Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC -13646

GREGORY RAFTERY, Plaintiff-Appellant

v.

STATE BOARD OF RETIREMENT, Defendant-Appellee

On Reservation and Report of
The Single Justice of the Supreme Judicial Court
For Suffolk County in SJ-2024-0213

CORRECTED
BRIEF OF PLAINTIFF-APPELLANT GREGORY RAFTERY

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STATEMENT OF THE ISSUES

1. Whether the provisions of Article 26 of the Declaration of Rights in the Massachusetts Constitution provide a greater degree of protection to the Inhabitants of the Commonwealth than do the provisions of the Eighth Amendment to the Constitution of the United States?
2. Whether the total forfeiture of the Appellant's Retirement Allowance and attendant loss of familial health benefits meets the standard to be applied under Article 26 of the Declaration of Rights?
3. What is the appropriate disposition of Gregory Raftery's claim?

STATEMENT OF THE CASE

Prior Proceeding

This case is before the Court based on an order of the Single Justice reserving decision on a petition for review in the nature of certiorari and referring the matter to the full Court because it raises significant constitutional issues. Add. 54-55. The petition before the Single Justice sought review of the April 16, 2024 Rulings of Law, Decision and Order made by a Justice of the Dedham District Court. Add. 26-51. There Justice Byrne concluded that the mandated pension forfeiture provision of G.L. c. 32, §15 did not constitute an excessive fine precluded by the 8th Amendment to the United States Constitution or Article 26 of the Declaration of Rights of the Massachusetts Constitution, does not constitute a

violation of the 'cruel and unusual' provision and that the cruel and unusual provisions of Article 26 do not apply to the forfeiture of retirement allowance benefits and health insurance as provided by G.L. c. 32, §15(4). Add. 57. The parties argued the matter in the District Court on December 1, 2023 and had previously submitted memoranda of law and an Agreed Upon Administrative Record.[1]

The matter had been brought before the District Court by the Appellant, Gregory Raftery, who filed a Complaint/Petition to Review pursuant to G.L. c. 32, §16(3). It sought to reverse a decision by the State Board of Retirement imposing a mandatory forfeiture of his pension under G.L. c. 32, §15(4).

The State Board of Retirement's decision which effectuated the forfeiture was in turn based on the Recommended Findings and Decision of its Hearing Officer. (Add. 2). There the Hearing Officer noted that the constitutional challenges mounted by the Appellant were not within the authority of the Board to address. (App. 238). The procedural background for her decision was provided by the Appellant's guilty plea on September 12, 2018 (App. 254-275) and subsequent

[1] Neither the argument nor the memoranda contained any reference to Commonwealth v. Mattis, 493 Mass. 216 (2024) which was then pending before this Court. Justice Byrne's decision following issuance of this Court's January 11 opinion contains no reference to it.

"final conviction" of Embezzlement from an Agency Receiving Federal Funds. App. 104.

The Preceding Pension Forfeiture Provision

The provisions of G.L. c. 32, §15(4) were added in 1987 by Chapter 697. This Court first dealt with its application ten years later in Gaffney v. Contributory Retirement Appeal Bd. 423 Mass. 1 (1996).[2] The first occasion in which this Court determined that the application of that statute was unconstitutional came twenty years later in Public Employee Retirement Administration Commission v. Bettencourt, 474 Mass. 60 (2016). There the forfeiture was challenged only on the grounds that it violated the Eighth Amendment to the United States Constitution. During the twenty year interval between the two decisions, the Court also rejected two other challenges to the statute, both of which were based on the Eighth Amendment.[3] The opinion issued in the Bettencourt matter relied heavily on the

[2]No excessive fine claim was presented in Gaffney and the Court decided that the implementation of the law did not violate the ex post facto provisions of the federal or state constitutions.

[3] In the years intervening between those decisions, this Court also rejected two Eighth Amendment excessive fine arguments in MacLean v. State Board of Retirement, 432 Mass. 339 (2000). The Court observed that the "economic advantage Senator MacLean gained in violation of G.L. c. 268A, §7 amounted to $512,000" and the "value of the forfeiture ($625,000) is roughly equivalent to the improper gains involved …" 432 Mass. at 348. An Eighth Amendment excessive fine claims was also rejected in Maher v. Retirement Board of Quincy, 452 Mass. 517 (2008). The District Court judge who heard the case found that the total amount that Maher forfeited pursuant to G.L. c. 32, §15(4) approximate $576,000.

reasoning and decision of the United States Supreme Court in United States v. Bajakajian, 524 U.S. 321 (1998). The majority opinion in that case affirmed the decision by the Court of Appeals for the Ninth Circuit, which, in turn, had affirmed the forfeiture of $15,000 ordered by the District Court in the face of the Government's argument that the total amount of unreported cash being flown out of the United States was required to be forfeited based on the mandatory provisions of a federal law. The majority opinion in Bajakajian, like that in Bettencourt, was based on the court's application of the excessive fines provision in the Eighth Amendment. Until the day the majority opinion was issued in Bajakajian, the Supreme Court had "not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive". The standard it then adopted was that "a punitive forfeiture violates the Excessive Crimes Clause if it is grossly disproportional to the gravity of the offense." Bajakajian, 524 U.S. at 334. The majority went on to observe that neither the text of the Excessive Fines Clause nor its history answered the question of just how proportional to a criminal offense a forfeiture must be, in part because it "was little discussed in the First Congress and the debates over the ratification of the Bill of Rights … (and) taken verbatim from

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Id. at 523. That was counterbalanced by the fact that Maher pleaded guilty to three crimes, with maximum sentences totaling seventeen and a half years and that he stood to gain $125,000. Id. at 525.

the English Bill of Rights of 1689." Id. at 335. (The same is true of the excessive fines clause in Article 26 of the Declaration of Rights). To establish the standard, the Court looked to its cases interpreting the Cruel and Unusual Punishments Clause of the Eighth Amendment (a clause which departs from the "cruel or unusual punishments clause in Article 26") and adopted the standard of "gross disproportionality" articulated in those federal cases. Id. at 336.

STATEMENT OF FACTS

Mr. Raftery's final conviction occurred when he was sentenced by United States District Court Judge William G. Young to a term of three months imprisonment followed by one year of supervised release. He was assessed a criminal monetary assessment of $100 and ordered to pay restitution of the payments he received for overtime not performed. He was not fined, and no forfeiture was ordered, but he was ordered to make restitution of the full amount of the embezzled funds. (App. 106, 107). Raftery met the terms of his sentence by serving the term of imprisonment and paying the assessment and order of restitution. The restitution was made with the garnishment of his Massachusetts Deferred Compensation SMART 457 Plan.

Mr. Raftery retired from the State Police Department on March 22, 2018. At that time, he had 21 years, 9 months and 25 days of creditable service. App. 230. His service roughly coincided with the implementation of an overtime program

referred to as the A-I-R-E, Accident and Injury Reduction Effort that was designed by Michael Mucci, The executive officer of Troop E. App. 437-438. From the year 2000 until the date of his retirement, Raftery was assigned to duty in Troop E and performed AIRE overtime shifts. Forty-six members of the state police were sanctioned for their role with respect to the performance of AIRE shifts in what the news outlets dubbed "Troopergate". App. 401-402. Five troopers, including Raftery, were prosecuted by the United States for embezzlement and three lieutenants were prosecuted by the Commonwealth. Those five individuals were subject to the application of the forfeiture provisions in G.L. c. 32, §15(4). The remaining thirty-eight were administratively sanctioned. Thus the total forfeiture worked by the automatic application of that statute does not apply to any of them.

At the time of his retirement, Raftery's annual retirement allowance (with an adjustment having been made because of his election of Option C to provide similar benefits to his wife) was $72,205. Monthly payments were in the amount of $6,017. Those payments stopped after payment for the month of March, 2019. Over the past four and a half years, $324,918 has been withheld by the Defendant State Retirement Board.

The State Actuary for the Public Employees Retirement Administration Commission determined that the then-present value of Raftery's future benefits was $1,025,000.00, exclusive of health insurance, and the District Court

recognized the value of the health insurance benefits as "significant". Add. 32. That determination has not been updated.

Mr. Raftery's offense conduct involved the collection of overtime payments for 729 hours of work he never performed, for which he received $51,337.50 in payments. Add. 9. In doing so, he submitted copies of citations that were never issued to drivers and never provided to the court officers, the state police or the registry of motor vehicles. Add. 9.

SUMMARY OF THE ARGUMENT

The Eighth Amendment was adopted by the First Congress in September 1789 and literally adopted its language from the English Bill of Rights of 1689. That occurred after the Revolutionary War. In contrast, Article 26 was drafted and approved in 1780 when the Revolutionary War was ongoing. It was one part of what was cast as a social contract between the Commonwealth and its Inhabitants. Far from a social contract with the People of Massachusetts, the Bill of Rights was a political afterthought.

The sanctions imposed as a result of Mr. Raftery's conviction are disproportionate to the offense conduct. They were applied by the Appellee automatically pursuant to a statute which applies to a singular but large category of people – members of the retirement systems of the Commonwealth, and its

political subdivisions and other enumerated authorities and public bodies. That statute applies to convictions for all crimes that are factually or legally connected to the member's position. Thus forfeiture is particularly harsh because it is total in nature and lasts throughout the lifetimes of the people on which it is imposed and it is compounded by the fact that public employment in Massachusetts is not creditable for social security purposes. Those distinctive features fall within the range of rights protected by Article 26.

This Court should develop a standard for the matters implicating the provisions of Article 26 that accounts for each of its subjects and exercise its prerogative to redress the unusual, cruel and excessive provisions G.L. c. 32, §15(4).

ARGUMENT

The Text, History And Purpose Of Article 26 Require It To Be Afforded Greater Protection Than That Provided By The Eighth Amendment[4]

The words "cruel" and "unusual" are both adjectives. They both modify the noun "punishment" in Article 26. All of those words were defined in 1780 as they might be understood today. "Cruel" was defined as "pleased with hurting others,

[4] The standard of review in certiorari matters is case specific. Denovo review based on an error of law is the standard to be applied in this case. Abner A. v. Massachusetts Interscholastic Athletic Association, 493 Mass. 538, 546 (2022).

inhuman, void of pity, want compassion, savage, barbarous, unrelenting." A Dictionary of the English Language by Samuel Johnson, 1773.[5] The word "sanguinary" which appeared in the 18th century constitutions of Maryland and South Carolina, is also an adjective. It was defined as "cruel; bloody; murtherous." Id. It is drawn from the Latin word pertaining to blood. John Adams' draft contained no such descriptor. It was worded in a manner similar to, but different than the provisions of North Carolina and Virginia.

"Unusual" was defined as "not common; not frequent, rare." Id. "Punishment" was defined as "any infliction of pain imposed in vengeance of a crime." Id.

The Massachusetts provision drafted by Adams, reported by the Massachusetts Constitutional Convention of 1779 – 1780, and approved by vote of the colony's towns, clearly differs not only from that of the Eighth Amendment but also from related provisions adopted by the colonies during the Revolutionary War period. Its text provides:

> No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishment.

[5] Accessed October 2, 2024. https://johnsondictionaryonline.com/1773

What it proscribed was set out in three clauses, separated from one another by commas and connected by the word "*or*".[6] The plain language of the provision indicates that an action by a magistrate or a court of law that violates any one of those three clauses is unconstitutional. The third clause uses the word "or" not once, but twice. Thus the infliction of a punishment that is either cruel or unusual is also unconstitutional. An action may violate more than one of the three clauses, but it need not violate all three. Raftery contends that a total forfeiture of his retirement allowance is an excessive fine within the meaning of the second of the three clauses, and its infliction is both a cruel and an unusual punishment as proscribed by the third clause. There is nothing in the text of Article 26 that suggests otherwise.

Article 26 was not written on a blank slate. It has a history linked to the Declaration of Independence and the Revolutionary War. Massachusetts was the last of the twelve original colonies which adopted a constitution prior to the Constitution of the United States.[7] Eight of those colonies adopted Constitutions in 1776 and three of those eight contained a Declaration of Rights, labelled as

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[6] The addition of the introductory phrase "No magistrate or court of law" is a likely consequence of the fact that John Adams had served on the General Court as a representative of the Town of Braintree while also arguing cases to the magistrates in the General Court.

[7] Connecticut did not adopt such a constitution.

such.[8] Two of those three contained provisions addressing fines and punishment.

Article XIV of the Maryland Constitution provided:

> XIV. That sanguinary laws ought to be avoided, as far as is Consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.

And Article X of the North Carolina Constitution provided:

> X. That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

South Carolina adopted two constitutions, one in 1776 and the other in 1778. The latter contained a provision addressing sanguinary laws, echoing Article XIV of Maryland's Constitution. It reads:

> XL. That the penal laws, as heretofore used, shall be reformed, and punishments made in some cases less sanguinary, and in general more proportionate to the crime.

Article 26 differs from each of the related provisions in the Constitutions of Virginia, Maryland and South Carolina. Unlike each of them, it proscribes actions,

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[8] Declarations of Rights, as opposed to Bills of Rights, were in keeping with the Declaration of Independence and – stylistically at least – at variance with the English Bill of Rights. The Constitution adopted by Virginia in 1776 was labelled "Bill of Rights" but it opened with phrase "A declaration of rights made by the good people of Virginia." Section 9 of that document reads:

> Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It was consistent with what became the text of the Eighth Amendment.

using the phrase "shall not" rather than suggests, as do the phrases "ought to be", "ought not" and "should not". Its final clause dealing with punishments applies not just to "sanguinary" laws but any cruel or unusual punishment, whether imposed by a law or court order, thus departing from the constitutions of Maryland and South Carolina. The final clause of Article 26 departs from its Virginia counterpart because it is triggered by either a cruel or an unusual punishment. That distinction, however, is consistent with Article X of its North Carolina counterpart.

There is a history connecting John Adams to the North Carolina Constitution. John Adams' Thoughts on Government helped fuel the rash of constitutional provisions adopted in 1776. Prior to publication, those thoughts were set forth in six handwritten letters, the first two of which were written during the week prior to March 27, 1776 and addressed to William Hooper and John Penn, each of whom was then a delegate to the Constitutional Congress representing North Carolina. David McCullough's John Adams[9] recounts "before returning home to help with a new constitution for North Carolina, (Hooper) had asked Adams for a 'sketch' of his views."

Hooper was characterized as a "friend" of Adams in Akhi Reed Amar's The Words That Made The US, America's Constitutional Conversation 1760-1840, p.

[9] David McCullough, John Adams, p. 101 (Simon and Schuster Paperbacks, 2001)

407 (Basic Books, 2021). He was born in Boston, attended Harvard College shortly after Adams. Following graduation "in 1761 he read law under the aegis of the fiery colonial rights-exhorting James Otis."[10] Otis famously exhorted for colonial rights in February 1761 in his argument on the Writs of Assistance. Fifteen years later, as the nation's Declaration of Independence was being composed, John Adams described that argument as the commencement of the controversy between Great Britain Britian and America. Charles Francis Adams, Familiar Letters of John Adams and His Wife, p. 191 (The Riverside Press, 1876.)[11]

The spate of state constitutions adopted in 1776 was driven by a resolution adopted by the Continental Congress in May of that year. The resolution was proposed by John Adams on May 6, adopted on May 10, and the preamble drafted by Adams (as one of a committee of three) was agreed to on May 15. It was the subject of a letter to Abigail Adams on May 17. Its purpose was to recommend to the respective assemblies and conventions of the united colonies that they adopt

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[10] Descendants of the Signers of the Declaration of Independence, https/www.dsdi1776.com/signer/williamhooper (last visited on October 14, 2024).

[11] The letter from John Adams to Abigail Adams is dated July 3, 1776. The paragraph which precedes the reference to argument concerning Writs of Assistance describes a Resolution passed the day before and promises a Declaration within a few days setting forth the causes which have impelled the revolution.

governments that would best conduce to the safety and happiness of their constituents in particular.[12] Familiar Letters of John Adams and His Wife, p. 173 (The Riverside Press, 1876.)[13]

The Eighth Amendment adopted by Congress nine years later bore "Madison's Hand", not that of John Adams.[14] Not surprisingly, it adopted the conjunctive "and" of Madison's home state rather than "or" as in that of Massachusetts.

The decision below characterizes the third clause as the "cruel and unusual" provisions of Article 26. As noted above, the words "cruel" and "unusual" are adjectives. They modify the subject of the clause, the noun "punishment". Standing by themselves, the modifiers lack meaning. Based on its reading of the

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[12] "Happiness" is a recurring word in the state constitutions which followed, appearing in seven of the ten which preceded the Massachusetts Constitution and is the last word in the Preamble to the Massachusetts Constitution, also a product of Adams' authorship. It is the object of the government established by the Frame of Government adopted in 1780 and the Declaration of Rights was intended as a bulwark to secure that objective.

[13] The letter from John Adams to Abigail Adams is dated July 3, 1776. The paragraph which precedes the reference to argument concerning Writs of Assistance describes a Resolution passed the day before and promises a Declaration within a few days setting forth the causes which have impelled the revolution.

[14] See the discussion of James Madison's quest to establish a national government with Virginia at its helm. See Mary Sarah Bilder, Madison's Hand, Revising the Constitutional Convention, pp. 7-8 (Harvard University Press, 2015).

terms, the Court found that those provisions simply do not apply to the punishment inflicted on Mr. Raftery.

Elsewhere in the decision, the District Court concluded that because Article 26 and the Eighth Amendment were adopted close in time and were intended to provide the same type of protection, the analysis was the same under either provision. At any point in time, different sovereigns may differently address a problem they share. Common purposes does not mean common solution.

The purpose of Article 26, like each of the provisions in the Declaration of Rights adopted in 1780 is set forth in the Preamble to the Constitution, which begins:[15]

> The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

[15] As adopted in 1780, the Constitution of the Commonwealth of Massachusetts consisted of that Preamble, which set forth the "Objects" or purposes of what followed; and then three "Parts" the first of which is the "Declaration of Rights of the Inhabitants of the Commonwealth." At the time it was adopted, "Preamble" was defined as "something previous, introduction, preface." https://johnsonsdictionaryonline.com/ last accessed on October 18, 2024. The use of preambles to set forth the purpose and reasons for what followed had a history in Great Britain (including the Bill of Rights of 1689) and the United States in its formative stages.

The first clause of Article I of the Declaration reinforced that statement of purpose. It reads:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

The Declaration of Rights as a whole had the purpose of limiting the Commonwealth's power, whether exercised by the Legislative, Executive or Judicial Department, to interfere with those natural rights.[16] Article 26 cuts across each of those Departments, as indicated by the introductory phrase "No magistrate or court of law".

Importantly, the Declaration of Rights was the first order of business in Massachusetts. Conversely the Bill of Rights adopted for the new United States was an afterthought. Its adoption by the First Federal Congress in 1789 was preceded by a debate between the Federalists who fought against inclusion of a declaration or bill of rights and the Antifederalists, whose number included advocates for such a measure. The failure to include such a declaration or bill "nearly proved fatal to the ratification of the Constitution" adopted in 1787. Creating the Bill of Rights, The Documentary Record from the First Federal

[16] See, Article 5 captioned "ACCOUNTABILITY OF ALL OFFICERS" whether legislative, executive or judicial.

Congress, ix-x, Helen E. Veit, Kenneth R. Bowling and Charlene Bangs Bickford eds. (Johns Hopkins University Press 1991).

When ratification of the United States Constitution itself was debated in 1786 in Massachusetts, its failure to contain a bill of rights was a prominent, oft-repeated obstacle to approval. See, Elliot's Debates, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, Volume II, pages 1-183. The Commonwealth's approval was by a narrow margin (187 yeas to 168 nays) and achieved only by "suggesting" amendments to the documents. Those amendments were designed to protect individuals from the type of governmental excesses that gave birth to the Revolution.

Because the Declaration of Rights in the Massachusetts Constitution was the first order of business in crafting the Massachusetts Constitution, and not a series of after-the-fact amendments such as the Bill of Rights, Article 26 should be read to provide greater protection to individuals than the Eighth Amendment.

There were two reasons the 1778 attempt of the colonial leaders of Massachusetts failed to adopt a state constitution in accordance with the resolution adopted by the Constitutional Congress. It was a product of the established colonial government rather than a convention constituted for that purpose; and it lacked a meaningful bill of rights. Each of those reasons reflect the fact that the people of the colony were rebelling against the Crown's impositions. The

government to be created had to be one that protected the people's unalienable rights from the impositions of those governing them. As set forth in the Essex Result in 1778,

> Over the class of unalienable rights the supreme power hath no control, and they ought to be clearly defined and ascertained in a BILL OF RIGHTS, previous to the ratification of any constitution. The bill of rights should also contain the equivalent every man receives, as a consideration for the rights he has surrendered. This equivalent consists principally in the security of his person and property, and is also unassailable by the supreme power: for if the equivalent is taken back, those natural rights which were parted with to purchase it, return to the original proprietor, as nothing is more true, than the Allegiance and protection are reciprocal.

The *Declaration of Rights, and Frame of Government* established in 1780 as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS suffered from neither of the infirmities that prevented adoption of the Commonwealth's proposed constitution in 1778. The same cannot be said of the United States Constitution which lacked a Bill of Rights – a fact that imperiled its ratification. That Declaration protected the unalienable rights of the Inhabitants of the Commonwealth against impositions by the government of the Commonwealth. It was a limitation on the powers of the Commonwealth, not an authorization to act in any manner. Likewise the federal Bill of Rights limits the power of the United States, and bestows no authority upon it.

The Commonwealth's departure from the English Bill of Rights is noteworthy. The first prefatory paragraph in the Declaration of Independence ends "a decent respect to the opinions of man and requires that they should declare the clauses which impel them to the separation." The self-evident truth which follows first is that "all men are created equal", have "certain unalienable Rights, and among them are Life, Liberty and Happiness", and "it is the Right of the People" to institute a new government based on principles which they consider "most likely to effect their Safety and Happiness. A litany of twenty-seven facts establishing the King's intent to establish "an absolute Tyranny over the thirteen united States of America" follows. The twenty-fifth fact addresses "the King's use of armies of foreign mercenaries to compleat the works of death, destruction and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages." The words "Happiness" and cruelty might today be characterized as "buzzwords" that appeared in the Constitutions adopted by the colonies as they became states during the Revolutionary War.

The historic precedent from which the Bill of Rights and the state constitutions related passages proceed is contained in the provisions in the English Bill of Rights of 1689. It was codified by Parliament at I William and Mary, Session 2, C2 (1689) which is set forth in the Addendum to this brief. Two of the three main components are relevant to the issues presented. The first is a recital of

twelve illegal and arbitrary acts committed by King James II and his "diverse evil counsellors, judges and ministers".[17] Paragraphs 10 and 11 of it read:

> 10. And excessive baile hath beene required of persons committed in criminall cases, to elude the benefit of the lawes made for the liberty of the subjects.
>
> 11. And excessive fines have been imposed, and illegal and cruell punishments inflicted.

The second component addresses those illegal acts. Its paragraph 10 reads:

> 10. That excessive baile ought not to be required nor excessive fines imposed; nor cruell and unusuall punishment be inflicted.

The remaining provisions deal with crowning William and Mary, succession to the throne and the administration of government.

John Adams, William Penn and the draftsmen of the New Hampshire and Maryland constitutions were well versed in English law and chose, at the time of the Revolution to use phraseology that differed from it. That decision is a significant factor in analyzing Article 26.

By the time the Bill of Rights was being crafted by Congress, seven states had constitutions containing formal bills or declarations of rights. Of the seven, four provided protection against cruel or unusual punishment. Massachusetts and

[17] The evils that led to the enactment are discussed at pages 639-688 of Thomas Pitt Taswell-Langmead, English Constitutional History from the Teutonic Conquest to the Present Time, 4th Ed. (Houghton, Mifflin 1890).

North Carolina were among them. When the question of ratification of the United States Constitution was presented in Massachusetts, the state convention "said yes, but by a vote of 187 to 168 …" Alongside its yes vote, the convention endorsed a series of proposed amendments for Americans in the Bay State and elsewhere to consider. That was "something the previous ratifying states had not done, but which most of the states thereafter would follow …." Akhil Amar, The Words That Made Us, America's Constitutional Convention 1760-1840 (Basic Books, 2021).[18] North Carolina held even tougher. Its ratification of the United States Constitution was a matter to be considered in November 1779, Creating the Bill of Rights at 245-246, and the Congressional hearings on the Bill of Rights, including a consideration of the states' amendments occurred from mid-July to late September. Id. at 5-13.

The text of the Eighth Amendment was unchanged and little debated as the First Congress promulgated the Bill of Rights. It was one of nine proposed amendments debated in the House of Representatives on August 17, 1789. Creating the Bill of Rights, The Documentary Record from the First Federal Congress, p. 7. The Congressional Register of that date notes the objection of Representative Smith of South Carolina who "objected to the words 'nor cruel and

[18] The Commonwealth of Massachusetts did not ratify the Bill of Rights until 1939. Prologue Magazine, Winter 2016, Vol 48, No. 4.

unusual punishments', the import of them being too indefinite." Representative Livermore of New Hampshire apparently agreed with Mr. Smith. The Congressional Register of that date referenced the Congressman's statement as did the Gazette of the United States dated five days later. The passage in the Register is as follows:

> The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lays with the court to determine. **No cruel and unusual punishment is to be afflicted; 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 too cruel?** If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the legislation to adopt it, but until we have some security that this will be done, we ought not to be restrain from making necessary lies by any declaration of this kind.
>
> The question was put on the clause and it was agreed by a considerable majority.

Creating the Bill of Rights, The Documentary Record from the First Federal Congress, p. 187. Emphasis supplied.

Today's answer to Mr. Livermore's question would be "yes".

So too is the answer to the question as posed in the Gazette:

> … as to punishments, taking away life is sometimes necessary, but because it may be thought cruel, will you, therefore, never hang anybody …

Creating the Bill of Rights, The Documentary Record from the First Federal Congress, pp. 179-180. Emphasis supplied.

The references to punishments of death in both were portentous.

It is ironic that punishment for murder has consumed so much of the Eighth Amendment of the nation's cruel and unusual jurisprudence. The Declaration of Independence, which lays out the Colonists' grievances against the British in a manner similar to the first component of the English Bill of Rights of 1689, mentions "murder" only once. It stated that the King combined with others and assented to their acts of precluded legislation:

1. For Quartering large bodies of armed troops among us:
2. For protecting them, by a mock Trial, from punishment for any murders which they should commit on the Inhabitants of these States:
3. For cutting off our Trade with all parts of the world:
4. For imposing Taxes on us without our Consent:

The events leading to the Revolutionary War included a litany of Acts of Parliament to which the King assented dealing specifically with the respective economic interests of the colonists and the British government. Among them were the Sugar Act of 1764; the Quartering Act and Stamp Act of 1765; the Townshend Acts of 1767; the Tea Act of 1773; the Coercive Acts of 1774; and the New

England restraining Act of 1775. The proper punishment for murder was not high on the list of the framers of the Declaration of Independence, United States Constitution or the subsequent Bill of Rights. Property interests leading to "happiness" were.

Other States With Provisions Similar To Article 26 Have Afforded Greater Protection To The People Based On Their State Constitutions

For many years following the adoption of the federal Bill of Rights, little or no attention was paid to the difference between its language and that in Article 26.[19] Nearly two centuries after the adoption of the Eighth Amendment, this Court noted it had never decided whether its language and Article 26 imparted the same meaning. Commonwealth v. Diatchenko, 387 Mass 718, 722, n. 2 (1982). Over the course of that time, the number of states had increased to fifty. California was admitted to the Union in September 1850 as the thirty-first state. A year earlier, it had adopted its own state constitution, drafted and debated in the Constitutional Convention of 1849. Unlike the Eighth Amendment, it prohibited the infliction of cruel or unusual punishments. In People v. Anderson, 6 Cal. 3d 628, 493 p. 2d

[19] In the final paragraph of its opinion in Harding v. Commonwealth, 283 Mass. 369, 374 (1933), this Court referred first to the cruel and unusual punishment in Article 26 and two sentences later used the phrase cruel or unusual punishment.

