitive fines and forfeitures, the plaintiff fares no better.

3. Conclusion. Article 26's excessive fines provision, like its Federal cognate, is properly analyzed using the factors

[18] The plaintiff raises, but does not develop, several additional arguments in support of his claim that his pension forfeiture constitutes cruel or unusual punishment, including that other States have different, and more lenient, approaches to postconviction pension forfeitures. As the plaintiff does not develop such arguments much beyond conclusory statements, they do not rise to the level of appellate advocacy. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019); Jeevanandam v. Bharathan, 496 Mass. 103, 109 n.12 (2025); Wortis v. Trustees of Tufts College, 493 Mass. 648, 671 (2024). See also note 16, supra (discussing disproportionality and legislative judgments).

articulated in Bajakajian and employed in Bettencourt. Applying those factors to this case, we find no basis on which to conclude that the pension forfeiture ordered by the retirement board pursuant to G. L. c. 32, § 15 (4), violates art. 26's excessive fines provision. The forfeiture is also not cruel or unusual. Accordingly, the case is remanded to the county court for entry of a judgment affirming the judgment of the District Court.

So ordered.