880 (1972), the Supreme Court of California described the process followed in adopting its cruel or unusual provision,

As indicated by the fact that California was the 31st State, 17 states had been admitted since the United States Constitution and the First Congress had adopted the Bill of Rights. And of the original 13 states several had adopted new state constitutions prior to the admission of California. During the course of the California Convention of 1849 the delegates had access to the constitutions of every one of the constitutions of the prior 30 states. Within two paragraphs supported by nine substantial footnotes, the Anderson court explained why the delegates had modified the California provision before adoption to substitute the disjunctive "or" for the conjunctive "and" in order to establish their intent that both cruel punishments and unusual punishments be outlawed there as in Massachusetts.[20] The Court went on to observe "The framers of the California

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[20] The two referenced paragraphs read:

> Although the delegates to the convention were limited in their access to models upon which to base the proposed California Constitution at the commencement of their deliberations,[10] by the end of the convention they had access to the constitutions of every state.[11] At least 20 state constitutions were mentioned by delegates during the debates.[12] The majority of those which included declarations of rights or equivalent provisions differed from the New York, Iowa, and United States Constitutions and did not proscribe cruel *and* unusual punishments. Rather, they prohibited "cruel *636

Constitution sought to restrict their fellow Californians' "zeal for devising novel and torturous punishments," noting that at the Massachusetts Convention of 1788 considering ratification of the United States Constitution a delegate expressed concern about the imposition of cruel and unheard of punishments. Anderson at

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> punishments,"[13] or "cruel or unusual punishments."[14] Several had provisions requiring that punishment be proportioned to the offense[15] and some had dual provisions prohibiting cruel and/or unusual punishments and disproportionate punishments.
>
> The fact that the majority of constitutional models to which the delegates had access prohibited cruel or unusual punishment, and that many of these models reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed, persuades us that the delegates modified the California provision before adoption to substitute the disjunctive "or" for the conjunctive "and" in order to establish their intent that both cruel punishments and unusual punishments[17] be outlawed in this state.[18] In reaching this conclusion we are mindful also of the well established rules governing judicial construction of constitutional provisions. We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form "haphazardly," nor may we assume that they intended that it be accorded any but its ordinary meaning.

Citations and footnotes omitted.

647. Under the heading "Capital Punishment is an Unusual Punishment"; the Anderson court concluded that the "increasingly unusual nature of capital punishment in the United States is readily apparent from" the dwindling number of executions in American jurisdictions in the 1960's, paralleled by a dejure and defacto abolition of capital punishment in foreign jurisdictions. Thus the Court concluded that capital punishment, "is now, an unusual punishment among civilized nations." Id. at 656. Accordingly the judgment against Mr. Anderson was modified to a punishment of life imprisonment rather than the death penalty. Id. at 657.

Anderson was decided in February of 1972 and Furman v. Georgia, 408 U.S. 238 (1972) was decided in June. In District Attorney for the Suffolk District v. Watson, 381 Mass. 648 (1980), the Court characterized that five to four decision as the touchstone for constitutional analysis of the death penalty. Id. at 657. The particular standard it examined was

> "that established by art. 26 in its prohibition of cruel or unusual *661 punishment. While the word "unusual" may suggest the need for an ongoing comparison of punishments meted out for comparable crimes in similar cultures, we focus instead on the constitutional prohibition of "cruel" punishments. All punishments might be said to be cruel, but what we examine here is the question of punishment which is too cruel under constitutional standards. Also, we focus on the absolute and irreversible punishment of death, as distinguished from all lesser penalties.

> The constitutional prerogatives and duties of this court permit, indeed require, a reexamination of the death penalty to determine whether it is unconstitutionally cruel in light of contemporary circumstances. "Certainly at the time of its adoption, art. 26 was not intended to prohibit capital punishment. Capital punishment was common both before and after its adoption. However, art. 26, like the Eighth Amendment, 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101 (78 S.Ct. 590, 598, 2 L.Ed.2d 630) (1958)." Commonwealth v. O'Neal, 367 Mass. 440, 451, 327 N.E.2d 662 (1975) (O'Neal I) (Wilkins, J., concurring). "A constitutional provision 'is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.' " Furman v. Georgia, 408 U.S. 238, 263-264, 92 S.Ct. 2726, 2738-2739, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), quoting from Weems v. United States, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793 (1910). Clearly, "(t)he framers of our Constitution, like those who drafted the Bill of Rights, anticipated that interpretation of the cruel or unusual punishments clause would not be static but that the clause would be applied consistently with the standards of the age in which the questioned punishment was sought to be inflicted." People v. Anderson, 6 Cal.3d 628, 648, 100 Cal.Rptr. 152, 493 P.2d 880, cert. denied, 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed.2d 344 (1972). Therefore, if the death penalty is indeed unacceptable under contemporary moral standards, *662 it is tantamount to those punishments barred since the adoption of art. 26, and it is our responsibility to declare it invalid.

In Watson, The Court concluded that "the Acts of 1979 contravenes the prohibition against cruel or unusual punishment contained in art. 26 of the Declaration of

Rights on each of two grounds: (1) the death penalty is unacceptably cruel under contemporary standards of decency, and (2) the death penalty is administered with unconstitutional arbitrariness and discrimination." Both the Opinion of the Court and the concurring opinion of Justice Liacos cited to People v. Anderson, supra, the former at page 661. Justice Liacos wrote:

> The Constitution of this Commonwealth may have a separate and distinct meaning which is to be interpreted *676 and enforced by this court. See e. g., Commonwealth v. Soares, 377 Mass. --,[FNa] 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979). Article 26, with its disjunctive phrasing, has been so interpreted by the Attorney General of this Commonwealth. See Note, The Death Penalty in Massachusetts, 8 Suffolk U.L.Rev. 632, 646 (1974). The California Supreme Court has similarly interpreted its constitutional provision containing essentially the same language as art. 26. People v. Anderson, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880, cert. denied, 406 U.S. 958, 92 S.Ct. 2060, 32 L.Ed.2d 344 (1972). This court has not decided whether the phrase "cruel and unusual" and the phrase "cruel or unusual" have the same or a distinct meaning. But cf. O'Neal II, supra, 369 Mass. at 247 n.4, 339 N.E.2d 676 (Tauro, C. J., concurring). The majority opinion does not reach this issue. While I concur in the reasoning and result of the majority, I would go further and state that art. 26 stands on its own footing, for reasons similar to those expressed in Anderson, supra. I would further hold that a punishment may not be inflicted if it be either "cruel" or "unusual." Last, in my view, the imposition of death by the State as a penalty for crime "is in itself so brutal to the object and so dehumanizing of others that it constitutes 'cruel' or 'unusual' punishment within art. 26." Opinions of the Justices, supra, 372 Mass. at 921, 364 N.E.2d 184.

Id. at 675-676.

Hawaii is the last of the fifty states to have been admitted to the United States. During the COVID pandemic years, the Supreme Court of Hawaii issued a series of unpublished orders and ultimately an unpublished opinion in an original proceeding captioned IN THE MATTER OF INDIVIDUALS IN THE CUSTODY OF THE STATE OF HAWAI'I. Add. 66. Part III of the opinion is captioned "Cruel and Unusual Punishment". It begins by identifying Hawaii as a state whose constitution prohibits the infliction of "cruel or unusual punishment", which is followed by a paragraph indicating its case law had applied a proportionality test not available under the Eighth Amendment but doing so as if the wording of its Article 1, section 12 was the same as of the Eighth Amendment. The next paragraph indicates that the Court had reviewed pertinent provisions in the constitutions of all fifty states. It reads:

> **A. "Cruel or unusual punishment"**
>
> Article 1, section 12 of the Constitution of the State of Hawai'i also prohibits the infliction of "cruel or unusual punishment" for those convicted of crimes. In comparison, the Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments."12 (Emphasis added.)

> Our case law has been applying a "proportionality" test not available under the Eighth Amendment's "cruel and unusual" punishment prohibition, but has been doing so on the basis that the federal and state constitutions contain identical language. For example, in State v. Guidry, this court stated:
>
> > [T]he standard by which punishment is to be judged under the "cruel and unusual" punishment provision of the Hawai'i Constitution is whether, in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community."
>
> The fifty states' constitutions differ in terms of whether their respective constitutions mirror the federal constitution's "cruel and unusual" language. Specifically, twenty states use the conjunctive language,14 twenty states use the disjunctive language,15 two states use both the conjunctive and disjunctive forms,16 six states ban only cruel punishments,17 and three states do not reference any of these terms.18

Add. 75.

The unpublished opinion then discusses application of the pertinent clauses of four state constitutions, beginning with California and People v. Anderson, then Michigan and Massachusetts. Each of those three are states that utilize the disjunctive "or" language. Washington was identified as one of six states that ban only "cruel" punishments. The unpublished opinion discusses the tests applied in determining whether the punishment imposed met the respective states' constitutional provisions. The unpublished opinion is set forth in the addendum.

A Standard For Determining Whether a Punishment is "Cruel and Unusual" Is Inappropriate for Determining Whether a Punishment is "Cruel" or Whether a Punishment is "Unusual"

In Bajakian, the forfeiture was inflicted by a United States District Court Judge and based on that Judge's determination of proportionality. In upholding that determination, the United States Supreme Court crafted its standard for evaluating excessive fines based on its cases dealing with the cruel and unusual punishment . In Bettencourt, the Court utilized the same standard because the claim of police officer Bettencourt was confined to the application of the Eighth Amendment. The fundamental imperative of Article 26 is that it "be proportionate to the offender and the offenses." Commonwealth v. Mattis, 493 Mass. 216, 221 (2024) (quoting Diatchenko v. District Attorney for the Suffolk District, 466 Mass 665, 671 (2013). The pension forfeiture imposed in the case before the Court was imposed by the State Retirement Board automatically, pursuant to G.L. c. 32, §15(4), a statute which applies to all members of the state, county and municipal retirement systems in the Commonwealth. It is triggered by a conviction of any criminal offense involving a violation of the laws applicable to his or her office or position. The critical alignment of crime and office as required by the statute requires either a factual or a legal link between a member's office or position and his or her conviction. Essex Regional Retirement Board v. Swallow, 481 Mass. 241, 254 (2019). Nevertheless, it applies to any criminal offense that meets one of

those criteria. A statute such as G.L. c. 32, §15 is a punishment. Its clauses overlap and are not exclusive. See Trop v. Dulles, 356 U.S. 86, 96-97 (1958).

The case presented here is one of first impression because it does assert that the plain language of Article 26, its history and purpose protect the Appellant from the imposition of an unusual punishment. Raftery contends the forfeiture imposed on him is both an "excessive fine" and a "cruel or unusual punishment." It is excessive because it is grossly disproportionate to his offense conduct. It is "cruel" because it imposes monetary sanctions on him that will last a lifetime and have a particular effect on him and his family members as their lives progress through their final years. It is "unusual" because the law authorizing the sanction has a greater impact than pension forfeiture provisions in other states and countries.

The appropriate standard to be applied to Raftery's case should calibrate the offense conduct to the sanction actually imposed. It should include consideration of the laws and regulations of other states and nations in order to evaluate whether that punishment that is unusual, meaning out of the ordinary. Because uniformity among states and nations on any matter is contrary to the structure of nations, that standard should have flexibility. Proportionality should be a central feature of the standard, but a requirement that it shock one's conscience should not. Given our

federal system, states are free to extend greater protections to the people of the state involving the infliction of punishment than the protections the United States affords in proposing punishment for the violation of its laws.

Over the course of the nation's history, the credo for punishment has morphed away from "a life for a life, an eye for an eye, and a tooth for a tooth" as laid out in the Code of Hammurabi and in the Old Testament Books of Exodus[21] and Leviticus[22] which certainly were known to the colonists. Sanguinary, torturous and barbaric punishments are no longer part of our culture. That may be a result of Eighteenth Century state constitutions, which, in turn, may have been influenced by the work of Cesare Buccaria, translated in 1767 into "On Crimes and Punishments" that is said to have influenced 4 Blackstone Commentaries. Making the punishment "fit the crime", a phrase credited to the Roman philosopher Cicero, is a better descriptor for the way punishment has been imposed over the years since Bajakajian was decided, but the standard required by Article 26 of the Declaration

[21] Exodus, Chapter 21, lines 23-25. (But if injury ensues, you shall give life for life, eye for eye, tooth for tooth, hand for hand, burn for burn, wound for wound, stripe for stripe.)

[22] Leviticus, Chapter 24, lines 17-22. (Whoever kills a person must be put to death … if someone injures another person, they must receive the same kind of injury in return, broken bone for broken bone, eye for eye, tooth for tooth … And he that killeth a man, he shall be put to death.)

of Rights in order to protect the people from the Commonwealth demands more. It demands that the punishment fit both the crime and the defendant.

Total pension forfeiture violates Article 26 of the Declaration of Rights in Part the First of the Commonwealth of Massachusetts in multiple ways. It is both an excessive fine and it inflicts punishment that is both cruel and unusual. Its imposition pursuant to G.L. c. 32, §15(4) is particularly harsh because those in the employ of the Commonwealth are not credited with time of service in the nation's Social Security program. It is imposed by the State Retirement Board as an operation of law following the conviction of any crime connected to one's public employment and punishes the offender for the rest of her life. See Gaffney v. Contributory Retirement Appeal Board, 423 Mass. 1 (1996). The longer the public service has been at the time of the conviction, the harsher the punishment. That is because the amount forfeited increases with each year of prior service while the time to provide for one's "golden" years diminishes.

In PERAC v. Bettencourt, 474 Mass. 60 (2016), the Court determined that the effectuation of the forfeiture provisions in G.L. c. 32, §15 to police officer Bettencourt was an excessive fine as proscribed by the forfeiture provisions in the Eighth Amendment to the United States Constitution. It did so applying the rationale of the United States Supreme Court in United States v. Bajakajian, 524 U.S. 321 (1998). Article 26 provides greater protection to the people of the

Commonwealth than does the Eighth Amendment. Rightfully so. As shown by the history outlined in Argument A, It predates its federal counterpart and is differently worded from it. Just as the age of youthful offenders is a factor in evaluating the constitutionality of criminal sentences as affirmed in Commonwealth v. Mattis, 493 Mass. 216 (2024), so too is the effect of pension forfeiture for retirees who are denied the "blessings of life" which are the very object of the Declaration of Rights and Frame of Government of the Commonwealth.

At the time of this writing, more than five and half years have passed since Raftery's retirement allowance was withheld (APP 033) and more than three years have passed since the State Retirement Board adopted the findings and recommendations of its Hearing Officer. (APP 242) At the time Raftery retired, his retirement benefits were roughly $72,205 per year. (APP 165) Over that five and a half year period, Raftery would have received approximately $407,125 in retirement benefits but for the operation of G.L. c. 32, §15(4). Board records indicate that he received $85,996 in the period prior to the suspension of payments. (APP 144) Thus more than $321,000 has already been withheld in connection with unearned overtime pay that has already been repaid in full.

Raftery "paid his debt to society" when he served his three month sentence and paid the $100 assessment levied upon him by the sentencing judge. He repaid the State Police the funds paid to him that were unearned. He has forfeited more

than six times the amount of the unearned overtime and faces a total loss of future benefits that had a value of $1.025 million in February 2020.

Raftery's offense conduct did not increase the amount of his subsequent retirement allowance. That is because the forfeiture imposed eliminates all the retirement benefits he earned over twenty-one years of service, eighteen of which preceded his offense conduct. He was twenty-six years old when he commenced his state service and is now fifty-four years old. (APP 186). In contrast, his state service over twenty-one years counts for nothing under the nation's social security system and his ability to play catch up fades every day. His personal situation is compounded because he had planned for retirement by availing himself of the Massachusetts Deferred Compensation SMART Plan 457. As part of his sentence, he was ordered to make restitution to the State Police in the amount of $51,337.50, the full amount he had received for overtime compensation not performed. The bulk of that restitution was made by garnishment of his deferred compensation.

The essence of proportionality is balance. Overtime pay is not "regular compensation" as defined in G.L. c. 32, §1 and thus was not a consideration in calculating Raftery's retirement allowance. See Public Employee's Retirement Administration Commission v. Contributory Retirement Appeal Board, 478 Mass. 832, 835 (2018).

The State Board Of Retirement Has Violated Rights Guaranteed To Mr. Raftery By Article 26 In The Declaration Of Rights Of The Constitution Of The Commonwealth

The Court below explicitly found that the cruel or unusual punishment provisions of Article 26 of the Declaration of Rights of the Massachusetts Constitution do not apply to the forfeiture of retirement allowance and health insurance as provided by G.L. c. 32, §15(4).

> #36. The Court finds that the cruel or unusual provisions of Article 26 of the Declaration of Rights to the Massachusetts Constitution do not apply to the forfeiture of retirement allowance benefits and health insurance as provided by G.L. c. 32, §15(4).

Add. 40.

The issue of its application was clearly preserved, and the ruling that it was inapplicable was clearly erroneous. The penultimate paragraph of the Court's Rulings/Conditions of Law bears directly on the proportionality determination the Court made and the unusual nature of the statute. It reads:

> #63. That being said, the Court does comment that the total forfeiture mandate of G.L. c. 32, §15(4) is flawed to the extent that it constrains the Court to an "all or nothing" proposition in determining forfeiture. In attempting to determine whether a forfeiture is excessive, the Court is required to assess whether the amount to be forfeited is proportionate to the gravity of the offense. The all or nothing condition restricts the Court in that determination in that it does not allow for the attempted application of measure, degree or balance. It precludes the ability to find the 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. The Court appreciates that following Bettencourt the Legislature did convene a special commission on pension forfeiture. The special commission filed a report in 2017 making various recommendations, including eliminating the "all or nothing" directive in the statute and calling for a tiered approach that would allow for partial forfeitures at various levels. While these recommendations have not become law, they do provide a recognition that there may be better approaches to pension forfeiture which can provide for more appropriate forfeitures. This Court believes that a forfeiture law which does not require an all or nothing determination in all cases will still carry out the deterrent effect desired. The Court also recognizes, as the Defendant points out, that many public pension systems provide alternative approaches to forfeiture, including non-forfeiture of benefits, partial forfeiture, Social Security benefits, retention of beneficiary benefits, retention of benefits accrued, until the time of the offense and more. Again, these examples of other systems and ideas provide an opportunity for continued discussion and consideration of how this state might find a way for a more measured approach to forfeiture in this setting. (Emphasis added.)

Add. 49-50.

The underscored passage leads one to conclude that the only person to have considered both Raftery as an offender and his offense was the federal judge who sentenced Raftery. That sentence better measures the gravity of the offense than anything else in the record. The sentence he imposed, not hypothetical maximum sentences, should guide this Court's analysis.

The six sentences which follow the underscoring draw on the work of the Special Commission on Pension Forfeiture created by the Legislature reacting to this Court's decision in Bettencourt, which pointedly gave the legislature the opportunity in the first instance, to address the disproportionality implicit within G.L. c. 32, §15(4) Mass. St. 2016, c.133. The Report is one of a handful of documents that illuminate the "unusual" nature of the forfeiture process in Massachusetts. It observes "the criminal offenses that precipitate pension forfeiture vary widely from state to state." That observation is accurate as illustrated by the compilation of the National Association of State Retirement Associations, Add. 114, and the Data Visualization of the Reason Foundation attributed to Senior Policy Analyst Ryan Frost, Add. 119. Those variations would be a consideration in the "tripartite" analysis as described in the Opinions of the dissenting Justices in Mattis, each of whom have retired. They are also considerations under the test articulated in the opinion of the Mattis court.

The state statute that most clearly fits Raftery's offense conduct is G.L. c. 268A, §23(b)(4), a provision added to the Commonwealth's Conflict of Interest Law in 2009. Mass. St. 2009, c. 28, §82. It prohibits public employees from knowingly "present(ing) a false or fraudulent claim to his employer for any payment or benefit of substantial value." Until 2009, violations of G.L c. 268A, §23 were not criminal offenses. Submitting citations written during an overtime shift was an essential part

of the AIRE program designed and implemented by Major Mucci as discussed above (Currently 010). Every one of the thirty-eight members of Troop E (Currently 011) sanctioned but not criminally prosecuted as a result of "Troopergate" overtime violated section 23(b)(4).

Section 84 of the session law criminalized violations of clause (4) of subsection (b) for the first time. It is codified at G.L. c. 268A, §26. Prior to the 2009 enactment, the State Ethics Commission had declined to apply the provisions of G.L c. 268A to time and attendance fraud. In Matter of Lincoln, 2008 SEC 2189 concluded

> Ordinary time and attendance fraud, absent any additional aspects, including those described above, does not amount to a use of official position in violation of the conflict of interest. Such matters are best dealt with by employers through disciplinary or other employment-related action, not as violations of the conflict of interest law.

District Court Justice Byrne rejected Raftery's time and attendance fraud contention. Add 046. It was error to do so because the citations written by Raftery provided to the Massachusetts State Police were an integral part of his false or fraudulent claim for payment which constituted his offense. There appear to be no reported cases that would assist this Court in calibrating the forfeiture imposed on Raftery to a violation of G.L. c. 268A, §§23(b)(4) and 26.

CONCLUSION

The period in which the Declaration of Rights in Part the First of the Constitution of the Commonwealth was written was tumultuous. The social contract it established is enduring. The rights it held inviolate cannot be defined by subsequent, related provisions of the United States Constitution or the cases interpreting those provisions. The proceedings below have not measured the proportionality of the forfeiture imposed on Raftery, which is the touchstone of Article 26. This Court should take the opportunity afforded by the Petition for Certiorari to establish a standard for challenges invoking the "excessive" "cruel" and "unusual" provisions occasioned by imposition of forfeiture provisions, reverse the decision below and order prospective payment of Raftery's retirement benefits and consequent restoration of health benefits.

Respectfully submitted,

GREGORY RAFTERY,

By his counsel,

/s/ Thomas R. Kiley

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Dated: October 31, 2024

RULE 16(a) CERTIFICATE OF COMPLIANCE

I, Thomas R. Kiley, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 10,434 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word. (version: Word 2409).

CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury, that on October 31, 2024, I have made service of this Brief upon the attorney of record for each party by electronic mail on:

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ADDENDUM

COMMONWEALTH OF MASSACHUSETTS
STATE BOARD OF RETIREMENT

SUFFOLK, ss.

In re: Gregory Raftery, Docket No. 19-3215-03

Appearance for the State Board of Retirement:	Melinda Troy, Esq. One Winter Street, Eighth Floor Boston, MA 02108
Appearance for Mr. Raftery	Thomas R. Kiley, Esq. Cosgrove, Eisenberg and Kiley, P.C. One International Place, Suite 1820 Boston. MA 02110-2600

RECOMMENDED FINDINGS AND DECISION

The State Board of Retirement ("SBR" or "Board"), based on preliminary information offered to it. requested that a hearing be held pursuant to G.L. c. 32, § 15 ("Section 15") regarding the applicability of that statute to the retirement account and benefits of Gregory Raftery, and that proposed findings of fact and rulings of law be presented to them. Following a hearing and after considering the parties' evidence and arguments. as set forth more specifically at the conclusion of this decision, the Hearing Officer recommends that the Board find and hold that:

- Pursuant to Section 15(4) Mr. Raftery has forfeited his right to receive a retirement allowance and to the interest earned on his accumulated total deductions, and neither he nor his beneficiaries are entitled to receive any rights or benefits under Section 15(4);
- Pursuant to Section 15(6). Mr. Raftery must repay all amounts paid to him and his beneficiaries from the date of his retirement;
- Pursuant to G.L. c. 32, § 20(5)(c)(2), Mr. Raftery must repay all payments made on his behalf of while his retirement allowance was suspended;

- Pursuant to the above-cited sections, the Board return to Mr. Raftery the balance of his accumulated total deductions, after subtracting the amounts identified above; and if there is a shortfall, to take steps to recover the balance from him.

PROCEDURAL BACKGROUND

On July 2, 2018, Gregory Raftery, a member of the Massachusetts State Employee's Retirement System ("MSERS"), pleaded guilty to one count of Embezzlement from an Agency Receiving Federal Funds, in violation of 18 U.S.C. § 666(a)(1)(A), and Aiding and Abetting, in violation of 18 U.S.C. § 2. On March 27, 2019, he was sentenced to a term of three months imprisonment, followed by one year of supervised release with conditions, and ordered to pay restitution.

On March 29, 2019, the Board voted, pursuant to G.L. c.32, § 15 and applicable regulations, suspend the superannuation retirement allowance that Mr. Raftery was at that point receiving, and to convene a hearing to determine whether it should take any action in connection with Mr. Raftery's rights or benefits under this or any other applicable laws. That same day, Nicola Favorito, Esq., Executive Director of the SBR, notified Mr. Raftery of the Board's actions.

A Notice of Hearing was issued on April 23, 2019, scheduling a hearing in this matter for July 11, 2019. On April 30, 2019, a Prehearing Order issued scheduling a prehearing conference, requesting the SBR submit a more particularized statement of the issues presented in the case, and further requesting that the parties confer to consider ways to simplify or clarify the issues in the case.

On May 28, 2019, Melinda Troy, Esq., on behalf of the SBR submitted a more particularized statement of issues. A prehearing conference was held June 6, 2019, at which Mr. Kiley appeared on behalf of Mr. Raftery, and the hearing postponed until August 27, 2019. Ms. Troy and Mr. Kiley each submitted a Prehearing Statement on August 26, 2019. The hearing went forward as scheduled, and the record was, by agreement, kept open for the submission of additional exhibits.

Ms. Troy and Mr. Kiley submitted closing memoranda on December 7, 2020. Ms. Troy argued that as Mr. Raftery has been convicted of violating laws applicable to his office or position, and those convictions became final upon his sentencing, Section 15 applies to his case, and under

Section 15(4), his retirement benefits must be deemed forfeited. Further, she argued that Section 15(6) also applies to this case, and therefore all benefits previously paid to Mr. Raftery's account must be repaid.

Mr. Kiley argued, first, that under Section 15(1), full restitution restores Mr. Raftery's entitlement to retirement benefits unless some other provision of Section 15 precludes it, and that none does. Second, he argued that the forfeiture of the entirety of Mr. Raftery's retirement allowance is unlawful as it constitutes an excessive fine under the Eighth Amendment to the United States Constitution and under Article 26 of the Massachusetts Declaration of Rights.

EVIDENCE PRESENTED

At the August 27, 2019 hearing, on behalf of the SBR, Ms. Troy submitted a series of documents that were admitted into evidence and marked as Exhibits 1 through 17, and by agreement, the record was kept open for the submission of additional exhibits from the SBR. Mr. Raftery was present, and testified solely on the question of his date of birth. No other witness was offered by either party.

Ms. Troy submitted an additional exhibit on October 4, 2019. On October 16, 2019, Mr. Kiley filed an unopposed motion to submit additional documents relating to restitution made by Mr. Raftery. The final exhibit offered by Ms. Troy was submitted on November 2, 2020. The additional documents were admitted and marked as Exhibits 18 through 21.

Exhibits

Exhibit 1.	Notice of Hearing (1 p.), with cover letters (2 pp.) (total, 3 pp).
Exhibit 2.	Pre-hearing Order dated May 1, 2019, with cover letter (2 pp.).
Exhibit 3.	Letter to Mr. Raftery from Nicola Favorito, Esq., Executive Director, State Board of Retirement, dated July 5, 2018 (2 pp.).
Exhibit 4.	Letter to Mr. Raftery from Nicola Favorito, Esq., Executive Director, State Board of Retirement, dated March 29, 2019 (2 pp.).
Exhibit 5.	Letter to Board from counsel for Mr. Raftery dated April 5, 2019 (1 p.).
Exhibit 6.	Certified copy of Criminal Docket, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY (5 pp.).

Exhibit 7.	Certified copy of the Information, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY (5 pp.), criminal case cover sheet (2 pp.) (total 7 pp.).
Exhibit 8.	Certified copy of Plea Agreement, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY, signed June 27, 2018 (9 pp.).
Exhibit 9.	Certified copy of the Waiver of Indictment, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY (1 p.).
Exhibit 10.	Certified copy of the Transcript of the Plea Colloquy, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY (37 pp.).
Exhibit 11.	Certified copy of the Government's Sentencing Memorandum, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY, March 21, 2019. (7 pp.).
Exhibit 12.	Certified copy of the Judgment, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY (7 pp.), transcript of Judge's findings (5 pp.) (total, 12 pp.).
Exhibit 13.	Certified copy of the Court's Statement of Reasons on Presentence Investigation Report, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY (4 pp.).
Exhibit 14.	Certified copy of Memorandum of Restitution Order, *U.S. v. Raftery*, U.S. District Court Docket No. 1:18-cr-10203-WGY, July 19, 2019 (1 p.).
Exhibit 15.	Notice and Demand for Payment [of restitution], issued to Gregory Raftery, U. S. District Court Docket No. 1:18-cr-10203-WGY dated April 15, 2019 (2 pp.). Notice of Intent to Offset, dated April 15, 2019 (1 p.), copy of check from Gregory Raftery, payable to Clerk, U.S. District Court (bank account number redacted) (1 p.), cover letter from Mr. Kiley (1 p.) (Total, 5 pp.).
Exhibit 16.	Retirement Application of Gregory Raftery, dated March 23, 2018 (3 pp.).
Exhibit 17.	State Board of Retirement, Data for annuity and Pension for Gregory Raftery (1 p.)
Exhibit 18.	Personnel Information, Dept. of State Police Rules and Regulations, Rules of Conduct (10 pp.), General Discharge, Gregory Raftery, March 23, 2018 (1 p.), Oath of Office (1 p.) (total, 12 pp.).

Exhibit 19. Affidavit of Executive Director, Nicola Favorito, Esq., October 4, 2019, (3 pp.), retirement account details, Gregory Raftery (11 pp.) (total, 14 pp.).

Exhibit 20. Copy of Motion for Proposed Order of Garnishment, 1:18-cr-10203-001-WGY, dated October 8, 2019, with proposed Order of Garnishment, (3 pp.); Memorandum in support of Motion for proposed Order of Garnishment (6 pp.) (total, 9 pp.).

Exhibit 21. Letter from John Boorack, Actuary, Public Employee Retirement Administration Commission, analyzing present value of Mr. Raftery's retirement benefit under Option C (joint-life) (1 p.).

FINDINGS OF FACT

1. On or about March 28, 1996, Mr. Raftery became a member of MSERS when he began working for the Massachusetts State Police ("State Police"), the statewide law enforcement agency for the Commonwealth. He ended his service on March 22, 2018, upon his retirement. Exhibits 17, 18 and 19.

2. By statute, each officer of the State Police must be sworn to the faithful performance of his duties. G.L. c. 22C, § 15.

3. On November 1, 1996, Mr. Raftery took an oath, which stated:

> I do solemnly swear (or affirm) that I will bear true faith and allegiance to the Commonwealth of Massachusetts, and that I will serve it honestly and faithfully against all its enemies whomsoever, that I will support the constitution of the Commonwealth of Massachusetts, and faithfully perform all the duties of an officer of the State Police of the Commonwealth of Massachusetts, and that I will obey the orders of my superior officers. I further agree to submit to any penalties, fines or forfeitures imposed in accordance with the rules and regulations of the State Police.

Exhibit 18.

4. The Rules of Conduct of the State Police require its members to

> . . . conduct themselves at all times in such a manner as to reflect most favorably on the Massachusetts State Police. Conduct unbecoming shall include that which brings the Massachusetts State Police into disrepute or reflects discredit upon the

> person as a member of the Massachusetts State Police, or that which impairs the operation. efficiency or effectiveness of the Massachusetts State Police or the member.

Dept. of State Police, Rules and Regulations, Article 5, Rules of Conduct. Rule 5.2; Exhibit 18.

5. On June 26, 2018. in the U.S. District Court for the District of Massachusetts, Mr. Raftery was charged by way of information with one count of Embezzlement from an Agency Receiving Federal Funds, in violation of 18 U.S.C. §666(a)(1)(A). and Aiding and Abetting. in violation of 18 U.S.C. § 2. Exhibit 10.

6. On July 2. 2018. at a plea hearing held before Judge William G. Young. Mr. Raftery agreed to plead guilty to an Information. and waived indictment. Exhibit 10.

7. At that hearing, Assistant U.S. Attorney Mark Grady summarized the evidence the government would offer if the case went to trial. While under oath, Mr. Raftery stated that he did not disagree with any of the statements. Those statements are also uncontroverted in this hearing. Exhibit 10.

8. In 2015 and 2016. the years at issue here. Mr. Raftery was a State Trooper assigned to Troop E of the State Police. Troop E was responsible for patrolling the Massachusetts Turnpike (the "Turnpike"). Exhibit 10.

9. Under an initiative that began in the 1990s, entitled. The Accident Injury Reduction Effort Program ("AIRE Program"), the State Police increased the patrols of the Turnpike with the goal of to reducing speeding on the Turnpike. and the resulting accidents and injuries. The State Police did this by establishing four-hour overtime shifts. Exhibit 10.

10. Troopers who were assigned to the AIRE Program conducted radar patrols in four-hour blocks outside of their regular work schedules. Troopers who worked AIRE shifts were required to report their activity at the end of each shift. including reports on citations issued. and submit the reports to the officer in charge. along with all the required paperwork needed to process them through the Registry of Motor Vehicles ("RMV"). the state court system, and the State Police. Exhibit 10.

11. The AIRE program operated parallel to a similar program, the "X-Team." Both programs sought to reduce accidents on the Turnpike, but the X-Team shifts were scheduled in eight-hour time blocks. Exhibit 10.

12. Both programs were funded by a public entity, the Massachusetts Department of Transportation ("MassDOT"), which paid the State Police for the invoices submitted for services rendered, including overtime shifts. The MassDOT, in turn, received funding for these initiatives from the United States Department of Transportation ("U.S. DOT"), which annually provides hundreds of thousands of dollars in funding to law enforcement agencies, including the Massachusetts State Police. The amount of federal funding thus provided exceeded $10,000 in each of the calendar years 2015 and 2016. Exhibit 10.

13. In 2016, Mr. Raftery signed up for and received overtime pay for more than 150 AIRE Program overtime shifts and one X-Team overtime shift. In 2015, Mr. Raftery signed up for and received overtime pay for more than 100 AIRE Program and seven X-Team overtime shifts. Exhibit 10, p. 26.

14. The State Police submitted invoices for AIRE Program and X-Team overtime to the MassDOT, and Mr. Raftery's invoices were thus reimbursed by the MassDOT. Exhibit 10, pp. 27-28.

15. During the years at issue, the cruisers assigned to State Troopers were equipped with computers that allow them to access relevant records, including driver records, vehicle registrations, and criminal histories. The computer system also maintained a record of all inquiries made on it, including the date and time of each query, by whom the query was made, the information sought, and the information provided in response. The State Police also maintained and stored radio transmission data related to these systems, including when the cruiser was turned on, and each radio signal sent from the vehicle's system. The investigation into this matter included evaluation of computer records of data queries made by Mr. Raftery, as well as radio transmission data. Exhibit 10.

16. Based on its analysis of the available evidence, the U.S. Attorney expected to show that during 2016 Mr. Raftery was not present or working for 397 hours of the 150 AIRE overtime shifts for which he was paid, and that during 2015 he was not present or working

for at 287 hours of the 100 AIRE overtime shifts for which he was paid. Additionally, he was not present or working for at least 42 hours of the seven X-Team overtime shifts for which he was paid over the course of those two years. Exhibit 10, pp. 27-28.

17. To substantiate these false reports of overtime worked and to conceal the fraud, Mr. Raftery submitted fraudulent traffic citations, including submitting citations that had never been issued to the drivers. When Mr. Raftery submitted fraudulent citations that had not been issued to drivers, he destroyed the copies intended for the motorist, the court system, and the Registry of Motor Vehicles. Exhibit 10.

18. At a payment rate of approximately $75.00 per hour, the excess overtime payments which Mr. Raftery received for the two programs totaled $51,337.50. Exhibit 10.

19. On June 27, 2018, Mr. Raftery signed a Plea Agreement with the U.S. Attorney, in which, *inter alia*, he agreed to plead guilty to the Information, and waive indictment.

20. In the Plea Agreement, the parties agreed that under the federal sentencing guidelines Mr. Raftery's total offense level should be increased by two levels to reflect that the offense involved sophisticated means, and that it should be increased by an additional two levels because Mr. Raftery abused a position of public trust. Exhibit 8.

21. During the plea colloquy, Mr. Raftery, while under oath, stated that he had heard and understood the facts alleged on behalf of the United States, and that he admitted to those facts. He further stated that he pleaded guilty, willingly and voluntarily, to the one-count Information. Exhibit 10.

22. On July 2, 2018, Judge Young found that Mr. Raftery's decision to plead guilty to the charge of Embezzlement from an Agency Receiving Federal Funds, in violation of 18 U.S.C. § 666(a)(1)(A) and Aiding and Abetting, in violation of 18 U.S.C. § 2 was knowing and voluntary, and the charge supported by substantial evidence. Accordingly, Judge Young accepted his guilty plea, and adjudged him guilty of the offense. Exhibit 10.

23. The Government's Sentencing Report, filed March 21, 2019, also set forth the parties' positions with respect to the federal sentencing guidelines, as stated in the Plea Agreement. Exhibit 11

24. On March 26, 2019, Judge Young held a sentencing hearing on Mr. Raftery's case, and imposed sentence upon him. On March 27, 2019, Judge Young entered a Sentencing Order sentencing Mr. Raftery to a term of three months' imprisonment, plus one year of supervised release with standard and special conditions. He was ordered to pay restitution in the amount of $51,337.50, and a special assessment of $100 was imposed. Exhibit 12.

25. On July 19, 2019, U.S. Probation Officer Patrick Skehill and Mr. Raftery agreed to a payment schedule for the ordered restitution of $400 per month. Exhibit 14.

26. On October 8, 2019, the U.S. Attorney for Massachusetts moved for an Order of Garnishment against Mr. Raftery and Empower Retirement, Massachusetts Deferred Compensation SMART 457 Plan, stating in its motion that it anticipated that disbursed funds would pay the outstanding restitution order in full. No evidence has been submitted to suggest that that Order was not granted, nor has any been offered to suggest that the restitution order was not satisfied. Exhibit 20.

27. On March 29, 2019, the Board voted to convene a hearing to consider whether any action should be taken in connection with Mr. Raftery's rights or benefits in accordance with G.L. c. 32 or any other applicable laws, and to suspend his retirement allowance, effective March 29, 2019. Exhibit 4.

28. Mr. Raftery had retired effective March 22, 2018, and as of the date of his retirement, he had 21 years, 9 months, and 25 days of creditable service. Mr. Raftery was born on July 29, 1970, and he thus retired at age 47. Exhibits 16, 17, Tr. 21:17-19.

29. On his Retirement Application, Mr. Raftery had elected "Option C," the option that provides for a lifetime benefit and, upon his death continued payment to his wife, as his beneficiary of record. Exhibits 16 and 21.

30. At the date of his retirement, Mr. Raftery's annuity reserve account totaled $169,324.05, of which $164,505.20 was attributable to deposits he made during his membership, $4,791.08 interest earned over time on those deposits, and $22.77 to current interest. Exhibits 17 and 19.

31. The first payment of his retirement allowance was issued June 30, 2018. Exhibit 19.

32. From the date that the MSERS began paying Mr. Raftery his retirement allowance until it suspended it because of his conviction, it issued a total to him of $73,951.73 in gross retirement benefits. While payments were being issued, deductions were taken from the gross amounts for federal tax withholding and insurance contributions. Exhibit 12.

33. The SBR sought and obtained an actuarial valuation of Mr. Raftery's account from John Boorack, State Actuary for the Public Employee Retirement Administration Commission ("PERAC"), an agency that oversees all Massachusetts state and local retirement boards. Mr. Boorack is a Member of the American Academy of Actuaries. Exhibit 21.

34. Mr. Boorack determined that as of March 22, 2018, Mr. Raftery's total Option C benefit was $72,205 per year. Exhibit 21.

35. Mr. Boorack estimated the present value[1] of Mr. Raftery's future retirement allowance to be $1.025 million. To calculate this estimate, Mr. Boorack used the RP-2000 Mortality Table (unisex) to estimate Mr. Raftery's and his wife's life expectancies, and assumed an annual interest rate of seven (7) percent. He also assumed that the payee would receive an annual cost of living adjustment ("COLA") of $390 per year. Exhibit 21.

ANALYSIS AND CONCLUSIONS OF LAW

Section 15 requires, first, consideration of whether Mr. Raftery has been convicted of violations of law applicable to his office or position, as that term is used in Section 15(1) through (4); and second, whether the conviction is "final" within the meaning of that statute. Neither party has disputed that the conviction is final. Thus if, as the SBR has argued, Section 15(4) applies to his case, Mr. Raftery's retirement allowance must, by law, be forfeited, and no beneficiary may be eligible to receive any benefits from his account. The Board must also consider additional consequences that potentially follow from that determination, in particular, the applicability of

[1] The term "present value" is an actuarial term of art that, when applied to annuities, represents an estimate of the sum that must be invested to guarantee a desired annuity payment in the future, assuming a specified rate of return on the investment and either a predicted or a defined end date for payments. Present value thus incorporates an interest rate that is chosen to reflect the time value of money. *See, e.g., Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365, 383–85 (D.N.J. 2018).

Section 15(6), and the amount, if any, of retirement allowance payments that must be either offset against Mr. Raftery's accumulated total deductions. The Board must also consider whether it should take any action pursuant to G.L. c.32, § 20(5)(c)(2), to correct any errors in Mr. Raftery's account.

In his closing memorandum, Mr. Kiley has argued that that full restitution restores Mr. Raftery's entitlement to retirement benefits under Section 15(1). His Statement of Issues similarly challenges the applicability of forfeiture under Section 15(3). Counsel for Mr. Raftery has also raised the issue of whether forfeiture of Mr. Raftery's retirement allowance under Section 15(4) constitutes an excessive fine in violation of the Eighth Amendment to the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights.

I. Whether G.L. c. 32, § 15 applies to Mr. Raftery's Retirement Account

Taking first the question of the applicability of Section 15(1); That subsection applies to "[a]ny member *who has been charged* with the misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement or termination of service . . ." (emphasis supplied). G. L. c.32, § 15(1). Mr. Kiley has argued that this section was established when overtime abuse was not treated as a criminal matter. Even accepting that to be so, this section cannot be interpreted to excuse wrongdoing against a governmental agency after a conviction for the crime of embezzlement. Rather, three other subsections of Section 15 establish the consequences of convictions of criminal offenses, and all three, in almost identical language, require forfeiture of all retirement benefits: Section 15(3), Section 15(3A) and Section 15(4). See also, *Essex Reg'l Ret. Bd. v. Swallow*, 481 Mass. 241, 245 (2019). There is no dispute here that Mr. Raftery has not merely been charged with a crime relating to misappropriation of funds, or property of a governmental unit by which he was employed, but he has been convicted of one, and Section 15(1) is inapplicable to his case.

With respect to Sections 15(3), 15(3A) and 15(4), all of which apply to the consequences to retirement system members who have been convicted of a crime, the Court in *Swallow* described the legislative history of those subsections, and the distinctions between them. It stated that Section 15(3) "denies a retirement allowance after final conviction of such member 'of an offense involving the funds or property of a governmental unit or system referred to in subdivision (1) of

this section,' and does not permit the return of retirement contributions 'unless and until full restitution for any such misappropriation has been made.' " *Swallow*, 481 Mass. 245 (2019). Contrary to the Respondent's suggestion, *Swallow* did not construe this subsection to allow reinstatement of the member upon making full restitution. rather. it makes full restitution a condition of receiving the member's own monetary contribution to the retirement system.

Section 15(4), by contrast. was enacted in response to the decision in *Collatos v. Boston Ret. Bd.*, 396 Mass. 684 (1986), which held that Section 15(3A). which mandated forfeiture of retirement benefits by public employees who have been convicted of certain state offenses, did not apply where the employee had been convicted of a parallel federal offense. Recalling the Court's holding in *Gaffney v. CRAB*. 423 Mass. 1 (1986), the Court in *Swallow* again noted the Legislature's intention to avoid specifying the precise nature of the crime or circumstances that would lead to pension forfeiture. Clearly, the Legislature also intended to ensure that federal crimes were sanctionable under Section 15. The Respondent's argument. that Section 15(4) is inapplicable to this case because restitution has been made, is unpersuasive.

The Application of Section 15(4) to Mr. Raftery's Account.

The primary issue presented here is whether Mr. Raftery's actions. which resulted in his conviction for one count of violation of Embezzlement from an Agency Receiving Federal Funds, in violation of 18 U.S.C. § 666(a)(1)(A). and Aiding and Abetting. in violation of 18 U.S.C. § 2 triggered the forfeiture requirements of Section 15(4). which 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 section one to twenty-eight. 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 rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

To make this determination. the Board must determine whether there is a direct link between at least one of the criminal offenses of which he was convicted, and his office or position.

> The substantive touchstone intended by the General Court is the criminal activity connected with the office or position. Yet it is also apparent that the General Court did not intend pension forfeiture to follow as a *sequelae* of any and all criminal convictions. Only those violations related to the member's official capacity were targeted. Looking to the facts of each case for a direct link between the criminal offense and the member's office or position best effectuates the legislative intent.

Gaffney v. Contributory Retirement Appeal Board, 423 Mass. 1, 4 - 5 (1996). The Court's definition of what constitutes a direct connection to criminal violations is not restricted to crimes that specifically reference public employment, or to criminal activities undertaken at or during work.

> This "direct link" requirement "does not mean that the crime itself must reference public employment or the employee's particular position or responsibilities," *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't*, 67 Mass. App. Ct. 612, 616 (2006), *Maher v. Retirement Bd. of Quincy*, 452 Mass. 517 (2008), *cert. denied*, 556 U.S. 1166 (2009), or that the crime necessarily must have been committed at or during work. *Durkin v. Boston Retirement Bd.*, 83 Mass. App. Ct. 116, 119 (2013). However, where the crime itself does not reference public employment or bear a direct factual link through use of the position's resources, there must be some direct connection between the criminal offense and the employee's official capacity by way of the laws directly applicable to the public position. *See Gaffney, supra at 5.*

Garney v. Mass. Teachers' Retirement System, 469 Mass. 384, 389 (2014).

The Court has identified two types of cases: those involving "factual links." and those involving "legal links". *Essex Reg'l Retirement Bd. v. Swallow*, 481 Mass. 241 (2019); State *Bd. of Ret. v. Finneran*, 476 Mass. 714, 720 (2017); *Garney v. Mass. Teachers' Retirement System*, 469 Mass. 384 (2014). In discussing this issue, the Court stressed that in cases involving factual links, a public employee's pension was subject to forfeiture only when there was "a direct factual connection between the public employee's crime and position." *Swallow*, 481 Mass. at 249 - 250.

In cases involving legal links, a public employee's pension is subject to forfeiture upon the conviction for a crime that directly implicates a statute that is specifically applicable to the employee's position." *Finneran*, 476 Mass. 720, citing *Ret. Bd. of Somerville v. Buonomo*, 467 Mass. 662, 671 (2014). A legal link is shown where the crime of which the employee is convicted "is contrary to a central function of the position articulated in applicable laws." *Finneran*, 476 Mass. 721, quoting *Garney*, 469 Mass. at 391.

The facts of this case show a clear factual link between Mr. Raftery's conviction and his position as a State Police Trooper. As a State Police Trooper, Mr. Raftery's duties included enforcing the traffic laws, including on the Turnpike. During the plea hearing in the U.S. District Court, Mr. Raftery admitted that he signed up for hundreds of AIRE Program and X-Team overtime shifts that he either did not work or did not work fully, and submitted timesheets to his employer, the State Police, requesting payment for them. This falsification involved sophisticated and deliberate actions. For example, Mr. Raftery submitted altered traffic citations to hide that he had not worked the full hours charged during these AIRE Program and X-Team overtime shifts. Based on these actions, his employer submitted his claims for overtime to the MassDOT, which funded the AIRE and X-Team programs through federal grant money. Mr. Raftery's materially false statements thus were critical to his accomplishing the fraudulent procurements from the MassDOT. The dollar value of the overtime he fraudulently claimed and was paid was substantial: $51,337. Thus, there is a direct factual link between the monetary payments that were the basis for Mr. Raftery's conviction and his position. See, *Winthrop Ret. Bd. v. LaMonica*, 98 Mass. App. Ct. 360, 370 (2020), *review denied*, 486 Mass. 1113 (2021) (direct factual link where payments were inextricably intertwined with member's position).

For the reasons stated above, the Hearing Officer recommends that the Board find and rule that there is a clear and direct factual link between Mr. Raftery's office or position and the crime for which he was convicted.

The second consideration under Section 15(4) is whether Mr. Raftery's convictions are final. The term "final conviction" as used in Section 15(4), means the sentence, which is the final judgment at issue. Therefore, upon sentencing, the conviction becomes final. *DiMasi v. State Bd. of Ret.*, 474 Mass. 194 (2016). On July 2, 2018, Mr. Raftery pleaded guilty to the charges encompassing three different crimes for which he was charged. On March 26, 2019, Judge Young imposed sentence on him, and that sentence was entered in the Court's records March 27, 2019. No party has disputed that under Section 15(4), upon that sentencing, his conviction became final.

Because Mr. Raftery's actions resulted in a final conviction for a violation of the law applicable to office or position, the forfeiture provisions of Section 15(4) apply to him. Accordingly, pursuant to Section 15(4), upon his final conviction, Mr. Raftery forfeited the right to receive a retirement allowance. Further, the second sentence of Section 15(4) mandates the SBR return to Mr. Raftery

his accumulated total deductions, but requires that the rate of interest be zero. As a practical matter, it thus unambiguously requires the forfeiture of all interest that has accrued on Mr. Raftery's retirement account.

The application of Section 15(6) and G.L. c. 32, § 20(5)(c)(2)

As the forfeiture provisions of Section 15(4) have been found to apply to Mr. Raftery, the Board must also consider the additional consequences that flow from that determination: the application of Section 15(6), and of G.L. c. 32, § 20(5)(c)(2).

Members who retire after April 2, 2012, are also subject to the provisions of Section 15(6). *See,* 2011 Mass. Acts c. 176, §§ 31 and 65. Section 15(6) states:

> If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay, all benefits received after the date of the offense of which the member was convicted.

Because Mr. Raftery retired after April 2, 2012, Section 15(6) applies to him. As the offenses for which he was charged and convicted pre-date his retirement, all benefits paid out of his retirement account are subject to the mandate of Section 15(6). Accordingly, the full value of the gross amounts paid from Mr. Raftery's account must be repaid to the MSERS, and the balance of Mr. Raftery's accumulated total deductions should be reduced by those amounts paid to him and his beneficiaries from the date of his retirement. [2]

Mr. Kiley concluded his final memorandum by arguing that if Mr. Raftery's retirement allowance is not restored and forfeiture is imposed, his accumulated total deductions should be returned to him pending the outcome of an appeal. The statute does not authorize such an action.

Section 15(4) states that, "In no event shall any member after final conviction . . . be entitled to receive a retirement allowance under the provisions of [G.L. c. 32, § § 1-28] inclusive." "The words '[i]n no event' connote the absolute never or 'under no circumstances.' [citations omitted]. It excludes all discretionary consideration." *State Bd. of Retirement v. Woodward,* 446 Mass.

[2] Section 15(4) has been held to require that, if the member has already received a retirement allowance, the net amount of Mr. Raftery's accumulated total deductions should be reduced to reflect the annuity portions of payments made to him from his account. *DiMasi v. State Bd. of Ret.*, 474 Mass. 194, 203-204 n.12 (2016). However, as Section 15(6) requires the repayment of both the annuity and pension portions of a retirement allowance, that requirement is redundant.

698, 708 (2006). To comply with this provision, after a member's final conviction but prior to a final Board determination under Section 15, the Board has consistently suspended direct retirement allowance payments on the member's account. However, during suspension of payments to the member, the MSERS system continues to make certain federal tax and insurance payments on the member's behalf.

When a member is receiving regular retirement allowance payments, the accounting system includes in the gross amount payments that are made toward federal taxes and insurance. The member receives a net payment that has been reduced by the deduction of those tax and insurance payments from the gross payment. As Section 15(6) requires recovery of the gross retirement allowance paid to Mr. Raftery prior to its suspension, no further accounting steps are required to address the recovery of those federal tax and insurance payments. However, upon the suspension of retirement allowance payments, continued tax and insurance payments made on the member's behalf are *not* deducted from a gross payment credited to the member, and thus must be treated separately, and treated as erroneously made.

Chapter 32, Section 20(5)(c)(2), provides in relevant part that

> When an error is . . . made in computing a benefit, and, as a result, the member or beneficiary receives from the system more or less than the member or beneficiary would have been entitled to receive . . . had the error not been made, the . . . error shall be corrected . . . and future payments shall be adjusted so that the actuarial equivalent of the pension or benefit to which the member or beneficiary was correctly entitled shall be paid.

Thus, the amount of accumulated total deductions returned to Mr. Raftery must be reduced further by any federal tax and insurance payments made on his and his beneficiaries' behalf while his retirement allowance was suspended.

II. Whether Forfeiture of Mr. Raftery's Retirement Allowance Under Section 15(4) Constitutes an Excessive Fine in Violation of the Eighth Amendment to the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights

Counsel for Mr. Raftery has also argued that total forfeiture of Mr. Raftery's retirement allowance, and with it the forfeiture of potential retirement benefits for a surviving spouse, constitutes an excessive fine and is thus in violation of the both the Eighth Amendment to the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights. U. S. CONST. amend. VIII, Mass. CONST Pt. 1, art. 26.

Neither the federal nor state constitutional challenge presented here can be resolved in this forum. Unless it is expressly granted, administrative agencies lack the authority to decide constitutional challenges. *Hartford Acc. & Indem. Co. v. Comm'r of Ins.*, 407 Mass. 23, 28 (1990) (Commissioner's broad authority under G.L. c. 175 does not imply a grant of authority to review constitutionality of residual market plan Commissioner himself had approved) citing, *Liab. Investigative Fund Effort, Inc. v. Med. Malpractice Joint Underwriting Ass'n of Massachusetts*, 409 Mass. 734, 744–45 (1991) As applied specifically to the issue of whether the Eighth Amendment might apply to forfeiture under Section 15, the Appeals Court has held that resolution of a constitutional claim is a judicial function, and as such is outside the jurisdiction and expertise of the retirement board. *Maher v. Justices of Quincy Div. of Dist. Court Dep't*, 67 Mass. App. Ct. 612 (2006).

There is a narrow exception applicable to Section 15 matters: The Courts, in considering Eighth Amendment challenges to Section 15, have called for specific findings regarding the value of the forfeiture at issue. *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 348 n.11 (2000). Mr. Boorack's estimate of the present value of Mr. Raftery's retirement allowance serves that purpose: it is based primarily on records held by the SBR that specifically relate to Mr. Raftery's account, is clearly within Mr. Boorack's expertise, and is directly related to PERAC's oversight of public employee retirement systems. Limited factfinding based on Mr. Boorack's evaluation is thus an appropriate response to the Court's direction, and also serves to advise the Board of the monetary value at issue.

Beyond that, however, the question of whether forfeiture of Mr. Raftery's retirement allowance constitutes an excessive fine is outside of the authority of the Board to address. The Board has no discretion to adjust the results of a forfeiture and no authority to waive the requirements of Section 15.

CONCLUSION

The Hearing Officer recommends that the Board find and determine that Mr. Raftery has been convicted of criminal offenses involving violations of law applicable to his office or position, and the pension forfeiture provisions of Section 15(4) therefore apply. The Hearing Officer also recommends that the Board find and determine that Mr. Raftery's convictions became final for

the purposes of Section 15(4) on March 27, 2019, the date the Order and Judgment of the U.S. District Court was entered.

In addition, the Hearing Officer recommends that the Board find and determine under Section 15(4), that Mr. Raftery forfeited his right to receive a retirement allowance under G.L. c.32, §§ 1 - 28 on his sentencing, and that neither he, nor any of his beneficiaries are entitled to receive any rights and benefits under such provisions.

Section 15(4) permits Mr. Raftery to receive a return of his accumulated total deductions but requires the Board to apply an interest rate of zero percent to those deductions. The Hearing Officer recommends that the Board specifically so rule, and thus find that interest in the amount of $4,813.35 is forfeit.

Because Mr. Raftery retired and began to receive a retirement allowance after committing the offenses for which he was convicted, the Hearing Officer recommends that pursuant to Sections 15(4) and 15(6), in determining the unexpended amount of his accumulated total deductions, the Board reduce the accumulated total deductions on his account by the full (*i.e.*, gross) value of all amounts paid to Mr. Raftery and to his beneficiaries.

Further, pursuant to G.L. c. 32, § 20(5)(c), the Hearing Officer also recommends that in determining the unexpended amount of Mr. Raftery's accumulated total deductions, the Board direct its staff further to deduct the amount of any federal income tax payments and the amount of any insurance payments made on his and his beneficiaries' behalf, beginning upon the date his retirement allowance was suspended, and continuing through to the implementation of this decision.

Finally, pursuant to Section 15(6), the Hearing Officer recommends that the Board direct its staff to pay to Mr. Raftery any remaining balance of his accumulated total deductions, and if there is a shortfall, to take steps to recover the balance from Mr. Raftery.

Dated: 3/24/2022

Susan G. Anderson, Esq.
Hearing Officer
Department of the State Treasurer
One Ashburton Place, 12th Floor
Boston, MA 02108

The Commonwealth of Massachusetts
Office of the State Treasurer
State Board of Retirement
Boston, Massachusetts 02108 4747

Deborah B. Goldberg
Treasurer and Receiver General
Chair

Linda Fremont, Esq.
Executive Director

April 5, 2022

Thomas R. Kiley, Esq.
Cosgrove, Eisenberg & Kiley
One International Place, Suite 1820
Boston, MA 02110-2600

Re: Gregory Raftery/ Applicability of G.L. c. 32, §15

Dear Attorney Kiley:

I am writing today on behalf of the State Board of Retirement ("Board") in connection with the above-referenced matter and your client, Gregory Raftery.

As you know, under correspondence dated March 24, 2022, the Board's Hearing Officer issued "Recommended Findings and Decision". The Board considered that recommended decision at its meeting held March 31, 2022.

This letter is to notify you that the Board voted to accept the findings and recommendations of the Hearing Officer. You have the right to appeal this determination pursuant to G.L. c. 32, §16(3) after the vote has been certified by the Board. Such certification will take place when the Board adopts the minutes of the March 31, 2022 meeting. See Salvatore F. DiMasi v. State Board of Retirement, Civil Docket Number 2010 01 CV 0373, decision of the Boston Municipal Court dated July 9, 2010 (McCormick, J.)

A formal notice from the Board, including that right of appeal will be forthcoming when the Board's March 2022 decision has been certified.

If you have any questions please contact Melinda Troy of this office at (617) 367-9333, extension 238. Attorney Troy will also be in touch with you under separate cover. Thank you for your attention.

Sincerely,

Nicola Favorito, Esq.
Executive Director

The Commonwealth of Massachusetts
Office of the State Treasurer
State Board of Retirement
Boston, Massachusetts 02108-4747

Deborah B. Goldberg
Treasurer and Receiver General
Chair

Nicola Favorito, Esq.
Executive Director

May 11, 2022

Thomas R. Kiley, Esq.
Cosgrove, Eisenberg & Kiley
One International Place, 18th Floor
Boston, MA 02110
Re: Gregory Raftery/ Applicability of G.L. c. 32, §15

Dear Attorney Kiley:

I am writing today on behalf of the State Board of Retirement ("Board") in connection with the above-referenced matter and your client, Gregory Raftery.

As you know, via a decision dated March 24, 2022, the Board's Hearing Officer issued "Recommended Findings and Decision". The Board considered that recommended decision at its meeting held March 31, 2022.

At that meeting, the Board voted to adopt all of the findings and recommendations of the Hearing Officer.

The minutes of that meeting were approved by the Board at its meeting held on April 28, 2022, thus certifying its decision. See Salvatore F. DiMasi v. State Board of Retirement, Civil Docket Number 2010 01 CV 0373, decision of the Boston Municipal Court dated July 9, 2010 (McCormick, J.). A copy of those minutes is attached.

If your client is aggrieved by the Board's decision, pursuant to G.L. c. 32, §16(3), you may, within thirty (30) days, bring a petition in the district court within the territorial jurisdiction in which he resides praying that such action and decision be reviewed by the court.

Sincerely,

Nicola Favorito, Esq.
Executive Director

Main Office: One Winter Street, Boston, MA 02108-4747 • Phone: 617.367.7770, 1.800.392.6014 (in MA) • Fax: 617.723.1438
Regional Office: 436 Dwight Street, Room 109A, Springfield, MA 01103 • Phone: 413.730.6135 • Fax: 413.730.6139
Web: www.mass.gov/retirement

MINUTES FOR THE 1,250th BOARD MEETING
STATE BOARD OF RETIREMENT
EXECUTIVE SESSION

DATE: March 31, 2022 **TIME: 11:50 A.M.**

PLACE: One Winter Street – 8th Floor, Boston, MA

THE BOARD ENTERS INTO EXECUTIVE SESSION

At 11:50 a.m. the Board entered into Executive Session to review applications for disability retirement, associated benefits, and to also consider the reputation, character, physical condition, or mental health of individuals with business before the Board. Indicated the Board would not reconvene in Open Session after the Executive Session and will adjourn the meeting at the conclusion of the Executive Session.

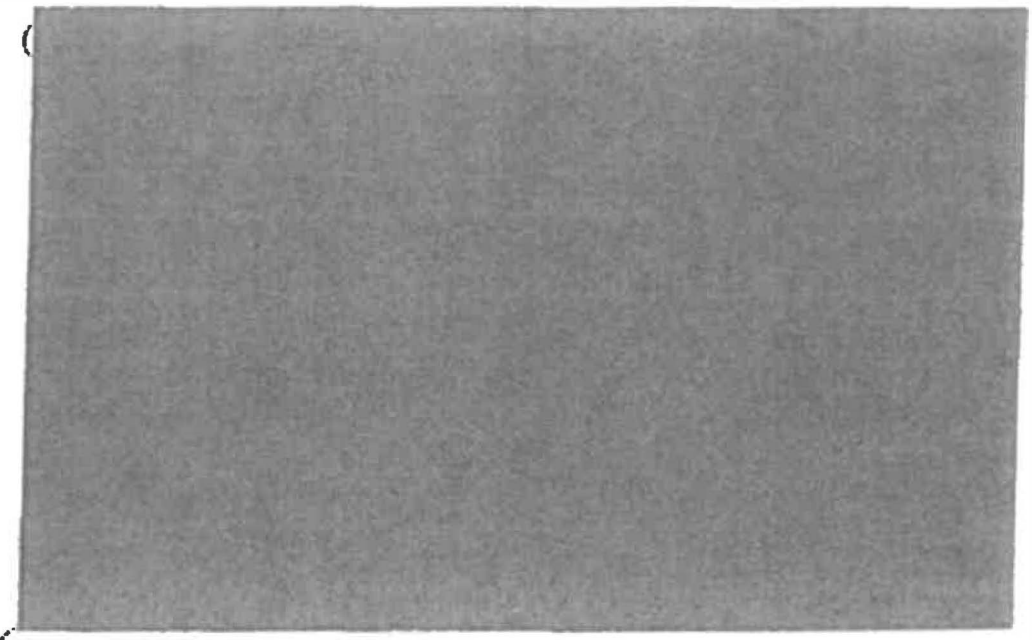
Each Board member confirmed that no other person was present with them and/or able to hear the discussion at the remote location.

Mr. Gormley made a motion to enter Executive Session, Ms. Deal seconded the motion.

ON THE ROLL CALL THE VOTE WAS AS FOLLOWS:

Ms. Deal	Yes
Ms. McGoldrick	Yes
Mr. Valeri	Yes
Mr. Gormley	Yes
Treasurer Goldberg	Yes

[redacted]



1. Gregory Raftery, Docket No. 19-3215-03

Hearing Officer Susan Anderson, Esq. reviewed the case and her findings. In 2015 and 2016 Mr. Gregory Raftery, A State Trooper, signed-up for and received overtime pay. It was later revealed that Mr. Raftery submitted false reports of overtime worked and fraudulent traffic citations. In 2018, Mr. Raftery plead guilty to the charge of Embezzlement from an Agency Receiving Federal Funds and Aiding and Abetting. In 2019, the Board voted to convene a hearing to consider whether any action should be taken in connection with Mr. Raftery's rights or benefits in accordance with Chapter 32.

Attorney Anderson outlined her recommendations as reported in her Decision of March 24, 2022. She recommended that Mr. Raftery forfeited his right to receive a retirement allowance; that he must repay all amounts paid to him and his beneficiaries from the date of his retirement; repay all payments made on his behalf; and the Board return to him the balance of his accumulated deductions after subtracting the amounts identified above.

After review and discussion, on a motion by Mr. McGoldrick and seconded by Ms. Deal, the Board voted to accept the findings and recommendations of the Hearing Officer as presented based on the circumstances presented.

ON THE ROLL CALL THE VOTE WAS AS FOLLOWS:

Ms. Deal	Yes
Ms. McGoldrick	Yes
Mr. Valeri	Yes
Mr. Gormley	Yes
Treasurer Goldberg	Yes

(Treasurer Goldberg departed the meeting at 12:10pm. Sarah Kim, Treasury General Counsel assumed the Chair.)

[redacted]

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. DEDHAM DISTRICT COURT
DOCKET NO. 2254CV000232

GREGORY RAFTERY,
Plaintiff

v.

STATE BOARD OF RETIREMENT,
Defendant

FINDINGS OF FACT, RULINGS OF LAW, DECISION AND ORDER ON PETITION TO REVIEW PENSION FORFEITURE

The Plaintiff, Gregory Raftery ("Plaintiff", "Raftery") brings his Complaint/ Petition to Review, pursuant to G. L. c. 32, § 16(3), seeking reversal of a decision by the Defendant Massachusetts State Board of Retirement ("Defendant", "SBR") imposing a mandatory forfeiture of Raftery's pension under G.L. c. 32, § 15(4), which provides that no member of a public employee retirement system shall be entitled to a retirement allowance after conviction of a criminal offense involving violation of the laws applicable to his or her office or position. Raftery does not contest the factual basis for the mandated forfeiture, but instead claims that the decision of the SBR violates the "excessive fines" provisions of Article XXVI of the Massachusetts Declaration of Rights

("Article 26", "Art. 26") and the Eighth Amendment to the United States Constitution ("8th Amendment") as well as the "cruel or unusual" provision of Art. 26.

Pursuant to G.L. c. 32, § 16(3)(a), this Court is authorized to hear all evidence as discussed in Bisignani v. Justices of the Lynn Division of the District Court Department of the Trial Court, 100 Mass. App. Ct. 618,621 (2022) and determine whether the forfeiture was justified. The parties may present new evidence to the Court and/or rely on the Administrative Record from the SBR proceedings and have the appeal decided by motions for judgment on the pleadings. In fact, in July of 2023, the parties filed, and the Court allowed, a Joint Motion to Proceed Based on Agreed Upon Record. The Agreed Record ("AR") consisted of the SBR Administrative Record in its entirety and eleven additional documents which the parties agree may form the factual basis for the Court's consideration of whether Raftery's pension was properly forfeited. The citations which follow are to the pages of the Agreed Record, which are labelled AR____.

Additionally, the parties presented oral arguments on the merits at a hearing before Judge Carroll on December 1, 2023 (Judge Carroll has since recused herself from this case). Although I was not present at the hearing, I have listened to the entire recording of that hearing twice. The parties filed Memoranda of Law in support of their respective positions and have also each filed proposed Findings of Facts and Conclusions of Law for the Court's consideration. The Court has accepted the Agreed Record and has considered all of its contents as well as the briefs on the merits and the

other filings of the parties. The Court will consider these as cross motions for judgment on the pleadings.

Discussion

Gregory Raftery served as a trooper for the Massachusetts State Police ("MSP") for just shy of 22 years. AR 224. In 2015 and 2016, he was assigned to Troop E and had responsibility for enforcing criminal laws and traffic regulations while patrolling the Massachusetts Turnpike ("Turnpike"). AR 78,225. During those years, as a Troop E trooper, Raftery was able to earn overtime pay (1.5 times regularly hourly pay) by working two Massachusetts State Police ("MSP") initiatives, the Accident Injury Reduction Effort ("AIRE") and the similar "X-Team" program. AR 78,225. The objectives of the AIRE and X-Team programs were to reduce accidents and injuries on the Turnpike through enhanced patrols and the targeting of speeders and aggressive drivers. AR 78-79,225. Troopers working the AIRE program worked overtime in four hours blocks and worked eight hours shifts for the X-Team. AR 79, 226. These programs were funded by the Massachusetts Department of Transportation ("Mass DOT"), which, in turn, received federal funds from the U.S. Department of Transportation (U.S. DOT") AR 78,226.

By 2018, federal investigators discovered that a number of the members of Troop E, including Raftery, had allegedly sought and received overtime for AIRE and X-Team shifts they did not complete. AR 80-87, 226-227. This investigation led to Raftery being charged in an Information on June 26, 2018, in U.S. District Court for the District of

Massachusetts with (1) embezzling from an agency receiving federal funds in violation of 18 U.S.C §666(a)(1)(A), and (2) aiding and abetting in violation of 18 U.S.C. §2, AR 39-45. It was alleged that Raftery received a total of $51,337,50 in payments for work he did not perform. AR 85,227. Approximately one week later, on July 2, 2018, Raftery proffered a guilty plea to the embezzlement charge of the Information, waiving indictment. AR 48-56, 87. On March 26, 2019, U.S. District Judge Young sentenced Raftery to three months imprisonment and one year of supervised release. AR 109-113. Raftery was also ordered to pay $51,337.50 in restitution to MSP and a criminal monetary assessment of $100. *Id.*

On March 22, 2018, prior to the initiation of criminal charges against him, Raftery retired from the MSP at age 47. AR 228. His retirement benefit was $72,205 per year. AR 229. On March 29, 2019, subsequent to Raftery's conviction and sentencing in federal court, SRB voted to suspend Raftery's retirement allowance and to convene a hearing to determine Raftery's pension rights. AR 221. A hearing at the SBR was held on July 11, 2019, presided over by a hearing officer and at which Raftery was represented by counsel. AR 164-99. On March 24, 2022, the hearing officer issued a Recommended Findings and Decision that concluded, because Raftery had been convicted of criminal offense involving violations of law applicable to his office or position, his pension was required to be forfeited and that any pension benefits which had been paid would be required to be returned, less contributions made. AR 236-37. SRB hearing officer also received and credited uncontroverted testimony from the State Actuary for the Public Employee Retirement Administration Commission that the

present value of Raftery's future benefits was $1,025,000. AR 229,236. On March 31, 2022, SRB voted to accept the findings and recommendations of the hearing officer and Raftery received notice of the decision on or about May 11, 2022. AR 238-39. This action ensued.

The Plaintiff asserts that the mandated total forfeiture of his retirement allowance and health benefits constitutes an excessive fine under the 8th Amendment as well as Art. 26. The Plaintiff further asserts that the mandatory total forfeiture constitutes cruel or unusual punishment under Art. 26, which is believed to be an issue of first impression in pension forfeiture cases in this state. The Defendant contends that Art. 26 does not apply since the SBR is neither a "Court" nor a "Magistrate" and because the cruel or unusual provisions of Art. 26 apply to matters involving the constitutionality of prison sentences or the death penalty and not to monetary (pension) forfeitures.

In PERAC v. Bettencourt, 474 Mass. 60 (2016), the Supreme Judicial Court established that G.L. c. 32, § 15 (4) ("§ 15 (4)") qualified as "punishment" and was a fine within the meaning of the excessive fines clause of the 8th Amendment. The Court stated, "[t]he touchstone of the constitutional inquiry 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 at 72 (quoting United States v. Bajakajian, 524 U.S. 321,334 (1998) (ellipsis in original).

The Supreme Judicial Court has not yet addressed whether Art. 26 also applies to § 15 (4) pension forfeitures in the context of being an excessive fine, although the Court notes that two relatively recent Massachusetts District Court decisions dealing with the issue, Cesan v. State Board of Retirement , Springfield District Court, 2023CV0944, (October 4, 2022) and Guilino v. State Board of Retirement, Pittsfield District Court, 2227CV0072, (September 13, 2023), (See Attachments A and B to Plaintiff's brief), were decided pursuant to the excessive fines clauses of both the 8th Amendment and Art. 26. The Plaintiff also contends that Art. 26 provides greater protection and is afforded broader application than the 8th Amendment.

The Plaintiff further argues that as § 15 (4) qualifies as punishment, Art.26 precludes the imposition of punishments that are cruel or unusual. The Plaintiff notes that the Art. 26 proscription against cruel or unusual punishment is likewise based on proportionality. "The essence of proportionality is that punishment for crime should be graduated and proportioned to both the offender and the offense." Commonwealth v. Concepcion, 487 Mass. 77, 86 (2021); see also Commonwealth v. Perez, 477 Mass. 677, 683 (2017). The Plaintiff espouses application of the proportionality tripartite analysis discussed in Perez and Concepcion, including a comparison of the challenged penalty (here, total forfeiture of Plaintiff's retirement allowance and health benefits) "with the penalties prescribed for the same offense in other jurisdictions." Perez at 684. Again, the Defendant responds that the cruel or unusual provision of Art. 26 does not apply in the setting of pension forfeitures.

Findings of Fact

1. Plaintiff Gregory Raftery ("Raftery") was a trooper for the Massachusetts State Police ("MSP") from March 28, 1996, until his retirement on March 28, 2018. AR224.

2. On November 1, 1996, Raftery took an oath to "honestly and faithfully" serve the Commonwealth of Massachusetts, to "faithfully perform" his duties, and to "submit to any penalties, fines or forfeitures imposed in accordance with the rules and regulations of the [MSP]." AR.128, 224; M.G.L. c. 22C, § 15.

3. When Raftery retired, on March 22, 2018, at age 47, he had 21 years, nine months, and 25 days of creditable service. AR.228. His retirement benefit was $72,205 per year, or a total present value of $1,205,000, exclusive of health insurance. The Court recognizes those health insurance benefits to be significant, although the amount is not established.

4. During 2015 and 2016, Raftery was assigned to Troop E of the MSP, which was responsible for enforcing criminal laws and traffic regulations on the Massachusetts Turnpike ("Turnpike"). AR.225, 79.

5. In addition to earning a salary for a regular 8-hour work shift, troopers within Troop E were also able to earn hourly overtime pay equivalent to 1.5 times their regularly hourly pay, for various overtime assignments. AR.78. In particular, Troop E troopers could earn overtime pay by working for two MSP initiatives, the Accident

Injury Reduction Effort ("AIRE") program and the similar "X-Team" program. AR.225, 78.

6. The objectives of the AIRE and X-Team programs were to reduce accidents and injuries on the Turnpike through an enhanced presence of troopers patrolling the Turnpike, and to target individuals who were speeding or engaging in aggressive driving. AR.78-79, 225. Troopers who were assigned to the AIRE Program conducted radar patrols on the Turnpike in four-hour blocks outside of their regular work schedules. AR.79, 225. X-Team shifts were eight hours long. Id.

7. As part of their AIRE and X-Team overtime performance and duties, troopers regularly issued citations. AR.79. In issuing a citation, troopers were required to complete the appropriate sections of the traffic citation, including the identity of the motorist of the vehicle, as well as the date, time, and place of the traffic violation, and to do so accurately. AR.79. AIRE and X-Team overtime rules then required troopers to forward the citation to the officer in charge, along with all the required paperwork needed to process them through the Registry of Motor Vehicles ("RMV"), the state court system, and the MSP. AR.225, 80-81.

8. Both the AIRE and X-Team programs were funded by the Massachusetts Department of Transportation ("MassDOT"), which paid the MSP for the invoices submitted for services rendered, including overtime shifts. AR.226. The MassDOT, in turn, received funding for these initiatives from the United States Department of

Transportation ("U.S. DOT"), which annually provides hundreds of thousands of dollars in funding to law enforcement agencies. Id.

9. By 2018, federal investigators had discovered Raftery was engaged in an embezzlement and cover-up scheme associated with his involvement in the AIRE and X-Team programs. AR.82-87. Federal agents determined that, during 2015 and 2016, Raftery frequently failed to work the entire 4-hour AIRE overtime shift or 8-hour X-Team overtime shift, leaving his assignment up to seven hours early in some cases. AR.82-83. In other cases, he collected overtime pay without showing up to work for a given overtime shift at all. AR.83.

10. At a rate of $75/hour, Raftery received a total of $51,337.50 in payments from the MSP for a total of 729 hours of work that he never performed. AR227, 85.

11. Raftery took steps to conceal this scheme by internally submitting to the MSP copies of citations that he never issued to drivers, pertaining to non-existent misconduct by drivers. AR.83. Raftery destroyed or discarded the duplicate copies of these citations that should have been provided to MSP court officers, the RMV, and the drivers themselves. Id.

12. On June 26, 2018, the United States Attorney for the District of Massachusetts filed a felony information ("Information") against Raftery in U.S. District Court for the District of Massachusetts, charging Raftery with: (1) embezzling from an agency receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(A), and (2) aiding and abetting in violation of 18 U.S.C. § 2. AR.38-45.

13. On June 17, 2018, Mr. Raftery signed a Plea Agreement with the U.S. Attorney, in which he agreed to plead guilty to the Information and waive indictment. AR.48-56.

14. On July 2, 2018, a plea hearing was held before Judge William G. Young. Mr. Raftery proffered a guilty plea to 18 U.S.C. sec. 666(a)(1)(A) of the Information, waiving indictment. AR.225-36.

15. On March 26, 2019, Judge Young sentenced Raftery to 3 months in prison, one year of supervised release thereafter, and imposed restitution in the amount of $51,337.50, and a mandatory special assessment of $100. AR.268-70.

16. A violation of 18 U.S.C. § 666(a)(1)(A) carried the following maximum penalties: up to ten years of incarceration; three years of supervised release; a maximum fine of $250,000, or twice the gross gain/loss stemming from the offense, whichever is greater; a mandatory special assessment of $100; restitution and/or forfeiture to the extent charged in the Information. AR.48, 35; 18 U.S.C. § 666. Judge Young stated at the time of sentencing, "the highest sentence the Court could constitutionally impose" in accordance with the provisions of 18 U.S.C. § 3553(a) for Mr. Raftery's offense was 27 months. AR. 255. Under the then advisory sentencing guidelines, Judge Young indicated he could "impose a fine of not less than $5,500, nor more than $55,000. Restitution in this case is calculated at $51,337.50. And there must be a special assessment." AR.257.

17. Raftery met the terms of his sentence by serving the term of imprisonment and paying both the fine of $100 and the order of restitution, the latter via garnishment of his Deferred Compensation SMART 547 Plan. Raftery thus made full restitution to MSP in an amount equal to that he received for the overtime hours he did not perform.

18. On March 29, 2019, the SBR voted pursuant to G.L. c. 32 § 15, to suspend the retirement allowance that Raftery was then receiving and to convene a hearing to determine Raftery's rights to a pension going forward. AR.221.

19. On March 24, 2022, after a hearing on July 11, 2019, the SBR's Hearing Officer issued Recommended Findings and Decision, concluding that because Raftery had been "convicted of criminal offenses involving violations of law applicable to his officer or position," his pension was required to be forfeited under G.L. c.32, § 15(4). AR.236.

20. The Hearing Officer found that the estimated present value of Raftery's future retirement allowance to be $1.025 million, exclusive of health insurance. AR.229,236. Raftery did not dispute that, at the time of the forfeiture, the estimated present value of his pension was $1.025 million, exclusive of health insurance.

21. The Hearing Officer further recommended that, because Raftery had begun to receive a retirement allowance (in 2018) after committing the criminal offenses (in 2015 and 2016), he would be required under G.L. c. 32, § 15(6), to return any benefits paid, less any contributions that he made during his employ. AR.237. The Hearing Officer did not consider Raftery's argument that the forfeiture would be an "excessive

fine" under the Eighth Amendment to the U.S. Constitution and Article 26 of the Massachusetts Declaration of Rights, observing that such questions were beyond the SBR's authority. AR.235-36 (citing Maher v. Justices of Quincy Div. Of Dist. Ct Dep't, 67 Mass. App. Ct. 612, 619 (2006)).

22. Subsequently, the board voted to adopt the Hearing Officer's Recommended Findings and Decision, and the SBR notified Raftery of its decision on May 11, 2022. AR.240-244.

Rulings/Conclusions of Law

23. Jurisdiction and venue of this matter lie with this Court under G.L. c. 32, § 16(3)(a) which is to review the action and decision of the State Board of Retirement and "determine whether such action was justifiable."

24. Raftery's challenge is not framed as a facial challenge to the constitutionality of G.L. c. 32, § 15(4). He challenges the application of it to him and his wife under the circumstances presented by the facts set forth in the Agreed Record.

25. General Laws c. 32, § 15(4), states, in pertinent part: "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 section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member."

26. Section 15(4) will result in a forfeiture where a member either "(1) engage[s] in criminal activity factually connected to his or her position or (2) violate[s] a law expressly applicable to public employees or officials." Essex Reg'l Retirement Bd. v. Swallow, 481 Mass. 241, 248 (2019).

27. The legal issue presented is whether the application of G.L. c. 32, § 15(4) by the State Board of Retirement totally forfeiting the retirement allowance and health benefits of Mr. Raftery and his wife based on his federal conviction results in a violation of rights guaranteed to them under the Eighth Amendment to the Constitution of the United States or Article 26 of the Declaration of Rights. ("Article 26").

28. This Court's role is not to determine whether the pension forfeiture statute is constitutional, but rather whether the State Board of Retirement's application of the penalty provisions it imposes on Raftery, his wife and family are either an excessive fine, or constitute cruel or unusual punishment.

29. With respect to that issue presented, no deference is to be afforded to the administrative determination made by the State Board of Retirement, which neither has, nor claims to have, any authority to determine whether the application of the forfeiture statute to Raftery is constitutional.

30. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

31. Article 26 of the Massachusetts Declaration of Rights similarly provides: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

Plaintiff's Constitutional Claim Under The Cruel and Unusual Clause of Article 26

32. In addition to claiming that SBR's order of total forfeiture of Raftery's retirement benefits was an excessive fine under the 8th Amendment and Art. 26, the Plaintiff argues that it constitutes cruel or unusual punishment under Art. 26.

33. Without addressing here whether SBR acts as a magistrate or court of law for purposes of Art. 26, which issue is addressed below, the Court finds the Plaintiff's cruel and unusual argument to be creative and earnest, but ultimately, unavailing.

34. The Plaintiff notes that the total pension forfeiture qualifies as punishment. He argues that it is unusual punishment because it is out of the ordinary in the realm of public pension forfeiture provisions as compared to other states and the federal government. He posits that it is cruel punishment because Massachusetts public employees do not receive Social Security benefits in connection with their employment.

35. The Plaintiff provides no authority for his proposition that the cruel or unusual provisions of Art. 26 apply to pension forfeitures. The Supreme Judicial Court, Appeals Court and Supreme Court have all applied the "excessive fines" clause in challenges to pension and other property forfeitures. Bettencourt and its progeny, as

well as Bajakajian, applied the Excessive Fines Clause as distinguished from the Cruel and Unusual Punishments Clause in assessing 8th Amendment challenges to forfeitures. The U.S Supreme Court has foreclosed challenges to property forfeiture under the Cruel and Unusual Punishments Clause because the Clause "is concerned with matters such as the duration or conditions of confinement." Alexander v. U.S., 509 U.S. 544, 558 (1993). In fact, in his written submissions, the cases which the Plaintiff references in advancing his cruel or unusual punishments argument under Art. 26 to pension forfeiture, generally relate to the constitutionality of prison sentences, conditions of confinement or the death penalty and not to pension or other property forfeitures. The Court also notes the disparity in the proportionality standard applied under the excessive fines clause with that of the cruel or unusual provision of Art. 26. To reach the level of cruel or unusual, the punishment must be so disproportionate to the crime that it "shocks the conscience and offends fundamental notions of human dignity", Commonwealth v. Jackson, 369 Mass. 904, 910 (1976), as opposed to the "grossly disproportionate" requirement for excessive fines. This heightened standard fairly suggests that the cruel or unusual clause of Art. 26 has application to a category of matters other than pension forfeiture.

36. The Court finds that the cruel or unusual provisions of Article 26 of the Declaration of Rights of the Massachusetts Constitution do not apply to the forfeiture of retirement allowance benefits and health insurance as provided by G.L. c. 32, §15(4).

Plaintiff's Constitutional Claims Under The Excessive Fines Clause Of The 8th Amendment And Article 26

37. The Plaintiff seeks application of the Excessive Fines clause under Art. 26, as well as the 8th Amendment, in his pension forfeiture challenge.

38. The Supreme Judicial Court has not addressed whether the Art. 26 excessive fines clause applies to mandatory forfeitures under §15(4). The Defendant SBR argues that it is not a "magistrate" or "court of law" as provided in Art.26 and thus Art. 26 does not apply. However, the Defendant further contends, to the extent that the prohibition on the imposition of excessive fines under Art. 26 does apply, it is not distinct from, or somehow broader than, the Excessive Fines Clause of the 8th Amendment.

Article 26 Excessive Fine Claim: Magistrate or Court of Law

39. Art. 26 provides, in relevant part: "No magistrate or court of law, shall ... impose excessive fines". Art. 26 is specifically limited to punishments imposed by a magistrate or court of law. The Plaintiff does claim that the SBR acted as a magistrate. He does not claim that the SBR acted as a court of law. As discussed below, like recent decisions in two Massachusetts District Court cases (Cesan and Guilino) applying the Excessive Fines Clause in Art. 26, as well as the 8th Amendment, to pension forfeitures, I rule that the SBR acted as a magistrate, as that word had been historically understood.

40. Art. 26 of the Declaration of Rights of the Massachusetts Constitution, was adopted in 1780, approximately eleven years before the Excessive Fines Clause of the 8th Amendment of the United States Constitution was enacted. The United States Constitution was modelled, in part, after the Massachusetts Constitution. The Art. 26 prohibition against excessive fines emanated from concerns about abuses carried out by the Crown through its courts and appointed officials. Those concerns provided impetus for the ensuing 8th Amendment and its Excessive Fines clause, which was aimed at preventing an offender from being "pushed absolutely to the wall" by decisions carried out by agents or officers within the executive branch of government and its "prosecutorial" power. See Browning-Ferris Indus. Of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989). The framers of Art. 26 and the 8th Amendment were seeking to prohibit imposition of excessive fines by agents and representatives of government at both the judicial and executive levels.

41. The word magistrate was used in the Massachusetts Declaration of Rights in reference to officials of the Commonwealth administering the law, regardless of where they served in the three branches of government. The Governor of the Commonwealth, whom we today associate with heading the executive branch of government, was identified as both the "supreme executive magistrate" (Part II, Chapter II, Section I, Article I) and "chief magistrate" (Article XIII) in the Massachusetts Constitution. The U.S. Supreme Court has noted that "magistrate" is not confined to persons "who exercise general judicial powers, but it includes others whose duties are strictly executive." Compton v. State of Alabama, 214 U.S. 1, 7 (1909). *Black's Law Dictionary,*

6th Edition, (1990), defines magistrate as "a public civil officer, possessing such power – legislative, executive or judicial - as the government appointing him may ordain." The *Merriam-Webster Dictionary* defines magistrate as "a local official exercising administrative and often judicial functions". The word magistrate appears to cover an assortment of officials and conduct in all three branches of government.

42. I find that the SBR, in ordering the forfeiture of Raftery's pension benefits, exercised the power of a "magistrate" as that term is used in Art. 26.

43. I rule that the Excessive Fines clause of Art. 26 (as well as that of the 8th Amendment), applies to the total forfeiture of the Defendant's pension benefits under G. L. c. 32, §15(4). Therefore, state constitutional protection does apply to §15(4) forfeitures.

44. As another Massachusetts District Court concluded in examining a state trooper's similar constitutional challenge to forfeiture: "the minor differences in the language and structure of both laws [Article 26 and the Eighth Amendment] do not support [plaintiff's] contention that art.26 provides him additional constitutional protection or mandates consideration of different factors than those discussed in United States v. Bajakajian, 524 U.S. 321, 336 (1998) and its progeny ...[B]oth constitutional provisions were adopted close in time and were intended to provide the same type of protection from excessive fines for the same historical reasons." Cesan v. St. Bd. Of Retirement, 2023CV00944, (Oct. 24, 2022, Mass. Tr. Ct., Springfield Div.). Therefore, the Court's analysis is the same under either Article 26 of the Massachusetts Declaration

of Rights or the Eighth Amendment to the U.S. Constitution. Under either authority, the Plaintiff bears the burden of demonstrating that the forfeiture is excessive.

Proportionality Analysis Under the 8th Amendment and Art.26

45. Forfeiture of a public pension pursuant to G.L. c. 32, § 15(4), is a "fine" within the meaning of the "excessive fines" clause of the Eighth Amendment. Public Employee Retirement Admin. Comm'n v. Bettencourt, 474 Mass. 60, 71 (2016).

46. In determining whether forfeiture of a public pension is excessive under the Eight Amendment, "'[t]he touchstone of the constitutional inquiry... is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that is designed to publish.'" Id. At 72 (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998) (ellipsis in original)).

47. In conducting that inquiry, this Court "compare[s] the forfeiture amount to that offense, and '[I]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.'" Id. (quoting Bajakajian, 524 U.S. at 337).

48. Specially, this Court looks to the following factors to determine "the gravity of the offense." (1) the nature and circumstances of the offense; (2) whether the offense was related to any other illegal activities; (3) the maximum potential penalty for the crime that could have been imposed; (4) the harm resulting from the offense. Id.

49. In determining whether the forfeiture was excessive under the 8th Amendment and Art. 26, in addition to the standard and factors outlined in Bettencourt and Bajakajian, this Court looks to other state and federal cases to determine what other factors may be considered in deciding whether the forfeiture was excessive. United States v. Heldeman, 402 F. 3d 220, 222 (1st Cir. 2005) was a federal forfeiture case involving health care fraud and drug distribution. In Heldeman, the First Circuit Court of Appeals, in determining whether the forfeiture was excessive, considered the following factors: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed, (2) other penalties authorized by the legislature or the Sentencing Commission, and (3) the harm caused by the defendant. In United States v. Levesque, 548 F3d 78, 83 (1st Cir. 2008), another forfeiture case, the First Circuit Court of Appeals announced that, in addition to the factors described in Heldeman, a court could also consider the financial impact of the forfeiture upon the defendant and whether it would deprive the defendant of his or her livelihood.

50. The Court notes that Raftery has not presented a Levesque loss of livelihood/financial impact argument in his excessive fine claim in this case. At hearing, his counsel explicitly represented to the Court that Raftery does not claim to be "destitute" and is able to continue earning a living and, in fact, is earning a living. Plaintiff appears to argue, as part of his cruel and unusual punishment claim, that the loss of pension benefits and health insurance has imposed a financial hardship on his wife and three daughters relative to payment of college tuitions and medical care.

1. The Amount of the Forfeiture

51. In cases of this type, Massachusetts courts have repeatedly assessed the value of a retirement by determining its present value. Bisignani v. Justices of the Lynn Div. Of Dist. Ct. Dep't, 100 Mass. App. Ct. 618, 622-23 (2022).

52. The parties agree that, at the time of the Board's forfeiture decision, the present value of Raftery's pension was $1,025,000. AR.229, 236. Again, that total present value calculation did not include the loss of health insurance, which the Court notes would be significant for family policy coverage over many years.

2. Gravity of the Offense

53. *The nature and circumstances of the offense.* Raftery pleaded to one offense – embezzlement. He admitted to engaging in a fraudulent scheme over the course of two years, involving 729 hours of overtime pay, totaling $51,337. He paid full restitution in that amount, in addition to serving a three-month sentence, a year of supervised release and a special assessment of $100. AR. 82-83.

54. Contrary to Plaintiff's assertion that this was a "time and attendance" case, it involved more than collecting pay for time not worked. Raftery also took the further step of issuing "dummy" citations to conceal his conduct.

55. *Whether the offense was related to any other illegal* activities. There is no allegation or evidence that Raftery's convicted conduct relates to any other individual

wrongdoing. Raftery does not have any prior convictions. AR.261. Therefore, this factor under Bettencourt is not relevant here.

56. *The maximum sentence that could have been imposed.* In this case, Raftery was convicted of a violation of 18 U.S.C. § 666(a)(1)(A). The maximum statutory sentence for that offense is ten years in prison, three years supervised release, a maximum fine of $250,000, or twice the gross/loss, whichever is greater, a mandatory special assessment of $100, and restitution and forfeiture to the extent charged in the indictment or information. AR.48, 46, 35.

57. Judge Young stated at sentencing that the highest sentence the Court could constitutionally impose was 27 months and, under then advisory sentencing guidelines, a fine of not more than $55,000. AR 255, 257.

58. *The harm resulting from the offense.* Raftery's conduct harmed the public. Raftery took $51,337 of public money. AR.227, 85. Raftery engaged in the fraud when he was supposed to be enforcing the law – thus depriving the Commonwealth of service intended to increase public safety. AR.78-79, 225. Further, Raftery's behavior eroded public trust in the MSP and law enforcement in general.

59. As previously noted, the Plaintiff does not claim to be impoverished nor does he argue that he has been deprived of his livelihood or the ability to make a living because of the forfeiture. Accordingly, the Court makes no determination in that regard.

60. The Court finds that the gravity of the Defendant's crime is serious. Raftery received pay for hours that he was not present to work. However, this was not a matter

of an employee leaving work early before a shift ended and then being paid for the full shift – a practice which admittedly sometimes occurs in the workplace in both the public and private sectors, often with either the active or tacit approval of supervisors. Most significantly, in this case, the Defendant intentionally and willingly engaged in a scheme to acquire pay without working and to cover-up his conduct by creating false citations. It involved not only unworked hours and failing to be on duty when he was supposed to be actively patrolling the Turnpike (not in an office or administrative position), but went further, with purposefully concealing the unworked hours by fraudulently falsifying citations for motor vehicle infractions and driver misconduct which never occurred.

61. The Court finds that forfeiture is in order. If this were strictly a "time and attendance" case, as the Defendant suggests, then this Court would be inclined to view the need for forfeiture differently and perhaps accept that the sentencing sanctions imposed in the federal criminal case (incarceration, restitution, etc.) were sufficient, or even agree with the Defendant that ordinary time and attendance fraud might be best handled with employers through disciplinary or other employment-related action. But it is not. Further, the Defendant's payment of full restitution in this case is not enough to avoid forfeiture. "Deterrence requires more, a penalty that places the violator in a position *worse* than he would have occupied before his violation." MacLean v. State, Bd. Of Ret., 432 Mass. 339,349 (2000). The purpose of the pension forfeiture statute is to deter misconduct by public employees, protect the public fisc and preserve respect for government service. See DiMasi v. State Bd. Of Retirement, 474 Mass. 194 (2016).

62. The Massachusetts pension forfeiture law, G.L. c, 32, §15(4) mandates total forfeiture of a public employee's retirement allowance. This court recognizes that our appellate courts have generally upheld forfeiture decisions by the SRB – there is ample precedent. Cases involving similar amounts of forfeiture as this one has been upheld as constitutional. (See e.g. Bisignani -$1.5 million; Cesan - $969,516; Flaherty v. Justices of the Haverhill Div. of the Dist. Court Dep't of the Trial Court, 83 Mass. App. Ct. 120 (2013) - $940,000). In this case, the forfeiture is approximately four times the statutory maximum fine of $250,000 and slightly more than nineteen times the maximum guidelines fine of $55,000. After assessing all of the factors discussed above, I rule that the forfeiture amount of Raftery's pension allowance is not grossly disproportionate to the gravity of his offense and is within constitutional proportionality limits under both the 8th Amendment and Art. 26. I find the decision of the SRB is justified.

63. That being said, the Court does comment that the total forfeiture mandate of G.L. c. 32, §15(4) is flawed to the extent that it constrains the Court to an "all or nothing" proposition in determining forfeiture. In attempting to determine whether a forfeiture is excessive, the Court is required to assess whether the amount to be forfeited is proportionate to the gravity of the offense. The all or nothing condition restricts the Court in that determination 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. The Court appreciates that following Bettencourt the Legislature did convene a special commission on pension forfeiture. The special

commission filed a report in 2017 making various recommendations, including eliminating the "all or nothing" directive in the statute and calling for a tiered approach that would allow for partial forfeitures at various levels. While these recommendations have not become law, they do provide a recognition that there may be better approaches to pension forfeiture which can provide for more appropriate forfeitures. This Court believes that a forfeiture law which does not require an all or nothing determination in all cases will still carry the deterrent effect desired. The Court also recognizes, as the Defendant points out, that many public pension systems provide alternative approaches to forfeiture, including non-forfeiture of benefits, partial forfeiture, Social Security benefits, retention of beneficiary benefits, retention of benefits accrued until the time of the offense and more. Again, these examples of other systems and ideas provide an opportunity for continued discussion and consideration of how this state might find a way for a more measured approach to forfeitures in this setting.

64. The Defendant had requested that this Court impose an amount of forfeiture if the Court found that forfeiture was in order. For the reasons discussed in the decisions in Bettencourt and Bisignani, this Court declines to do so.

ORDER

For the reasons set forth above, I rule and order as follows:

1. The pension forfeiture mandated in this case pursuant to G.L. c. 32, §15(4) is constitutional under the Excessive Fines Clause of both the 8th Amendment to the United States Constitution and Article 26 of the Massachusetts Declaration of Rights. The decision of the Defendant SRB is justified.
2. The mandated pension forfeiture does not constitute a violation of the "cruel or unusual" provision of Article 26.
3. The Plaintiff Gregory Raftery's Motion for Judgment on the Pleadings is DENIED.
4. The Defendant State Board of Retirement's Motion for Judgment on the Pleadings is ALLOWED. Judgment is to enter on behalf of the Defendant.

Dated: April 16, 2024

James E. Byrne
Justice of the Dedham District Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
SJ-2024-0213

Dedham District Court
No. 2254-CV-00232

GREGORY RAFTERY

v.

STATE BOARD OF RETIREMENT

RESERVATION AND REPORT

I have before me a petition for relief in the nature of certiorari, G. L. c. 249, § 4, filed by former State Trooper Gregory Raftery, seeking review of a judgment of the District Court upholding the total forfeiture of his pension and health insurance pursuant to G. L. c. 32, § 15 (4), on the ground that he was convicted of a criminal offense involving the laws applicable to his position. Raftery pleaded guilty in Federal court to embezzlement from an agency receiving Federal funds; this charge arose from his submitting false documents to receive over $51,000 in unearned overtime compensation. He was sentenced to a term of three months' imprisonment and one year of supervised release, with restitution to the Massachusetts State Police and a fine of $100. He 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 article 26 of the Massachusetts Constitution, which, he argues, should be interpreted to provide greater protection than the Eighth Amendment to the United States Constitution. He also requests that this matter be reserved and reported to the full court.

In my view, this case raises important constitutional issues warranting the attention of the full court. Accordingly, the petition is hereby reserved and reported to the full court for determination. The record shall consist of the following:

1. All of the papers filed before the single justice in the case of SJ-2024-0213 Gregory Raftery vs. State Board of Retirement;

2. This reservation and report; and

3. The docket sheet in SJ-2024-0213.

This reservation and report shall proceed in all respects with the Massachusetts Rules of Appellate Procedure. The parties shall consult with the Clerk of the Supreme Judicial Court for the Commonwealth regarding the briefing schedule and date for oral argument.

By the Court. (Wendlandt, J.)

Maura S. Doyle, Clerk

Dated: August 12, 2024

United States Code Annotated
Constitution of the United States
Annotated
Amendment VIII. Excessive Bail, Fines, Punishments

U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Notes of Decisions (6591)

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII
Current through P.L. 118-106. Some statute sections may be more current, see credits for details.

End of Document

M.G.L.A. Const. Pt. 1, Art. 26

Art. XXVI. Excessive bail or fines; cruel or unusual punishments

Currentness

Art. XXVI. No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

Notes of Decisions (331)

M.G.L.A. Const. Pt. 1, Art. 26, MA CONST Pt. 1, Art. 26
Current through amendments approved February 1, 2024.

End of Document

M.G.L.A. 32 § 15

§ 15. Dereliction of duty by members

Effective: February 16, 2012

Currentness

(1) *Misappropriation of Funds.* -- Any member who has been charged with the misappropriation of funds or property of any governmental unit in which or by which he is employed or was employed at the time of his retirement or termination of service, as the case may be, or of any system of which he is a member, and who files a written request therefor shall be granted a hearing by the board in accordance with the procedure set forth in subdivision (1) of section sixteen. If the board after the hearing finds the charges to be true, such member shall forfeit all rights under sections one to twenty-eight inclusive to a retirement allowance or to a return of his accumulated total deductions for himself and for his beneficiary, or to both, to the extent of the amount so found to be misappropriated and to the extent of the costs of the investigation, if any, as found by the board. He shall thereupon cease to be a member, except upon such terms and conditions as the board may determine.

(2) *Initiation of Proceedings.* -- Proceedings under this section may be initiated by the board, by the head of the department, by the commission or board of the commonwealth or of any political subdivision thereof wherein the member is employed or was last employed if not then in service, or in a county by the county commissioners, in a city by the mayor, in a town by the board of selectmen, in the Massachusetts Department of Transportation by the authority, in the Massachusetts Housing Finance Agency by the agency, in the Massachusetts Port Authority by the authority, in the Greater Lawrence Sanitary District by the district, in the Blue Hills Regional School System by the system or in the Minuteman Regional Vocational Technical School District by the district. The procedure set forth in subdivision (1) of section sixteen relative to delivery of copies, statement of service thereof, notice, hearing, if requested and the filing of a certificate of findings and decision, so far as applicable, shall apply to any proceedings under this section.

(3) *Forfeiture of Rights upon Conviction.* -- In no event shall any member after final conviction of an offense involving the funds or property of a governmental unit or system referred to in subdivision (1) of this section, be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty-eight inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member, unless and until full restitution for any such misappropriation has been made.

(3A) *Forfeiture of rights upon conviction.* -- In no event shall any member after final conviction of an offense set forth in section two of chapter two hundred and sixty-eight A or section twenty-five of chapter two hundred and sixty-five pertaining

to police or licensing duties be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member.

(4) *Forfeiture of pension upon misconduct.* -- 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 section one to twenty-eight, 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 rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

(5) If the attorney general or a district attorney becomes aware of a final conviction of a member of a retirement system under circumstances which may require forfeiture of the member's rights to a pension, retirement allowance or a return of his accumulated total deductions pursuant to this chapter, sections 58 or 59 of chapter 30 or section 25 of Chapter 268A, he shall immediately notify the commission of such conviction.

(6) If a member's final conviction of an offense results in a forfeiture of rights under this chapter, the member shall forfeit, and the board shall require the member to repay, all benefits received after the date of the offense of which the member was convicted.

(7) In no event shall any member be entitled to receive a retirement allowance under sections 1 to 28, inclusive, which is based upon a salary that was intentionally concealed from or intentionally misreported to the commonwealth, or any political subdivision, district or authority of the commonwealth, as determined by the commission. If a member intentionally concealed compensation from or intentionally misreported compensation to an entity to which the member was required to report the compensation, even if the reporting was not required for purposes of calculating the member's retirement allowance, the member's retirement allowance shall be based only upon the regular compensation actually reported to that entity or the amount reported to the board, whichever is lower. Unless otherwise prohibited by law, such member shall receive a return of any accumulated total deductions paid on amounts in excess of the compensation actually reported, but no interest shall be payable on the accumulated deductions returned to the member.

Credits

Added by St.1945, c. 658, § 1. Amended by St.1967, c. 597, § 13; St.1973, c. 1003, § 10; St.1978, c. 487, § 9; St.1980, c. 556, § 10; St.1982, c. 630, § 20; St.1983, c. 364, § 9; St.1984, c. 189, § 41; St.1987, c. 697, § 47; St.2004, c. 149, § 79, eff. July 1, 2004; St.2004, c. 352, § 19A, eff. Sept. 17, 2004; St.2009, c. 25, § 53, eff. July 1, 2009; St.2011, c. 176, § 31, eff. Feb. 16, 2012; St.2012, c. 36, § 9, eff. Feb. 16, 2012.

Notes of Decisions (106)

M.G.L.A. 32 § 15, MA ST 32 § 15
Current through Chapter 129 of the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

ment; and that England, long dependent and degraded, was again a power of the first rank; that the ancient laws by which the prerogative was bounded would thenceforth be held as sacred as the prerogative itself, and would be followed out to all their consequences; that the executive administration would be conducted in conformity with the sense of the representatives of the nation; and that no reform, which the two Houses should, after mature deliberation, propose, would be obstinately withstood by the sovereign. The Declaration of Right, though it made nothing law which had not been law before, contained the germ . . . of every good law which had been passed during more than a century and a half, of every good law which may hereafter, in the course of ages, be found necessary to promote the public weal, and to satisfy the demands of public opinion.'[1]

The Bill of Rights

In the second session of the Convention Parliament, which re-assembled on the 25th of October, 1689, the Declaration of Right was embodied and confirmed, with some slight but important amendments, in a regular Act of the Legislature. The text of the Bill of Rights, the third great Charter of English liberty and the coping-stone of the Constitutional building, is as follows —

BILL OF RIGHTS.

1 Will. and Mary, Sess. 2, c. 2 (1689).

An Act Declareing the Rights and Liberties of the Subject, and Setleing the Succession of the Crowne.

Recitals.

Presentation of Declaration of Right

Whereas the Lords Spirituall and Temporall and Commons, assembled at Westminster, lawfully, fully, and freely representing all the Estates of the people of this Realme, did, upon the thirteenth day of February, in the yeare of our Lord One thousand six hundred eighty eight, present unto

[1] Macaulay, Hist. II [668].

their Majesties, then called and known by the names and stile of William and Mary, Prince and Princesse of Orange, being present in their proper persons, a certaine Declaration in writeing, made by the said Lords and Commons, in the words following, viz.:—

Its contents:

Illegal and arbitrary acts committed by the late King James II.

Whereas the late King James II. by the advice of diverse evill councellors, judges, and ministers imployed by him, did endeavour to subvert and extirpate the Protestant religion, and the lawes and liberties of this kingdome:—

1. By assumeing and exerciseing a power of dispensing with and suspending of lawes, and the execution of lawes, without consent of Parlyament.

2. By committing and prosecuting diverse worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

3. By issueing and causeing to be executed a commission under the Great Seale for erecting a court, called the Court of Commissioners for Ecclesiasticall Causes.

4. By levying money for and to the use of the Crowne, by pretence of prerogative, for other time, and in other manner than the same was granted by Parlyament.

5. By raising and keeping a standing army within this kingdome in time of peace, without consent of Parlyament, and quartering soldiers contrary to law.

6 By causing severall good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and imployed contrary to law.

7 By violating the freedome of election of members to serve in Parlyament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable onely in Parlyament; and by diverse other arbitrary and illegal courses.

9. And whereas of late yeares, partiall, corrupt, and unqualifyed persons have been returned and served on juryes in tryalls, and particularly diverse jurors in tryalls for high treason, which were not freeholders.

10 And excessive baile hath beene required of persons committed in criminall cases, to elude the benefitt of the lawes made for the liberty of the subjects.

11. And excessive fines have been imposed, and illegall and cruell punishments inflicted.

12. And severall grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whome the same were to be levyed.

All which are utterly and directly contrary to the knowne lawes and statutes, and freedome of this realme.

And whereas the said late King James the Second haveing

abdicated the government, and the throne being thereby vacant, his Highnesse the Prince of Orange (whome it hath pleased Almighty God to make the glorious instrument of delivering this kingdome from Popery and arbitrary power) did (by the advice of the Lords Spirituall and Temporall, and diverse principall persons of the Commons) cause letters to be written to the Lords Spintuall and Temporall, being Protestants, and other letters to the severall countyes, cityes, universities, burroughs, and Cinque Ports, for the choosing of such persons to represent them, as were of right to be sent to Parlyament, to meete and sit at Westminster upon the two and twentyeth day of January, in this yeare One thousand six hundred eighty and eight, in order to such an establishment, as that their religion, lawes and liberties might not againe be in danger of being subverted; upon which letters elections having beene accordingly made.

Abdication and consequent vacancy of the throne.

Summons of the Convention Parliament.

And thereupon the said Lords Spirituall and Temporall, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best meanes for attainmg the ends aforesaid, doe in the first place (as their auncesters in like case have usually done) for the vindicating and asserting their auntient right and liberties, declare:—

Declaration that the acts previously enumerated are illegal.

1. That the pretended power of suspending of laws, or the execution of laws, by regall authority, without consent of Parlyament is illegall.

2. That the pretended power of dispensing with laws, or the execution of laws, by regall authoritie, as it hath beene assumed and exercised of late, is illegall.[1]

3. That the commission for erecting the late Court of Commissioners for Ecclesiasticall Causes, and all other commissions and courts of like nature, are illegall and pernicious.

4. That levying money for or to the use of the Crowne by pretence of prerogative, without grant of Parlyament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subject to petition the King, and all commitments and prosecutions for such petitioning are illegall.[2]

[1] *Supra*, p. 329. In drawing up the Declaration of Right the Lords were unwilling absolutely to condemn the Dispensing power, and therefore inserted the qualifying words, 'as it hath been assumed and exercised of late;' the effect of which is to reserve to the Crown the prerogative of pardoning criminals or commuting their sentences. By sec. XII. of the Bill of Rights [*infra*, p. 688] the Dispensing power was absolutely abolished, except in such cases as should be specially provided for by a Bill to be passed during the then present session. No such Bill was, however, passed

[2] On the right of petitioning see *supra*, p. 641. The Act 13 Car. II. c. 5, against *tumultuous* petitioning was not affected by this clause of the Bill of Rights. [On Petitions of Right, see *post*, Appendices.—ED.]

6. That the raising or keeping a standing army within the kingdome in time of peace, unless it be with consent of Parlyament, is against law.[1]

7 That the subjects which are Protestants may have arms for their defence suitable to their conditions,[2] and as allowed by law.

8 That elections of members of Parlyament ought to be free

9 That the freedome of speech, and debates or proceedings in Parlyament, ought not to be impeached or questioned in any court or place out of Parlyament.

10 That excessive baile ought not to be required nor excessive fines imposed; nor cruell and unusuall punishment inflicted.

11. That jurors ought to be duely impannelled and returned, and jurors which passe upon men in trialls for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegall and void.

13. And that for redresse of all grievances, and for the amending, strengthening, and preserveing of the lawes, Parlyament ought to be held frequently.

And they doe claime, demand, and insist upon all and singular the premisses, as their undoubted rights and liberties; and that noe declarations, judgments, doeings or proceedings, to the prejudice of the people in any of the said premisses, ought in anywise to be drawne hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highnesse the Prince of Orange, as being the onely means for obtaining a full redresse and remedy therein.

Haveing therefore an intire confidence that his said Highnesse the Prince of Orange will perfect the deliverance soe farr advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties·

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[1] *Supra*, p 666, *n* 1

[2] This declaration (says Blackstone) of the right of the subject to carry arms proper for his defence 'is a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanction of society and laws are found insufficient to restrain the violence of oppression.' There is an ancient enactment, however (2 Edw III c. 3), against going armed under such circumstances as may 'tend to terrify the people,' or indicate an intention of disturbing the public peace; and by a modern statute (60 Geo. III. c 1) the training of persons without lawful authority to the use of arms is prohibited; and any Justice of the Peace is authorised to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present —Stephen, Commentaries (5th ed.), i. 154, and, as to the authority under which the Volunteer Rifle Corps are trained, ii 610.

II The said Lords Spirituall and Temporall, and Commons, assembled at Westminster, doe resolve, that William and Mary, Prince and Princesse of Orange, be, and be declared, King and Queene of England, France and Ireland, and the dominions thereunto belonging, to hold the Crowne and royall dignity of the said kingdomes and dominions to them the said Prince and Princesse dureing their lives, and the life of the survivour of them, and that the sole and full exercise of the regall power be onely in, and executed by the said Prince of Orange, in the names of the said Prince and Princesse, dureing their joynt lives, and after their deceases, the said Crowne and royall dignitie of the said kingdomes and dominions, to be to the heires of the body of the said Princesse; and for default of such issue to the Princesse Anne of Denmarke, and the heires of her body; and for default of such issue to the heires of the body of the said Prince of Orange. And the Lords Spirituall and Temporall, and Commons, do pray the said Prince and Princesse to accept the same accordingly. *Bestowal of the Crown on William and Mary, according to limitations mentioned*

III. And that the oathes hereafter mentioned be taken by all persons of whome the oathes of allegiance and supremacy might be required by law, instead of them, and that the said oathes of allegiance and supremacy be abrogated. *New oaths in lieu of the old oaths of allegiance and supremacy.*

I, A B., doe sincerely promise and sweare, That I will be faithfull and beare true allegiance to their Majestyes King William and Queene Mary: *Allegiance.*

Soe helpe me God.

I, A. B, doe sweare, That I doe from my heart abhorr, detest, and abjure as impious and heretical, this damnable doctrine and position, that Princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever And I doe declare, That noe forreigne prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authoritie, ecclesiasticall or spirituall, within this realme: *Supremacy.*

Soe helpe me God.

IV. Upon which their said Majestyes did accept the Crowne and royall dignitie of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration. *Acceptance of the Crown by William and Mary.*

V. And thereupon their Majestyes were pleased, that the said Lords Spirituall and Temporall, and Commons, being the two Houses of Parlyament, should continue to sitt, and with their Majestyes royall concurrence make effectual provision for the settlement of the religion, lawes, and liberties of this kingdome, soe that the same for the future might not be in danger againe *Agreement between their Majesties and the Convention that the latter, being the two*

Houses of Parliament, should continue to sit.

of being subverted; to which the said Lords Spirituall and Temporall, and Commons, did agree and proceede to act accordingly.

Formal ratification and confirmation of Declaration of Right.

VI. Now in pursuance of the premisses, the said Lords Spirituall and Temporall, and Commons, in Parlyament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due forme by authority of Parlyament, doe pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration are the true, auntient, and indubitable rights and liberties of the people of this kingdome, and soe shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majestyes and their successors according to the same in all times to come.

Recognition and declaration of their Majestyes' title as King and Queen of England, France, and Ireland, and the dominions thereunto belonging.

VII. And the said Lords Spirituall and Temporall, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and mercifull goodness to this nation, to provide and preserve their said Majestyes' royall persons most happily to raigne over us upon the throne of their auncestors, for which they render unto Him from the bottome of their hearts their humblest thanks and praises, doe truly, firmely, assuredly, and in the sincerity of their hearts, thinke, and doe hereby recognize, acknowledge, and declare, that King James the Second haveing abdicated the government, and their Majestyes haveing accepted the Crowne and royall dignity aforesaid, their said Majestyes did become, were, are, and of right ought to be, by the lawes of this realme, our soveraigne liege Lord and Lady, King and Queene of England, France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royall State, Crowne, and dignity of the same realmes, with all honours, stiles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and intirely invested and incorporated, united, and annexed.

Settlement of the Crown and limitations of the succession.

VIII. And for preventing all questions and divisions in this realme, by reason of any pretended titles to the Crowne, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spirituall and Temporall, and Commons, doe beseech their Majestyes that it may be enacted, established, and declared, that the Crowne, and regall government of the said kingdoms and dominions, with all and singular the premisses thereunto belonging and appertaining, shall bee and continue to their said Majestyes, and the survivour of them, during their lives, and the life of the survivour of

them. And that the entire, perfect, and full exercise of the regall power and government be onely in, and executed by, his Majestie, in the names of both their Majestyes dureing their joynt lives, and after their deceases the said Crowne and premisses shall be and remaine to the heires of the body of her Majestie; and for default of such issue, to her Royall Highnesse the Princesse Anne of Denmarke, and the heires of her body; and for default of such issue, to the heires of the body of his said Majestie: and thereunto the said Lords Spirituall and Temporall, and Commons, doe, in the name of all the people aforesaid, most humbly and faithfully submitt themselves, their heires and posterities, for ever: and doe faithfully promise, That they will stand to, maintaine, and defend their said Majestyes, and alsoe the limitation and succession of the Crowne herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

Exclusion from the succession of Papists and of persons marrying Papists.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdome, to be governed by a Popish Prince, or by any King or Queene marrying a Papist, the said Lords Spirituall and Temporall and Commons, doe further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever uncapeable to inherit, possesse, or enjoy the Crowne and government of this realme and Ireland, and the dominions thereunto belonging, or any part of the same, or to have, use, or to exercise any regall power, authoritie, or jurisdiction within the same; and in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance, and the said Crowne and government shall from time to time descend to, and be enjoyed by, such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons soe reconciled, holding communion, or professing or marrying as aforesaid, were naturally dead.[1]

Declaration to be made by every King or Queen hereafter succeeding to the crown.

X. And that every King and Queene of this realme, who at any time hereafter shall come to and succeede in the Imperiall Crowne of this kingdome, shall, on the first day of the meeting of the first Parlyament, next after his or her comeing to the Crowne, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coro-

[1] This provision, although not included in the Declaration of Right, was in accordance with the previous Resolution of the Convention, that it was contrary to the interests of the kingdom to be governed by a Papist.

nation oath to him or her, at the time of his or her takeing the said oath (which shall first happen), make, subscribe, and audibly repeate the declaration mentioned in the statute made in the thirtyeth yeare of the raigne of King Charles the Second, entituled 'An Act for the more effectuall preserveing the King's person and government, by disableing Papists from sitting in either House of Parliament.' But if it shall happen, that such King or Queene, upon his or her succession to the Crowne of this realme, shall be under the age of twelve years, then every such King or Queene shall make, subscribe, and audibly repeate the said declaration at his or her coronation, on the first day of meeting of the first Parlyament as aforesaid, which shall first happen after such King or Queene shall have attained the said age of twelve years.[1]

Enacting clause

XI All which their Majestyes are contented and pleased shall be declared, enacted, and established by authoritie of this present Parlyament, and shall stand, remaine, and be the law of this realme for ever; and the same are by their said Majestyes, by and with the advice and consent of the Lords Spirituall and Temporall, and Commons, in Parlyament assembled, and by the authoritie of the same, declared, enacted, and established accordingly

Dispensing power abolished.

XII. And bee it further declared and enacted by the authoritie aforesaid, That from and after this present session of Parlyament, noe dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of noe effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed dureing this present session of Parlyament.[2]

Exception in favour of charters, grants, and pardons made before 23 Oct., 1689.

XIII. Provided that noe charter, or grant or pardon granted before the three-and-twentyeth day of October, in the yeare of our Lord one thousand six hundred eighty nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remaine of the same force and effect in law, and noe other, then as if this Act had never beene made. (*Statutes of the Realm*, vi. 142—145.)

[1] This clause supplements the preceding by enacting that every English sovereign shall, as a test of non popery, repeat and subscribe, in full Parliament or at the coronation, the Declaration against Transubstantiation, Adoration of the Virgin, and the Sacrifice of the Mass, contained in the Parliamentary Test Act of the 30th Car. II. st. 2, c. 1.—See *supra*, p. 656.

[2] [No such Bill, however, was passed.—Ed.]

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Supreme Court of Hawai‘i.

In the MATTER OF INDIVIDUALS IN CUSTODY OF the STATE of Hawai‘i

SCPW-21-0000483
|
October 12, 2021

ORIGINAL PROCEEDING

(By: Recktenwald, C.J., Nakayama, McKenna, Wilson, and Eddins, JJ.[1])

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR EXTRAORDINARY WRIT PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6) AND/OR FOR WRIT OF MANDAMUS

***1** The COVID-19 pandemic has created an unprecedented public health emergency of global impact. Throughout the pandemic, the Office of the Public Defender ("OPD") has initiated three original proceedings seeking relief related to certain categories of inmates as well as pandemic-related conditions at Hawai‘i's community correctional centers and facilities. This order disposes of the third proceeding filed on August 27, 2021.

PART ONE

(By: Recktenwald, C.J., Nakayama, McKenna, and Eddins, JJ., with McKenna, J., also concurring in part and dissenting in part separately, in which Wilson, J., joins as to Sections I and III.A., Wilson, J., concurring and dissenting separately, and Eddins, J., also concurring separately)

In 2020, on two separate occasions, OPD filed petitions for an extraordinary writ seeking, among other things, the expedited release of certain categories of inmates at Hawai‘i's community correctional centers and facilities. When the first petitions were filed in late March 2020,[2] the potential catastrophic impact of the pandemic on our State, the community, our citizens, and our correctional centers and facilities was not determinable. There were lockdowns across the nation and the death toll was rising. When the second petition was filed in early August 2020, the O‘ahu Community Correctional Center, in particular, was experiencing a concerning surge in COVID-19 positive cases.

At the time these petitions were filed, the pandemic's trajectory remained uncertain and vaccinations were not available. Given the virulent transmission of the virus within close quarters and the likelihood that an outbreak and spread of the virus in Hawai‘i's community correctional centers and facilities had the potential to tax the capacities of the health care systems and the limited resources of the community health providers on each of the islands as the State continued to navigate this unprecedented pandemic, this court provided multiple forms of relief, including, among other things, setting forth procedures and processes for consideration by the courts for the release of inmates and pretrial detainees who met certain criteria, which included an opportunity for objection to the release. With respect to the first petition, this court also appointed a Special Master to work with the parties in a collaborative and expeditious manner to address the issues and facilitate a resolution, while protecting public health and public safety.

Since these petitions were filed, three different vaccines have been made available to the public including every inmate and staff at Hawai‘i's community correctional centers and facilities. Inmates have been prioritized for vaccination and are encouraged to get vaccinated.

In addition, a class of inmates filed a federal court lawsuit (Chatman v. et al. v. Otani et al., Civil No. 21-00268-JAO-KJM (D. Haw.)) alleging that the Department of Public Safety ("DPS") mishandled the pandemic and failed to implement its Pandemic Response Plan ("PRP") in violation of their constitutional rights. On September 2, 2021, the parties reached a settlement, which includes the establishment of a five-member panel of experts to provide advice and recommendations to assist DPS in its pandemic response.[3]

***2** On August 27, 2021, shortly before the settlement was executed in Chatman v. Otani, OPD filed another petition for an extraordinary writ pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for writ of mandamus. The petition seeks the following relief:

> 1) Order the Circuit, Family and District courts that when adjudicating motions for release: (a) release shall be presumed unless the court finds that the release of the individual would pose a significant risk to the safety of the individual or the public; (b) design capacity (as opposed to operational capacity) of the correctional facility shall be taken into consideration; (c) the health risk posed by the COVID-19 pandemic should be taken into consideration. Motions for release based on the foregoing are for the following categories of incarcerated persons:
>
> > a. Individuals serving a sentence (not to exceed eighteen months) as a condition of felony deferral or probation, except for: (i) individuals serving a term of imprisonment for a sexual assault conviction or an attempted sexual assault conviction; or (ii) individuals serving a term of imprisonment for any felony offense set forth in HRS Chapter 707, burglary in the first degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS §§ 709-906(7) and (8), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) and (2), including attempt to commit those specific offenses (HRS §§ 705-500, 705-501).
> >
> > b. Individuals serving sentences for misdemeanor or petty misdemeanor convictions, except those convicted of abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).
> >
> > c. All pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, except those charged with abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).
> >
> > d. All pretrial detainees charged with a felony, except those charged with a sexual assault or an attempted sexual assault, any felony offense set forth in HRS Chapter 707, burglary in the first degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS §§ 709-906(7) and (8), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1), including attempt to commit those specific offenses (HRS §§ 705-500, 705-501).
>
> 2) Order the Circuit, Family and District courts, DPS, and the HPA to reduce the population of Hawai‘i’s correctional facilities to allow for the social separation and other measures recommended by the CDC to prevent the spread of COVID-19 by taking immediate steps to reduce the population those facilities to their design capacity and/or Infectious Disease Emergency Capacity as recommended by the Hawai‘i Correctional System Oversight Commission.
>
> ***3** 3) Appoint a public health expert to enter into all of Hawai‘i correctional facilities and review protocols, the ability to social distance and make recommendations.
>
> 4) Order testing for COVID-19 for all incarcerated persons and staff at Hawai‘i correctional facilities and to notify all parties of any positive or presumptive-positive test results for any incarcerated person. The information released to the parties should include the individual’s name, date of test and date of test result.
>
> 5) Order the Circuit, Family and District courts to suspend the custodial portions of such sentence until the conclusion of the COVID-19 pandemic or until deemed satisfied for individuals serving intermittent sentences.
>
> 6) Order that the practice of no cash bail, including the release of individuals on their own recognizance, on signature bonds, or on supervised release, should be regularly employed, and pretrial detainees who are not a risk to public safety or a flight risk should not be held simply because they do not have the means to post cash bail.
>
> 7) Order the HPA to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. The HPA should

also consider release of incarcerated persons who are most vulnerable to the virus, which includes individuals who are 65 years old and older, have underlying health conditions, who are pregnant, and those individuals being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been designated as having "minimum" or "community" security classifications and are near the maximum term of their sentences. The HPA shall prepare and provide periodic progress reports to the parties of their efforts and progress in the aforementioned areas. The reports should include a list of the names of individuals who have been granted release, the names of the individuals who are under consideration for release, and the names of the individuals who were considered for release but for whom release was denied.

8) Order DPS to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities in all Hawai'i correctional facilities.

9) Order DPS to adhere to its Pandemic Response Plan – COVID-19 (May 28, 2021 rev.)

10) Order DPS to comply with the requirements of HRS § 353-6.2 and conduct periodic reviews to determine whether pretrial detainees should remain in custody or whether new information or a change in circumstances warrants reconsideration of a detainee's pretrial release or supervision.

Answers to the petition were filed by respondents (1) Max N. Otani, DPS Director and Edmund (Fred) K.B. Hyun, Chairperson of the Hawai'i Paroling Authority, (2) Steven S. Alm, Prosecuting Attorney, City and County of Honolulu, (3) Andrew H. Martin, Prosecuting Attorney, County of Maui, (4) Kelden B.A. Waltjen, Prosecuting Attorney, County of Hawai'i, and (5) Justin F. Kollar, Prosecuting Attorney, County of Kaua'i.

A hearing was held before this court on September 22, 2021.

Based upon consideration of the petition, the respective answers, and the arguments presented at the September 22, 2021 hearing, the record is insufficient to warrant the extraordinary relief requested except as it relates to DPS's compliance with the requirements of HRS § 353-6.2.[4]

***4** Unlike when OPD filed its August 2020 petition, the total number of active positive COVID-19 cases among inmates in all Hawai'i community correctional centers and facilities as of October 8, 2021 is 34. Vaccines are now widely available to all inmates, and it has been reported that statewide, as of September 14, 2021, 66% of inmates are fully vaccinated. Additionally, as this court has stated in the prior proceedings, OPD or defense counsel are not precluded from filing individual motions seeking the release of any inmate or pretrial detainee, and the State continues to have the option of filing individual motions seeking to modify the release status of any defendant. OPD has not shown that they have been precluded from using this procedural mechanism, or substantiate why this procedure is an inadequate remedy. Moreover, the trial courts have full discretion whether to set bail and to impose conditions of release.[5] Further, the relief that is being requested regarding adherence to public health standards and compliance with the PRP within the correctional centers and facilities are currently being reviewed by the five-member panel established under the settlement agreement in Chatman v. Otani. And, finally, issues regarding inmate populations may be addressed through alternative means, including by the Hawai'i Correctional Systems Oversight Commission.

As to OPD's request for relief regarding compliance with HRS § 353-6.2, there is dispute as to whether DPS has conducted the periodic reviews and provided the required information. At the hearing, DPS acknowledged that this action is a "ministerial" duty and indicated that it "intends" and "plans" to conduct the review and transmit the information as statutorily required.

Accordingly,

It is ordered that the petition is granted in part and denied in part as follows:

1. DPS shall comply with the requirements of HRS § 353-6.2, including timely transmitting its findings and recommendations by correspondence or electronically to the appropriate court, prosecuting attorney, and defense counsel.

2. In all other respects, the petition is denied.

This original proceeding is concluded.

PART TWO

(By: Recktenwald, C.J., Nakayama, McKenna, and Wilson, JJ., with Eddins, J., dissenting)

I. This Court Has the Authority to Grant Relief Similar to That Ordered in the Two Prior Original Proceedings.

Justice Eddins's concurrence questions this court's authority to grant additional relief beyond ordering DPS to comply with HRS § 353-6.2. Although a majority of the court determined in Part One that OPD has failed to demonstrate entitlement to such additional relief, we nevertheless take this opportunity to address this court's inherent, constitutional and statutory authority to grant extraordinary relief in unique circumstances. Specifically, we reaffirm this court's authority to provide the relief the court granted with respect to the prior OPD petitions (e.g., the March 2020 and August 2020 petitions).

OPD sought a wide range of relief in the prior proceedings, some of which was granted, and much of which was denied without discussion. In separate filings, Justice Wilson dissented from the court's denial of those items of relief. The relief that was granted generally focused on expedited decision making with regard to whether certain lower-risk inmates in custody should be released, consistent with protecting public safety. The premise of that relief was that ordinary mechanisms for determining individualized requests for release could not work quickly enough to meet the extraordinary circumstances that were presented (1) in the very early days of the COVID-19 pandemic in March-April 2020, and (2) when COVID cases "erupt[ed]" at the Oahu Community Correctional Center ("OCCC") in August 2020.[6] The court also appointed a Special Master, the Honorable Daniel R. Foley (ret.), to work with interested parties during the course of the first proceeding. The court's April 2020 order provided:

> ***5** The role of the Special Master is to work with the parties in a collaborative and expeditious manner to address the issues raised in the two petitions and to facilitate a resolution while protecting public health and public safety. The Special Master may include, as part of these efforts and discussions, members of the public health community and other affected agencies.
>
> Safety of the inmates, staff, and the public are imperative. The parties shall consider viable options to keep inmates and the public safe (e.g., bracelet monitoring, alternative locations to house inmates, inmate categories such as age or medical condition, etc.).
>
> ...
>
> The Special Master shall convene and conduct meetings with the parties and any community agency that the Special Master deems important, in his discretion, to carrying out his role.

Order of Consolidation and for Appointment of Special Master, Office of the Public Defender v. Connors, SCPW-20-0000200 at 3 (April 2, 2020). Special Master Foley conducted extensive discussions, elicited position statements from the parties, and filed five detailed reports with this court documenting those efforts.[7] Thanks to extraordinary work by the trial courts, and the efforts of the parties to the proceedings, inmate populations at correctional centers were "significantly reduced." See Fifth Summary Report and Recommendations of the Special Master (May 28, 2020) at page 3.[8]

As set forth below, this court has the authority under the constitution, the court's inherent powers, and various statutes, to provide extraordinary relief when circumstances warrant. This court has previously stated that such power should be used sparingly, such as when existing remedies are inadequate, or would take too long to implement. We reaffirm those principles now, as well as the court's determination that the circumstances that existed in March-April and August 2020, justified the use of those extraordinary powers. We reject the suggestion that the court's authority to provide such relief was restricted by its rule-making authority. Finally, we note that courts in other jurisdictions relied on similar powers to provide relief in the face of the pandemic.

II. This Court Has Both Explicit and Inherent Authority to Grant Extraordinary Relief in Extraordinary Circumstances.

Our constitution vests the "judicial power of the State" in the courts. Haw. Const. art. VI, section 1. "Nowhere in [the constitution] is the exact nature of the 'judicial power' defined." State v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 711-12 (1982) (citations omitted). But "speaking generally, the 'inherent power of the court is the power to protect itself; the power to administer justice whether any previous form of remedy has been granted or not; the power to promulgate rules for its practice; and the power to provide process where none exists.' " Id. at 55, 647 P.2d 712 (quoting In re Bruen, 172 P.1152, 1153 (Wash. 1918)) (emphasis added). This court has held that the "essentially inherent or implied powers of the court

are by their nature impracticable if not impossible of all-inclusive enumeration."[9]Id.

***6** Our legislature has enumerated the inherent powers conferred on our courts by the constitution in several provisions of HRS ch. 602.[10] These include this court's power "[t]o make or issue any order or writ necessary or appropriate in aid of its jurisdiction," HRS § 602-5(a)(5), and "[t]o make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it."HRS § 602-5(a)(6). Pursuant to HRS § 602-4, this court also has the power of "general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

In recognizing that the inherent powers vested in our courts are broad and not susceptible to precise enumeration, the court has invoked those powers with restraint, in circumstances where existing remedies were either inadequate or would take too long to implement. See, e.g., State v. Moniz, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987) ("[A] strong commitment to the prudential rules shaping the exercise of our jurisdiction has resulted in a sparing use of this extraordinary power.") (citing State v. Fields, 67 Haw. 268, 276, 686 P.2d 1379, 1386 (1978)).

Similarly, in Gannett Pac. Corp. v. Richardson, the court held that "[o]nly where there is urgent reason ... for the invocation of this court's supervisory jurisdiction over the lower courts, under both HRS §§ 602-4 and 602-5, will this court consider departing from [the doctrine of res judicata]." 59 Haw. 224, 226-27, 580 P.2d 49, 53 (1978). There, the court noted that "we have deviated from this rule only in rare and exigent circumstances," where "allow[ing] the matter to wend its way through the appellate process would not be in the public interest and would work upon the public irreparable harm." Id. at 227, 580 P.2d at 53 (citing Sapienza v. Hayashi, 57 Haw. 289, 554 P.2d 1131 (1976)).

In Gannett, the court considered a petition for a writ of prohibition by representatives of the news media who sought to prohibit the respondent district judge from closing a preliminary hearing from the public. Id. at 226, 580 P.2d at 52. The court held that exercise of the court's supervisory jurisdiction and discretionary power was appropriate because the case presented a question "of grave import ... involv[ing] not only the right of the accused to be tried by an impartial jury, but ... also ... the right of the public to attend and to be present at judicial proceedings." Id. at 227, 580 P.2d at 53. The court noted:

> [B]ecause of the relative frequency with which preliminary hearings are being conducted in the district courts, thus enhancing the probability of collisions between established and fundamental rights, and because it appears to us only too clear that the district courts are in immediate need of direction from this court on a procedural and substantive matter of public importance, we deem it necessary to entertain the petition for writ of prohibition.

***7**Id. (emphasis added); see alsoMoniz, 69 Haw. at 374, 742 P.2d at 376 (holding that "a classic example of when this court should exercise its supervisory power" is when the lower courts have differed in their interpretations of a statute).

Similar but even more serious concerns were presented by the March 2020 and August 2020 petitions that were granted in part by this court. The premise of the relief granted was that ordinary mechanisms for determining individualized requests for release could not work quickly enough to meet the extraordinary circumstances that were presented (1) in the very early days of the COVID-19 pandemic in April 2020, and (2) when COVID cases "erupt[ed]" at OCCC in August 2020. In an effort to prevent irreparable harms and provide direction to the trial courts, the court invoked its supervisory jurisdiction and discretionary power.

Such action, though rare, is far from unprecedented. In several cases, this court and the ICA have relied on HRS § 602–5(a)(6) [previously HRS § 602–5(7)] to modify trial court judgments to prevent unfair results. In State v. Arlt, 9 Haw. App. 263, 277, 833 P.2d 902, 910 (1992), the ICA vacated a defendant's conviction as to First Degree Robbery and remanded to the circuit court with instructions to enter a judgment convicting and resentencing the defendant for Theft in the Fourth Degree. The ICA stated that "[s]ince there is no statute or constitutional provision in Hawai'i which specifically vests in the appellate courts the express authority to affirm, reverse, remand, vacate, or set aside any judgment, decree, or order of a court brought before them, such authority presumably derives from [HRS § 602-5(a)(6)]." Id. The ICA thus interpreted HRS § 602-5(6) to allow an appellate court to modify a trial court's judgment of conviction if the interests of justice would be thereby promoted. Similarly, in Farmer v. Admin. Dir. of the Court, 94 Hawai'i 232, 241, 11 P.3d 457, 466 (2000), this court relied on its inherent powers under article VI, section 1 of the constitution and the statutory authorization under HRS § 602-5(6) in unanimously holding that "justice require[d]" that the

defendant be given an opportunity to challenge the lifetime revocation of his driver's license after one of the three predicate convictions on which his revocation was based was set aside, even though the district court's rules specifically precluded such a remedy.[11]

As noted by the concurrence, this court has not previously provided relief of the type provided in response to the March 2020 and August 2020 petitions.[12] Thankfully, the court has never before been faced with circumstances such as the global COVID pandemic. The deadly implications of the pandemic — particularly in light of the overcrowding in our state's correctional facilities — were largely unknown in March 2020. Moreover, the rapid spread of COVID in our prisons and jails in August 2020 presented an immediate threat that the virus would spread from the correctional system into our community, and strain already overtaxed health resources.

***8** These unknown and potentially catastrophic circumstances required a coordinated response from the judiciary. The work done by Special Master Foley on behalf of this court during the March 2020 petition was invaluable: he facilitated extensive discussion and problem-solving between the parties, and collected essential information for use by the court. That work was done at remarkable speed: his first report, with detailed submissions from the parties and others with relevant information, was submitted on April 9, 2020, only one week after he was appointed. This report, and the four that followed, provided the basis for prompt, informed, and coordinated decision-making by this court. It simply would not have been feasible for individual trial courts to replicate that effort on a case-by-case basis.[13]

These extraordinary circumstances justified the use of the court's supervisory power to ensure that decisions about the release of inmates due to COVID concerns were made in a prompt, coordinated manner that minimized risks to inmates and the public as a whole, and promoted a fair and efficient judicial process. This court's orders established presumptions, provided discretion to the trial judges where appropriate, and made system-wide determinations when necessary. The alternative — waiting for trial court decisions relating to the release of specific inmates to be appealed to this court — would have taken too long under the circumstances, with different trial courts taking different approaches in the meantime. That piecemeal approach would have increased the risk to our community.[14] As the court has previously recognized, providing relief when delay will result in harm is a legitimate use of our supervisory power. See, e.g., Gannett, 59 Haw. at 226-27, 580 P.2d at 53 (1978). And, as set forth below, other state supreme courts and chief justices came to the same conclusion and, likewise, identified categories of lower-risk offenders who could be released, if certain conditions were met, to alleviate overcrowding and reduce the risk of COVID spreading in correctional facilities and then into the community.[15]

***9** Inasmuch as the "inherent power of the court is ... the power to provide process where none exists," our grants of partial relief in the previous OPD petitions were appropriate under HRS §§ 602-4 and 602-5. Moriwake, 65 Haw. at 55, 647 P.2d at 712. The provision of such remedies was consistent with the purpose of our constitution and statutes to ensure a fair and efficient judicial process.

This analysis is not affected by the fact that this court has rule-making authority under article VI, section 7 of the constitution. That provision provides that the "[t]he supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law." The court's orders in the prior proceedings did not purport to be rules or regulations: the court did not invoke its rule-making power in adopting them, and none of the parties ever suggested that the orders should have been subject to the court's rule-making process, or limited by the provisions of HRS § 602-11.[16] Moreover, nothing in the language of article VI, section 7 suggests that it was intended to restrict this court's inherent judicial powers, which, as noted above, are incorporated into the constitution via article VI, section 1 ("the judicial power of the State shall be vested in one supreme court ..."), and codified in HRS § 602-5(a)(6).

III. Other Jurisdictions' Highest Courts Have Also Exercised Their Supervisory Powers to Provide Relief in Circumstances Similar to Those Here.

The court's actions on the March 2020 and August 2020 petitions are supported by the response of other state supreme courts to the exigent circumstances caused by the pandemic. In Massachusetts, for example, the supreme judicial court ruled that in order to reduce the exposure of the virus in correctional facilities, COVID-19 shall constitute a "changed circumstance" under Massachusetts law.[17]Comm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct., 142 N.E.3d 525, 530, aff'das modified, 143 N.E.3d 408 (Mass. 2020). To that end, the court concluded that with certain exclusions,[18] defendants who were pending trial are "entitled to a rebuttable presumption of release.

The individual shall be ordered released pending trial on his or her own recognizance, without surety, unless an unreasonable danger to the community would result, or the individual presents a very high risk of flight." Id.

***10** In support of its actions, the Massachusetts court cited to the broad language in Mass. Gen. Laws. 211 § 3, which in relevant part, states that "[t]he supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors therein if no other remedy is expressly provided[.]" Id. at 538.

According to the Massachusetts Supreme Judicial Court, for "those individuals who are currently serving sentences of incarceration, absent a finding of a constitutional violation, our superintendence power is limited."Id. at 530. The court therefore urged the Department of Corrections and the parole board to work with the special master to expedite hearings, and "to determine which individuals nearing completion of their sentences could be released on time served, and to identify other classes of inmates who might be able to be released by agreement of the parties, as well as expediting petitions for compassionate release." Id.

A significant number of incarcerated individuals were released as a result of the Massachusetts Supreme Judicial Court's decision. In fact, the number of inmates in various counties dropped, in some cases as high as 27 percent, just one month after the court's ruling.[19]

In a subsequent case, the Massachusetts Supreme Judicial Court also expanded the factors a judge is required to consider when evaluating a defendant's motion to stay a sentence pending an appeal. Commonwealth v. Nash, 159 N.E.3d 91, 99 (Mass. 2020). Prior to the pandemic, there were two factors: (1) the defendant's likelihood of success on appeal; and (2) certain security factors. Id. In Christie v. Commonwealth, 142 N.E.3d 55 (Mass. 2020), a third consideration, known as the COVID-19 factor, was included in the calculus. Id. at 59 ("In these extraordinary times, a judge deciding whether to grant a stay should consider not only the risk to others if the defendant were to be released and reoffend, but also the health risk to the defendant if the defendant were to remain in custody.") (emphasis in original). The court in Nash reinforced the COVID-19 factor and emphasized the objective "to reduce temporarily the prison and jail populations, in a safe and responsible manner, through the judicious use of stays of executions of sentences pending appeal."[20]Nash, 159 N.E.3d at 101-02.

***11** Other state supreme courts and chief justices have used their inherent and supervisory authority to grant relief to inmates due to the COVID pandemic. In South Carolina, for example, Chief Justice Donald W. Beatty issued a March 16, 2020, order requiring that "[a]ny person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk."[21] Chief Justice Beatty also required that in bond hearings, "[i]f a defendant has been in jail as a pre-trial detainee for the maximum possible sentence, the court shall convert the bond to a personal recognizance bond and release the defendant."[22]

In Maryland, Chief Judge Mary Ellen Barbera issued an order on April 14, 2020. Citing to the judiciary's authority under the Maryland Constitution[23] and the emergency powers granted by the Maryland Rules of Practice and Procedure,[24] Chief Judge Barbera required judges to consider a variety of factors in determining whether to release adult defendants from pretrial detention, including, inter alia, whether the defendant suffers from pre-existing conditions that render the defendant more vulnerable to COVID-19 or whether the release of the defendant during the pandemic is in the interest of justice.[25] Furthermore, Chief Judge Barbera also ordered that "judges should consider the risk that COVID-19 poses to people confined in correctional facilities when taking into account all statutory requirements and relevant Maryland Rules in determining release conditions and the status of defendants pending sentencing and appeal[.]"[26]

Similar to some of this court's orders, the Kentucky Supreme Court ordered the emergency administrative release of any defendant charged with a non-sexual/non-violent misdemeanor who had not been classified as high risk for new criminal activity.[27] Those charged with a non-sexual/non-violent Class D felony were also eligible for release.[28] As a result, according to Kentucky's Administrative Office of the Courts, more than 35,000 inmates were released since the start of the pandemic either from a judge's order or on administrative release up through October 3, 2020.[29] While the Governor of Kentucky also ordered additional releases utilizing his executive power under the Kentucky Constitution,[30] each executive order reduced the sentences of specific incarcerated individuals based on the recommendations by the Justice and Public Safety Cabinet.[31] The Kentucky Supreme Court, however, utilized its supervisory powers to order the lower courts to follow the broad emergency administrative release schedule to "further protect the health and safety of our criminal justice partners--peace officers, county jails, and pretrial drug testing providers--and to protect the health and safety of all pretrial defendants and any defendants housed in county

jails[.]" 2020-27 Order at 1.

IV. Conclusion

***12** This court has the authority to grant the relief that was ordered in the March 2020 and August 2020 petitions, pursuant to explicit and inherent authority under the constitution and state statutes. While this court uses that power with restraint, the circumstances that existed when the March 2020 and August 2020 petitions were adjudicated justified its use.

CONCURRENCE AND DISSENT OF McKENNA, J., IN WHICH WILSON, J., JOINS AS TO SECTIONS I AND III.A.

Since the late 1970s, Hawai'i, as with the rest of the United States, has been suffering from an over-incarceration epidemic. The over-incarceration epidemic is now overlaid with the COVID-19 pandemic. This has resulted in conditions that I believe violate constitutional rights of our incarcerated people. Therefore, although I would not grant the relief requested in the petition, I would grant the relief discussed below and would also provide the following guidance to our trial courts.

Hence, I respectfully concur and dissent.

I. Hawai'i has been suffering from an over-incarceration epidemic that is now overlaid with the COVID-19 pandemic

From 1978 to 2016, Hawai'i's population increased by only 53%. During the same time period, however, Hawai'i's incarceration rate exploded by 670%, with the number of incarcerated people increasing from 727 to 5,602.[1] As explained by Lezlie Kī'aha in 2016:[2]

> The United States is currently the largest jailer in the world. Though it accounts for only 5% of the world's total population, it holds 25% of the world's prisoners, or nearly two-and-a-half million people. This epidemic of incarceration can be attributed to several factors, all of which led to the greater problem of mass incarceration, and consequently, the rise of the private prison industry.
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> In 1971, President Richard Nixon's attack on drug use launched the country's War on Drugs and the imposition of harsh prison sentences for drug offenses, including mandatory minimums. According to Michelle Alexander, civil rights attorney, scholar, and author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, "this policy single-handedly drove much of the increase in incarceration rates."
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> ....
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> In Hawai'i, non-violent crimes make up the greatest percentage of the offenses committed by incarcerated individuals.[3]

As explained by the Prison Policy Initiative ("PPI"), "[f]or four decades, the U.S. has been engaged in a globally unprecedented experiment to make every part of its criminal justice system more expansive and more punitive. As a result, incarceration has become the nation's default response to crime, with, for example, 70 percent of convictions resulting in confinement — far more than other developed nations with comparable crime rates." See Peter Wagner & Wendy Sawyer, States of Incarceration: The Global Context 2018, Prison Policy Initiative (June 2018), https://www.prisonpolicy.org/global/2018.html, also available at https://perma.cc/U6UK-2Z68.

***13** According to PPI's "States of Incarceration: The Global Context 2021," 664 of every 100,000 people in the United States are incarcerated. See Emily Widra & Tiana Herring, States of Incarceration: The Global Context 2021, Prison Policy Initiative (September 2021), https://www.prisonpolicy.org/global/2021.html, also available at https://perma.cc/ER9W-HPT8. If every U.S. state were a country, thirty-four states would be the countries with the highest incarceration rates in the world. In other words, if the fifty U.S. states were treated as countries, El Salvador, with an incarceration rate of 562 out of 100,000 people (making it the country with the second highest incarceration after the U.S.) would be ranked thirty-fifth.

PPI reports Hawai'i's 2021 incarceration rate at 439 out of every 100,000 people, lower than the national average of 664. If the fifty states were treated as countries, however, Hawai'I would still be the country with the forty-fifth highest incarceration rate. In other words, in addition to the thirty-nine U.S. states that exceed our incarceration rate, only five other actual countries exceed our incarceration rate: El Salvador (562), Turkmenistan (552), Rwanda (515), Cuba (510), and Thailand (445).[4]

Hawai‘i’s 439 out of 100,000 2021 incarceration rate significantly exceeds that of South Africa (248), Taiwan (243), Israel (234), the Philippines (200), New Zealand (188), Mexico (166), Australia (160), Kenya (157), Scotland (136), England and Wales (130), Spain (122), China (121), Portugal (111), Republic of (South) Korea (105), Canada (104), France (93), Italy (89), Denmark (72), Germany (69), the Netherlands (63), Norway (54), and Japan (38).[5] Id.

Thus, as noted by the PPI, “[e]ven ‘progressive’ states like Hawai‘i, with incarceration rates below the national average, continue to lock people up at *more than double* the rates of our closest international allies.” Id. Hawai‘i’s incarceration rate is actually more than double that of Australia, New Zealand and the Philippines, more than quadruple that of South Korea and Canada, and more than tenfold that of Japan.

More recently, the State of Hawai‘i Department of Public Safety (“DPS”) reported a total of 4,077 incarcerated people under its jurisdiction as of September 20, 2021. This figure is down from 4,631 people as of March 31, 2020, DPS, End of Month Population Report (March 31, 2020), https://dps.hawaii.gov/wp-content/uploads/2020/04/Pop-Reports-EOM-2020-03-31.pdf, also available at https://perma.cc/2W24-JDRV, 5,137 people as of March 31, 2019, DPS, End of Month Population Report (March 31, 2019), https://dps.hawaii.gov/wp-content/uploads/2019/04/Pop-ReportsEOM-2019-03-21.pdf, also available at https://perma.cc/3R73-VXCP, and the 5,325 people as of December 31, 2016 referenced above. Based on an estimated statewide population of about 1.46 million, however, the DPS incarceration rate is still 279 per 100,000 people, which does not include people placed in custody by Hawai‘i’s federal court.[6]

***14** Due to Hawai‘i’s exploding incarceration rates, for many years, inmate populations at Hawai‘i correctional centers and facilities (“CCFs”) have greatly exceeded the number intended by planners and architects (“design capacity”). Overcrowding has even led CCFs to exceed “operational capacity,” which is defined by the United States Department of Justice as “[t]he number of inmates that can be accommodated based on a facility’s staff, existing programs, and services.”[7] Some Hawai‘i CCFs incarcerate multiple people in cramped cells designed to house one person; people are sometimes forced to sleep on floors next to in-cell toilets.

Thus, Hawai‘i has, for many years, been suffering through an over-incarceration epidemic. To the sometimes deplorable prison conditions caused by over-incarceration, we now overlay the COVID-19 pandemic.

II. The Hawai‘i Constitution prohibits the imposition of “punishment” as well as the setting of excessive bail pending trial

According to DPS, as of September 20, 2021, 783 of the 4,077 people in DPS custody were incarcerated based on pending felony charges, while 125 more were incarcerated based on pending misdemeanor charges. DPS, End of Month Population Report (March 31, 2020), https://dps.hawaii.gov/wp-content/uploads/2021/09/Pop-Reports-Weekly-2021-09-20.pdf, also available at https://perma.cc/5VWG-AYB7. Thus, as of September 20, 2021, up to 908 people, or 23% of the 4,077 people incarcerated under DPS custody, were apparently being incarcerated pre-trial because they were unable to post bail.

It is a due process violation under both the federal and state constitutions to punish a person before an adjudication of guilt. SeeGordon v. Maesaka-Hirata, 143 Hawai‘i 335, 358, 431 P.3d 708, 731 (2018) (citing Bell v. Wolfish, 441 U.S. 520, 535, 538-39 (1979)). At minimum, under both federal and state constitutional standards, courts may infer that conditions of confinement are prohibited punishment of a pretrial detainee if they are the result of an expressed intent to punish, if they are not rationally related to a legitimate alternative purpose, or if they are excessive in relation to that legitimate alternative purpose. Id. But this court has also recognized that people incarcerated before trial can have greater rights under the due process clause of article I, section 5 of the Hawai‘i constitution than under the federal constitution. Id.

I believe that under the Hawai‘i due process clause, all pretrial “punishment” must be prohibited. The question then is what constitutes pretrial “punishment” prohibited by the Hawai‘i constitution’s due process clause. I believe that incarcerating people before an adjudication of guilt can constitute “punishment” prohibited by the Hawai‘i constitution, especially in light of our “excessive bail” provision discussed below. I also believe that pretrial incarceration constitutes unconstitutional “punishment” if a person is neither a flight risk nor a danger to the community.[8] And even for those for whom pretrial incarceration might otherwise survive constitutional

muster, the COVID-19 pandemic has created circumstances that could cause pretrial incarceration to become unconstitutional "punishment."

***15** Compared to unincarcerated people, who can choose to take measures to avoid contact with others, an incarcerated person has no real control over their exposure to SARS-CoV-2, the virus that causes COVID-19, except for getting vaccinated and consistently wearing a mask. Although DPS reports issuing two cloth masks to each incarcerated person, it is unrealistic to expect that an incarcerated person would be able to enforce consistent and proper mask-wearing by others. And due to over-incarceration and resultant overcrowding, recommended social distancing measures cannot be enforced within cells designed for one person but occupied by two or three people or in barracks-style pretrial facilities, and probably also cannot be enforced in other areas.

Thus, in my opinion, if a fully-vaccinated person incarcerated before trial consistently wears a mask while incarcerated but contracts symptomatic COVID-19 due to exposure to the SARS-CoV-2 virus while incarcerated, this would clearly constitute unconstitutional "punishment" in violation of the due process clause of the Hawai'i constitution.[9]

In order to avoid unconstitutional pretrial punishment, provisions within article 1, section 12 of the Constitution of the State of Hawai'i must be effectuated and enforced. That section provides in part that "[e]xcessive bail shall not be required" and that a "court may dispense with bail if reasonably satisfied that the defendant ... will appear when directed, except for a defendant charged with an offense punishable by life imprisonment." Haw. Const. art. 1, § 12.

In my opinion, bail set in an amount higher than a person can afford can be "excessive."[10] Even without COVID-19 intermittently spreading in our various CCFs, as discussed earlier, I believe incarcerating a person before trial without reasons permitted by the constitution would constitute unconstitutional "punishment" inflicted before an adjudication of guilt.[11] But due to the pandemic, I believe that even for those people for whom pretrial incarceration might otherwise be constitutionally permissible, judges should consider pretrial release or release with conditions, such as home confinement with monitoring pending trial.

Thus, the prohibitions on pretrial punishment and excessive bail must be effectuated and enforced by our courts. For those currently in custody, various procedural mechanisms exist. Despite the abolishment of the writ of habeas corpus in the post-conviction context by Hawai'i Rules of Penal Procedure Rule 40(a) (2006), the writ is still available in the pre-conviction context. SeeHRS § 660-3 (2016) ("The supreme court ... and the circuit courts may issue writs of habeas corpus in cases in which persons are unlawfully restrained of their liberty[.]"). Habeas petitions requiring evidentiary hearings, however, must be filed in the circuit courts. SeeOili v. Chang, 57 Haw. 411, 412, 557 P.2d 787, 788 (1976). Hence, individuals incarcerated pretrial may file petitions for writs of habeas corpus in our circuit courts or motions for pretrial release in the appropriate courts. After completion of evidentiary hearings in trial courts, writs of habeas corpus are also available in this court for pretrial bail matters. See, e.g., Sakamoto, 56 Haw. at 447, 539 P.2d at 1197.

***16** For those that may be charged with crimes in the future, our trial courts must also uphold the constitutional prohibitions on pretrial punishment and excessive bail when addressing bail for newly-filed charges.

III. The Hawai'i constitution prohibits cruel or unusual punishment for those convicted of crimes

A. "Cruel or unusual punishment"

Article 1, section 12 of the Constitution of the State of Hawai'i also prohibits the infliction of "cruel or unusual punishment" for those convicted of crimes. In comparison, the Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments."[12] (Emphasis added.)

Our case law has been applying a "proportionality" test not available under the Eighth Amendment's "cruel and unusual" punishment prohibition, but has been doing so on the basis that the federal and state constitutions contain identical language. For example, in State v. Guidry, this court stated:

> [T]he standard by which punishment is to be judged under the "cruel and unusual" punishment provision of the Hawai'i Constitution is whether, in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the

> conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community."

105 Hawai'i 222, 237, 96 P.3d 242, 257 (2004) (cleaned up).[13]

The fifty states' constitutions differ in terms of whether their respective constitutions mirror the federal constitution's "cruel and unusual" language. Specifically, twenty states use the conjunctive language,[14] twenty states use the disjunctive language,[15] two states use both the conjunctive and disjunctive forms,[16] six states ban only cruel punishments,[17] and three states do not reference any of these terms.[18]

***17** Article 1, section 17 of the Constitution of the State of California provides, "Cruel or unusual punishment may not be inflicted or excessive fines imposed." In 1972, the Supreme Court of California analyzed the death penalty against the disjunctive requirements of its state constitution in People v. Anderson, 493 P.2d 880 (Cal. 1972). Although Anderson was later superseded by legislation and constitutional amendment ratifying the death penalty, the court's construction of the disjunctive language is noteworthy. This case was the first time the California court acknowledged the significance of "cruel or unusual" versus "cruel and unusual." Id. at 888 ("Although we have often considered challenges to the constitutionality of capital punishment, we have heretofore approached the question in the Eighth Amendment context of 'cruel And unusual' punishment, using that term interchangeably with the 'cruel Or unusual' language of article 1, section 6, of the California Constitution, and have never independently tested the death penalty against the disjunctive requirements of the latter.").

The Anderson court first reviewed the constitutional history of the provision and noted that the initial proposal at the Constitutional Convention of 1849 actually used the term "cruel and unusual punishment." Id. at 883-84. When the House of Delegates finally adopted the section, however, the language had changed to "cruel or unusual" punishments. Id. at 884. The court concluded that this change was intentional in light of the debates over other state constitution models that did not use the conjunctive form:

> Although the delegates to the convention were limited in their access to models upon which to base the proposed California Constitution at the commencement of their deliberations, by the end of the convention they had access to the constitutions of every state. At least 20 state constitutions were mentioned by delegates during the debates. The majority of those which included declarations of rights or equivalent provisions differed from the New York, Iowa, and United States Constitutions and did not proscribe cruel And unusual punishments. Rather, they prohibited 'cruel punishments, or 'cruel or unusual punishments.' Several had provisions requiring that punishment be proportioned to the offense and some had dual provisions prohibiting cruel and/or unusual punishments and disproportionate punishments.
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> The fact that the majority of constitutional models to which the delegates had access prohibited cruel or unusual punishment, and that many of these models reflected a concern on the part of their drafters not only that cruel punishments be prohibited, but that disproportionate and unusual punishments also be independently proscribed, persuades us that the delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state. In reaching this conclusion we are mindful also of the well established rules governing judicial construction of constitutional provisions. We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form 'haphazardly,' nor may we assume that they intended that it be accorded any but its ordinary meaning.

Id. at 884-85 (cleaned up).

The court next examined past case law and admitted that it previously used the conjunctive and disjunctive forms interchangeably. It reasoned that its past disregard for whether a punishment could be unconstitutionally "cruel" was understandable because, at the time, capital punishment was "not considered so cruel" and "was a widely accepted, customary punishment," so cases were decided with more focus on whether the penalty was "unusual." Id. at 888-89. The court determined that it could no longer continue assuming that capital punishment comported with "contemporary standards of decency" and thus had to reexamine whether it was cruel, unusual, or both according to then-present standards. Id. at 891.

***18** Discussing cruelty, the Anderson court concluded that California's framers "used the term cruel in its ordinary meaning--causing physical pain or mental anguish of an inhumane or tortuous nature." Id. at 892. Whether a punishment was unconstitutionally cruel depended on "whether the punishment affront[ed] contemporary standards of decency." Id. at 893. The court considered several factors, including public acceptance of the punishment; the frequency of its actual application;

the pain and dehumanizing effects, including the "brutalizing psychological effects," of the punishment; and whether the continued practice of the punishment demeaned the "dignity of man, the individual and the society as a whole." Id. at 893-95. Additionally, while the court did not decide the permissibility of "necessary" cruelty, it held that the death penalty, at least, was not necessary to any state interest. Id. at 895-97.[19]

Article 1, section 16 of the Michigan Constitution of 1963 provides, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." The Supreme Court of Michigan acknowledged this textual difference from the federal Constitution and concluded that the divergence was intentional and also a compelling reason for broader state constitutional protection:

> [T]he Michigan provision prohibits "cruel or unusual" punishments, while the Eighth Amendment bars only punishments that are both "cruel and unusual." This textual difference does not appear to be accidental or inadvertent.[n.11]
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> ....
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> [n.11] While the historical record is not sufficiently complete to inform us of the precise rationale behind the original adoption of the present language by the Constitutional Convention of 1850, it seems self-evident that any adjectival phrase in the form "A or B" necessarily encompasses a broader sweep than a phrase in the form "A and B." The set of punishments which are either "cruel" or "unusual" would seem necessarily broader than the set of punishments which are both "cruel" and "unusual."

People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992).

Today, Michigan courts employ a three-part test to determine whether a punishment is "proportional" and therefore escapes the constitutional ban on "cruel or unusual punishment":

> "The Michigan Constitution prohibits cruel or unusual punishment, Const. 1963, art. 1, § 16, whereas the United States Constitution prohibits cruel and unusual punishment, U.S. Const., Am. VIII." People v. Benton, 294 Mich. App. 191, 204, 817 N.W.2d 599 (2011). "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." Id. (cleaned up). "[U]nder the Michigan Constitution, the prohibition against cruel or unusual punishment include[s] a prohibition on grossly disproportionate sentences." Id.
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> ***19** This Court employs the following three-part test in determining whether a punishment is cruel or unusual: "(1) the severity of the sentence imposed and the gravity of the offense, (2) a comparison of the penalty to penalties for other crimes under Michigan law, and (3) a comparison between Michigan's penalty and penalties imposed for the same offense in other states." Id.

People v. Burkett, No. 351882, 2021 WL 2483568, at *2 (Mich. Ct. App. June 17, 2021).

With respect to Massachusetts, part 1, article XXVI of the Constitution or Form of Government for the Commonwealth of Massachusetts provides, in relevant part, "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The Supreme Judicial Court of Massachusetts reads the disjunctive language[20] in its constitution as being "at least as broad as the Eighth Amendment to the Federal Constitution." Good v. Comm'r of Correction, 629 N.E.2d 1321, 1325 (Mass. 1994) (citing Michaud v. Sheriff of Essex Cnty., 458 N.E.2d 702 (Mass. 1983)) (emphasis added). Earlier Massachusetts case law echoed California's initial threshold of "contemporary standards of decency which mark the progress of society." Id. The test thereafter evolved into one of proportionality:

> "The touchstone of art. 26's proscription against cruel or unusual punishment ... [is] proportionality." Commonwealth v. Perez, 477 Mass. 677, 683, 80 N.E.3d 967 (2017). "The essence of proportionality is that 'punishment for crime should be graduated and proportioned to both the offender and the offense.' " Id., quoting Miller, 567 U.S. at 469, 132 S.Ct. 2455.
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> "To reach the level of cruel [or] unusual, the punishment must be so disproportionate to the crime that it shocks the conscience and offends fundamental notions of human dignity" (quotation and citation omitted). Commonwealth v. LaPlante, 482 Mass. 399, 403, 123 N.E.3d 759 (2019). To determine whether a sentence is disproportionate requires (1) an "inquiry into the nature of the offense and the offender in light of the degree of harm to society," (2) "a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth," and (3) "a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions" (quotation and citation omitted). Cepulonis v. Commonwealth, 384 Mass. 495, 497-498, 427 N.E.2d 17 (1981). "The burden is on a defendant to prove such disproportion...." Id. at 497, 427 N.E.2d 17.

Commonwealth v. Concepcion, 164 N.E.3d 842, 855 (Mass. 2021). Like Michigan, Massachusetts has not defined the words "cruel" or "unusual" separately but has construed the disjunctive phrase together as providing broader protection.

Washington is one of the six states that bans only "cruel" punishment. Article 1, section 14 of the Constitution of the State of Washington provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." The Supreme Court of Washington found the state's departure from the federal Constitution to be intentional:

> ***20** Especially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation. The historical evidence reveals that the framers of Const. art. 1, § 14 were of the view that the word "cruel" sufficiently expressed their intent, and refused to adopt an amendment inserting the word "unusual". The Journal of the Washington State Constitutional Convention: 1889 501-02 (B. Rosenow ed. 1962).

State v. Fain, 617 P.2d 720, 723 (Wash. 1980). The court has also repeatedly held that Washington's cruel punishment clause offers greater protection than the federal cruel and unusual punishment amendment. See, e.g., State v. Manussier, 921 P.2d 473 (Wash. 1996); State v. Bartholomew, 683 P.2d 1079 (Wash. 1984); State v. Fain, 617 P.2d 720 (Wash. 1980); State v. Morin, 995 P.2d 113 (Wash. App. 2000); State v. Ames, 950 P.2d 514 (Wash. App. 1998); State v. Roberts, 14 P.3d 713 (Wash. App. 2000); State v. Ramos, 387 P.3d 650 (Wash. 2017); State v. Gregory, 427 P.3d 621, 631 (Wash. 2018).

Washington applies a proportionality test for assessing whether a sentence is "cruel." The Washington factors for proportionality are nearly identical to both the Michigan and Massachusetts tests: the nature of the offense, the legislative purpose behind the criminal statute, the punishment the defendant would have received in other jurisdictions for the same offense, and the punishment imposed for other offenses in the same jurisdiction. Fain, 617 P.2d at 720.

The Washington Supreme Court is currently considering an inmate's constitutional challenge to the conditions of his confinement due to the COVID-19 pandemic. Matter of Williams, 476 P.3d 1064, 1078 (Wash. App. 2021), review granted, 484 P.3d 445 (Wash. 2021). In Matter of Williams, petitioner Robert Williams was a 78-year-old Black man diagnosed with diabetes and hypertension who was also largely immobilized after suffering a stroke. Williams, 476 P.3d at 1070. He had been sentenced to 270 months of confinement for first-degree burglary, first-degree robbery, and attempted second-degree murder and entered prison at age 67. Id. Following the outbreak of COVID-19 in his prison and his deteriorating health post-infection, Williams argued that, given his age, race, and disabilities, the conditions of his confinement became a "cruel punishment" in violation of Washington's constitution and he should be released. Id. In February 2021, the Supreme Court of Washington determined that the continuous evolution of "grim facts" surrounding the case warranted review. Matter of Williams, 484 P.3d 445, 447 (Wash. 2021).

The constitutional history of our "cruel or unusual punishment" clause does not appear to explain why our constitution uses the disjunctive "or." Cases from other states can provide some guidance but are not binding on us. Importantly, however, the state high court decisions discussed above all agree on the importance of interpreting state constitutions to provide greater rights than under the federal constitution.

In this regard, the Hawai'i constitution is unique and must be interpreted according to its own principles. But we must effectuate the plain language of the self-executing provision of our constitution that prohibits "cruel" or "unusual" punishment. I believe our law in this area must be developed. In doing so, I believe we should consider the preamble to our state constitution, which provides:

> ***21** We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, "Ua mau ke ea o ka aina i ka pono."
>
> We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire.
>
> We reaffirm our belief in a government of the people, by the people and for the people, and with an understanding and compassionate heart toward all the peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii.

No other constitution in the world requires that those it governs dedicate their efforts to fulfilling the philosophy of "Ua mau ke ea o ka 'āina i ka pono." I am also not aware of any other constitution that expresses "an understanding and compassionate heart toward all the peoples of the earth."

Thus, the preamble of our constitution encourages all of us, including our courts, to act in a manner that is pono

and with an understanding and compassionate heart. We should interpret and give life to our constitutional prohibition against "cruel or unusual punishment" in this light.

B. Cruel or unusual punishment is occurring due to the over-incarceration epidemic overlaid with the COVID-19 pandemic

In whatever manner we interpret our constitutional prohibition against cruel or unusual punishment, the over-incarceration epidemic overlaid with the COVID-19 pandemic may now be causing conditions of confinement that are unconstitutionally "cruel" or "unusual." For example, at the September 22, 2021 hearing on this petition, the State reported that seven people incarcerated at Halawa Correctional Facility had died from COVID-19 as of that date. If the count of 748 people incarcerated there as of September 20, 2021 is used, this would mean that approximately one person out of every 107 people incarcerated there has died of COVID-19.

In contrast, as of September 22, 2021, the State of Hawai'i Department of Health reported 726 cumulative deaths statewide. Subtracting the seven Halawa deaths left 719 deaths statewide as of that date. Hawaii COVID-19 Data, State of Hawai'i – Department of Health: Disease Outbreak Control Division | COVID-19, https://health.hawaii.gov/coronavirusdisease2019/current-situation-in-hawaii/, also available at https://perma.cc/2MC5-NN3N (last visited Sept. 22, 2021). It appears that almost all COVID-19 deaths in Hawai'i occurred in people over the age of 18, id., and all those incarcerated at Halawa are presumably over 18. Of Hawai'i's estimated 1.46 million population, about 76.4%, or 1,111,188 people, are over 18 years old. Latest Population Estimate Data for the State of Hawai'i, Dep't of Bus. Econ. Dev. & Tourism, https://census.hawaii.gov/home/population-estimate/, also available at https://perma.cc/YU62-EJU8 (follow "DBEDT Data Warehouse" hyperlink; select the "Population (Census): Total Resident (Census)" and the "Population by Age: 18 years and over" indicators; select "State of Hawaii" as the Area and "Annual" for the Frequency for 2020; then select "Get Data").

Thus, for the general population in Hawai'i over the age of eighteen, it appears COVID-19 has caused one death per 1,612 people as of September 22, 2021. This means that people incarcerated in Halawa had a COVID-19 death rate more than fifteen times greater than that of the general population. Granted, I do not know whether people incarcerated at Halawa have higher rates of underlying conditions than the general. In light of this death rate, however, the number of people incarcerated at Halawa needs to be reduced to prevent further transmission of COVID-19.

***22** I also note that according to DPS, two of our people incarcerated at the Saguaro Correctional Center in Arizona have died of COVID-19. PSD CORONAVIRUS (COVID-19) INFORMATION AND RESOURCES, State of Hawaii: Department of Public Safety (Mar. 17, 2020), https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19information-and-resources/, also available at https://perma.cc/PPA5-PCXU. Kī'aha also points out that the disproportionately disparate treatment of Native Hawaiians in our criminal justice system has resulted in a disproportionate percentage of Native Hawaiians being transferred to Saguaro.[21]

Even before COVID-19, I had concerns regarding whether the long-term transfer of Native Hawaiians to the continental United States implicates article XII, section 7 of the Hawai'i constitution, which states:

> **Section 7.** The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

As explained in Native Hawaiian Law: A Treatise:[22]

> In essence, indigenous cultural property includes everything with which indigenous peoples have a relationship and to which they have a responsibility. As [former U.S. Human Rights] Special Rapporteur [Erica-Irene] Daes explains, "Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plans and places with which the song story or medicine is connected." Therefore, indigenous peoples' cultural property can be conceived as "a bundle of relationships, rather than a bundle of economic rights."

***23** Thus, it appears to me that article XII, section 7 of the Hawai'i constitution encompasses "human relationships" within its protections. The reality is that, even before the COVID-19 pandemic, Native Hawaiians transferred to Saguaro were largely cut off from familial and other cultural human relationships. The COVID-19 pandemic has seriously exacerbated this disconnect. Thus, distinct

cultural rights of Native Hawaiians protected by the Hawai‘i constitution may also inform what constitutes “cruel or unusual punishment” with respect to Native Hawaiians.[23]

Turning back to “cruel or unusual punishment” in general, as of September 20, 2021, 359 people were incarcerated by DPS based on alleged probation violations and 658 people were incarcerated based on alleged parole violations. This totals 1,017 people, or about 25% of the 4,077 people incarcerated in DPS custody. In my opinion, especially if the alleged probation or parole violations are of a “technical” nature, such as missed check-ins with probation or parole officers, contraction of symptomatic COVID-19 by a mask-wearing fully-vaccinated person[24] in these categories would clearly constitute cruel or unusual punishment prohibited by the Hawai‘i constitution. In my opinion, this would also be true with respect to the fully-vaccinated[25] elderly, pregnant people, or those with underlying health conditions, who are especially vulnerable to COVID-19.

IV. Conclusion

As stated at the outset, we are dealing with an epidemic of over-incarceration now overlaid with the COVID-19 pandemic. We must remember that incarcerated people are people from our communities and families who, with very few exceptions for those sentenced to life imprisonment without the possibility of parole, are entitled to return to our communities and families without suffering long-term complications or death from COVID-19. In addition, we must address our over-incarceration epidemic. To address the actual and potentially unconstitutional conditions described above, I would therefore mandate as follows.

In 2019, the Hawai‘i State Legislature created the Hawai‘i Correctional Oversight Commission (“Oversight Commission”), tasked in part to “[e]stablish maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility[.]” SeeHRS § 353L-3(b)(2) (2019). In September 2020, the Oversight Commission issued its “Infectious Disease Emergency Capacities” report for Hawai‘i Correctional Facilities. See Hawaii Corr. Oversight Comm’n, Hawai‘i Correctional Facilities Infectious Disease Emergency Capacities (Sept. 2020), https://ag.hawaii.gov/wp-content/uploads/2020/09/FINAL REPORT-091120.pdf, also available at https://perma.cc/4YJN-JVQJ.

It is unclear to me whether the Oversight Commission stands by these capacity numbers for each facility now as this report was issued well before vaccinations became available. However, I also do not believe there were any deaths in Hawai‘i correctional facilities as of September 2020. I would in any event request an update from the Oversight Commission as to the capacity numbers it currently believes are appropriate for each CCF. I would also ask the DPS Corrections Division to post its Corrections Populations Reports weekly.

***24** I would then encourage our trial courts to effectuate the constitutional principles discussed above when they address bail for newly-filed charges. I would also encourage defense counsel to file individualized writs of habeas corpus or motions for release, as appropriate. Finally, I would encourage all those within our criminal justice system, including respondents and our trial courts, to continuously exercise their best efforts to apply measures within their legal authority and discretion to achieve capacity numbers for CCFs indicated by the Oversight Commission, whether during or after the COVID-19 pandemic.

I hereby join in the concurrence and dissent of Justice McKenna as to Sections I and III.A. only.

CONCURRENCE AND DISSENT TO ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR EXTRAORDINARY WRIT PURSUANT TO HRS §§ 602-4, 602-5(5), AND 602-5(6) AND/OR FOR WRIT OF MANDAMUS (By: Wilson, J.)

I. Introduction

In March 2020, the State of Hawai‘i (the “State”), including its incarcerated people, faced an emergency declared by the Governor.[1] The emergency constituted the Governor’s recognition that extraordinary emergency powers were necessary to protect the population from the lethal threat of COVID-19. The severity of the threat of COVID-19 infection to Hawai‘i’s incarcerated people and the failure of the Department of Public Safety (“DPS”) to meet its legal duty to protect them necessitated intervention by this court on their behalf.[2] At the time of

this court's emergency intervention in April 2020, no incarcerated person had died of or been infected with COVID-19.[3] Nevertheless, we intervened. We recognized that "[t]he COVID-19 pandemic ha[d] caused a public health emergency that [wa]s impacting Hawai'i's community correctional centers and facilities" and posited that there was "a significant interest in reducing inmate populations to protect those who work at or are incarcerated in these overcrowded facilities."[4] Thus, despite DPS' assurances that it was taking "reasonable steps" to "abate the risk" of COVID-19,[5] we appointed a special master and instituted procedures to facilitate the expedited release of certain categories of incarcerated people.[6]

***25** In the nearly eighteen months since we first intervened, the consequences from the pandemic have significantly worsened. Severe overcrowding has persisted:[7] six of nine DPS facilities are over design capacity, and DPS' current population is nearly as high as it was when this court first intervened in April 2020, with more people being detained pretrial now than in April 2020.[8] This overcrowding has exacerbated the unsafe and unsanitary conditions within DPS facilities. Incarcerated persons are forced to eat and sleep shoulder-to-shoulder, in some cases, with so many people in one cell that one person must sleep with his head directly next to the toilet.[9] At HCCC, detainees are frequently kept in areas without toilets or running water, forcing some to urinate on themselves, on the walls, or in their drinking cups.[10] The tension among incarcerated persons from being held in such conditions has led to violence, with at least one detainee beaten to death at OCCC in a module that was being used as a quarantine area for COVID-positive detainees.[11]

As of October 4, 2021: 2863 people in DPS custody and 389 members of DPS staff have contracted COVID-19;[12] of those incarcerated persons infected with COVID-19, 32 required hospitalization;[13] and of those 32 persons hospitalized, 7 passed away,[14] According to a recent report from Prison Policy Initiative, when comparing Hawai'i's incarcerated mortality rate (0.22%) to that of the general population (0.04%), incarcerated persons are 5.5 times more likely to die of COVID-19, making Hawai'i the most disproportionate state in the country.[15] And according to Justice McKenna's calculations, with respect to HCF specifically, "approximately 1 person out of every 107 people incarcerated has died[,]" leading to a death rate in HCF that is more than 15 times greater than that of the general population in Hawai'i.[16] Moreover, we know very little about the 7 incarcerated men who died of COVID-19. We do not know their names or backgrounds, or where, how, and under what circumstances they passed away.[17] The lack of disclosure on the part of DPS is an alarming signal that inmates may be dying due to inadequate medical care.[18]

***26** For pretrial detainees, compliance with HRS § 353-6.2 (2019) requires DPS to apprise the court, the prosecuting attorney, and defense counsel every ninety days of any "new information or a change in circumstances"--for example, updates about a pretrial detainee's health status or an outbreak of COVID-19 in their facility of confinement--that would warrant a release from custody and help prevent their future infection or death.[19] However, there is no indication that DPS has been complying with its statutory duty to conduct ninety-day reviews of pretrial detainees or transmit such reviews to the appropriate parties. There is nothing more serious than the deaths of those held under the care and control of the State to underscore the severity of the COVID-19 emergency and the urgency with which we must now act. And the lack of disclosure by DPS provides no assurance to this court that more people in DPS custody will not die of COVID-19.[20]

II. This Court has a Duty to Protect Incarcerated Persons from Cruel and/or Unusual Punishment in DPS Facilities

The Majority's attempts to justify this court's inaction in this proceeding run counter to five important truths: (1) DPS has failed to implement its Pandemic Response Plan ("PRP"), which was designed to protect incarcerated people from COVID-19; (2) DPS facilities are overcrowded at levels significantly over both design capacity and the Infectious Disease Emergency Capacities set by the Hawai'i Correctional System Oversight Commission ("HCSOC" or "Oversight Commission");[21] (3) pretrial detainees and convicted persons in DPS custody during the COVID-19 pandemic are being unconstitutionally subjected to cruel or unusual punishment;[22] (4) the United States District Court for the District of Hawai'i found "a strong likelihood" that DPS is violating the Eighth and Fourteenth Amendment rights of incarcerated people in Hawai'i;[23] and most critically, (5) incarcerated persons are at risk of being infected with, and potentially, dying of, COVID-19 so long as they are subjected to a present risk of infection in DPS facilities that far surpasses the dangerous conditions that caused court intervention in April 2020.[24]

***27** Notwithstanding the Majority's rejection of the

request by the Office of the Public Defender ("OPD") to protect Hawai'i's incarcerated people, the emergency created by the COVID-19 pandemic is not over.[25] The various measures previously taken by this court, and DPS have proven insufficient to prevent the spread of COVID-19 in Hawai'i's jails and prisons. These measures have failed, in large part, because meaningful and sustained population reduction in DPS facilities has not been achieved. Therefore, while I concur with the Majority's decision to order DPS to comply with the requirements of HRS § 353-6.2[26]--requirements imposed by the legislature and that apply even without this court's order--greater relief is warranted. The incarcerated population must be reduced to at least design capacity or to the HCSOC's Infectious Disease Emergency Capacities. And it is the duty of this court to finally heed the repeated entreaty of the Office of Public Defender for appointment of a public health expert to visit DPS facilities, report on the conditions of confinement and recommend corrective measures to end the cruel and unusual treatment of Hawaii's incarcerated people.

This court previously recognized, approximately thirteen months ago, that COVID-19 created a "public health emergency" and that rising cases within DPS facilities warranted "urgent and immediate concern in reducing" the incarcerated population.[27] Within the last month, the Majority found the threat to judges and Judiciary personnel posed by incarcerated persons infected with COVID-19 within our correctional facilities to be so severe as to require the suspension of pretrial incarcerated people's right to appear in person for preliminary hearings and arraignments pursuant to HRPP Rules 5[28] and 10 [29] of the Hawai'i Rules of Penal Procedure. Citing the "continued need to protect the health and safety of court users and Judiciary personnel during" the "unprecedented" COVID-19 emergency, the Majority suspended HRPP Rules 5 and 10.[30] The Majority's opinion that the severity of the COVID-19 emergency at Hawai'i's correctional institutions requires intervention of the court to protect the Judiciary, but does not require intervention of the court to protect the incarcerated population held in conditions that have caused infection and death constitutes an arbitrary inconsistency.[31]

***28** Incarcerated persons in DPS custody are being subjected to cruel and/or unusual punishment in violation of the Eighth Amendment of the United States Constitution and article I, section 12 of the Hawai'i Constitution.[32] The prohibition of cruel and unusual punishment reflects a benchmark for civilization and human decency. Under the federal constitution, the Eighth Amendment "proscribes more than [just] physically barbarous punishment";[33] it "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency[.]' " Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). The bounds of what constitutes cruel and/or unusual punishment is now being tested in Hawai'i's correctional facilities at both the federal and state levels.

The United States District Court for the District of Hawai'i found there was a strong likelihood that DPS was acting with "deliberate indifference" as to the inhumane conditions in DPS facilities, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment for postconviction detainees and the Fourteenth Amendment's prohibition against punishment for pretrial detainees.[34] Considering a record consistent with that currently before us, the federal district court found a strong likelihood that DPS was subjecting incarcerated people to inadequate testing and quarantining procedures, inadequate social distancing and mask wearing policies, severe overcrowding, and unsanitary living conditions.[35] The federal district court found that DPS was not following its Pandemic Recovery Plan and "ha[d] not taken reasonable available measures to abate the risks caused by the [aforementioned] conditions, knowing full well--based on multiple prior outbreaks--that serious consequences and harm would result to the inmates."[36] Dissatisfied with DPS' contentions that it was complying with its PRP, the federal district court noted that "[p]olicies are meaningless if they are not followed" and found that DPS' actions and alleged failure to comply with their PRP constituted "more than simple lapses [in compliance]" and, at times, showed "complete disregard for the [PRP.]"[37] To protect the incarcerated population from cruel and unusual conditions, the court partially granted a preliminary injunction that, in relevant part, ordered DPS to "fully comply" with its PRP and to "[p]rovide sanitary living conditions to all inmates in DPS custody[.]"[38]

***29** DPS is also violating the right of incarcerated people to be free from cruel or unusual punishment under article I, section 12 of the Hawai'i Constitution. DPS has failed to take "reasonable action to protect" incarcerated persons "against unreasonable risk of physical harm[,]" instead maintaining overcrowded facilities where COVID-19 has and will continue to infect, and possibly cause the death of, these persons.[39] Though this court has not had the opportunity to expound on what constitutes "cruel or unusual punishment" under the Hawai 'i Constitution, it is clear that confinement in unsanitary, overcrowded conditions under the constant threat of contracting an infectious and lethal disease is cruel or unusual.[40]

DPS is also violating the right of pretrial detainees to be free from punishment under article I, section 5 of the Hawai‘i Constitution. Those being held pretrial--909 individuals comprising approximately 30% of the total incarcerated population--have not been convicted of a crime and are presumed innocent, yet are subjected to the same overcrowded, unsanitary environment with the same elevated risk of infection with a deadly disease as those being held postconviction.[41] These pretrial detainees are not only being subject to cruel or unusual punishment in contravention of article I, section 12, but also to unconstitutional punishment under the Fourteenth Amendment of the United States Constitution and article I, section 5 of the Hawai‘i Constitution.[42]

The Majority, considering the same alleged conditions as the federal district court, has determined that the conditions in which incarcerated people are being held in Hawai ‘i are neither inhumane nor cruel or unusual. The Majority does not find it to be cruel or unusual that thousands of incarcerated persons have contracted COVID-19, or that seven people have died, while in DPS custody. The Majority does not find it to be cruel or unusual that innocent persons are being detained pretrial in overcrowded facilities that consistently experience new infections and outbreaks of COVID-19.[43] The Majority, instead, contends "the record is insufficient to warrant [the] extraordinary relief" requested by the OPD. This contention, however, disregards the uncontroverted expert testimony this court received from Dr. Pablo Stewart, who not only described in detail the conditions within OCCC that would lead to unnecessary infection and death, but also correctly predicted as early as April 2020 that DPS' inadequate pandemic response would lead to outbreaks within OCCC and other DPS facilities,[44] and that such outbreaks would "overwhelm local hospitals" and strain the healthcare facilities also used by the general population.[45]

***30** In lieu of ordering relief, the Majority cites availability of the vaccine and states that 66% of the incarcerated population is fully vaccinated. But the Majority fails to acknowledge that the vaccination rate in our jails, where the community is more susceptible to COVID-19 outbreaks due to a consistent inflow of new detainees, is significantly lower, only 54.75%, and at OCCC is a mere 49%, as of September 21, 2021.[46] The Majority cites no evidence that such a low vaccination rate will actually prevent infections in DPS facilities; in fact, two major outbreaks have occurred, both in jails,[47]after April 2021, when virtually all persons in DPS custody became eligible for vaccination.[48] The Majority also fails to acknowledge the increased transmissibility of the Delta variant, which according to the Centers for Disease Control is twice as contagious as previous variants and is transmissible even to vaccinated individuals,[49] and currently accounts for 93% of new infections in Hawai‘i.[50] Relying solely on vaccination also discounts the possibility of new variants developing and spreading.[51] Other than the Majority's speculation, there is no evidence to counter the finding of the federal district court that despite the rate of vaccination of incarcerated persons, cruel and unusual conditions persist.

***31** The Majority also contends that "much of the relief" requested by the OPD in this proceeding is "already being addressed" by the five-member Monitoring Panel established under the Settlement signed by the parties in Chatman v. Otani, No. CV 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021). Respectfully, the Majority is incorrect. The Settlement states that the Panel is "advisory" and may provide only "non-binding" recommendations to DPS.[52] Three of the five Panel members are present or former DPS employees, and only one member is an independent public health and corrections expert.[53] Critically, the Settlement expressly precludes the Panel from addressing the overcrowding that exacerbates the COVID-19 threat and all other cruel and/or unusual conditions of confinement.[54] There is no indication that the Panel has convened, and the Panel will end in approximately ninety days, after January 31, 2022, along with "all jurisdiction of any court to enforce" the Settlement.[55] The Majority makes the unlikely assumption that the Panel will accomplish in less than ninety days by agreement of the five Panel members what the single master appointed by this court was unable to achieve: devise measures DPS should take to comply with its legal duty to protect incarcerated people through quarantine, sanitization, social distancing, testing, contact tracing, and vaccination procedures.[56] As noted, were the five-member Panel to act with extraordinary alacrity to achieve this objective, the Panel's authority to provide guidance to DPS would only continue until January 31, 2022, the date the Settlement expires.[57] It is not likely, however, that the Panel will make constructive recommendations, that DPS adopts such recommendations, and that the conditions in DPS facilities actually improve before the Settlement's expiration. Thus, this court cannot rely on the Monitoring Panel established in Chatman to eliminate the threat posed by COVID-19 in Hawai ‘i's correctional facilities.

While the boundaries set by the United States Constitution are being rigorously defended by the federal district court, this court refuses to do the same on behalf of the Hawai‘i Constitution. In refusing to do so, the Majority relies on as yet unidentified relief in Chatman that cannot address the signature cause of the unconstitutional conditions: overcrowding. COVID-19

remains a public health emergency,[58] as evidenced by the 2863 incarcerated persons who have contracted COVID-19, as well as the 7 people who have died of COVID-19, while under DPS' care.[59] It is the duty of this court to independently uphold the rights of incarcerated people under both the United States and the Hawai'i Constitution where the proven consequences of this court's failure to do so is the death of people placed in custody by the State Judiciary.

III. This Court Must Order the Reduction of the Incarcerated Population and Appoint a Public Health Expert

The gravity of the current emergency and the magnitude of the constitutional violations in this case warrant significant relief. The relief now requested by the OPD is largely the same as that relief first requested by the OPD eighteen months ago, and then again, one year ago, based on the unrefuted expert opinion of Dr. Stewart describing the unsanitary, crowded, and dangerous conditions that have since worsened at OCCC.[60] Had the unrebutted oft-repeated expert opinion of Dr. Stewart been heeded, had the special master entered DPS facilities and ordered the conditions therein to be made constitutional, and had the recommendations of the Oversight Commission been implemented by this court to reduce the prison population to at or below design capacity, lives would have been saved and unconstitutional suffering ended. As it is now, men and women suffer fear and disease that has escalated into a new cycle of proven lethality: incarcerated individuals are dying under unknown circumstances and pretrial detainees are being held without bail in conditions that DPS fails to disclose in violation of the legislative mandate that their conditions be described every three months pursuant to HRS § 353-6.2. To comply with the basic standard of humanity and human decency that prohibits cruel and unusual punishment under the Eighth Amendment of the United States Constitution and prohibits cruel or unusual punishment under article I, section 12 of the Hawai'i Constitution, this court must "[o]rder the Circuit, Family and District courts, DPS, and the [Hawai 'i Paroling Authority] to reduce the population of Hawai 'i's correctional facilities ... to their design capacity and/or Infectious Disease Emergency Capacity as recommended by the [HCSOC]" and "[a]ppoint a public health expert to enter into all of Hawai'i's correctional facilities and review protocols, the ability to social distance and make recommendations."[61] The expert must be provided full disclosure by DPS of the identities and circumstances of the seven deaths at HCF to ensure that no more incarcerated people die of COVID-19 in DPS custody.

IV. Conclusion

***32** For the foregoing reasons, I concur with part II of the Majority's Order, which concludes that this court has authority under the Hawai'i Constitution and state statutes to grant relief in this proceeding, and the portion of the Order requiring DPS to comply with HRS § 353-6.2, and respectfully dissent from the Majority's denial of the OPD's "Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus." I also concur with parts I and III.A of Justice McKenna's concurring and dissenting opinion.

CONCURRENCE AND DISSENT OF EDDINS, J.

I concur with the outcomes of the court's order. But I cannot endorse the order's premise.

The fundamental reason Petitioner must be denied so much of the relief it wants is not that Petitioner has failed to show its entitlement to a writ (though I agree that is the case here). It is, rather, that this court does not have the authority to grant the Office of the Public Defender (OPD) the relief it seeks. To the extent the OPD asks us to rewrite bail statutes, commute sentences, or micromanage the Hawai'i Paroling Authority, it is asking us to exercise legislative and executive power. This court has broad powers to both control the litigation before it and administer justice. But our power is judicial. We cannot do what Petitioner asks of us. Not even in times of emergency. SeeHaw. Insurers Council v. Lingle, 120 Hawai'i 51, 70, 201 P.3d 564, 583 (2008).[1]

After explaining why this court lacks the authority to grant Petitioner much of the relief sought, I supplement my concurrence with the court's order in two respects.

First, leaving aside my jurisdictional concerns, I elaborate on why – with one exception - Petitioner has failed to show it is entitled to a writ of mandamus or an extraordinary writ.

Second, I clarify my concurrence with the court's

disposition of Petitioner's constitutional claims. After stating my belief that convicted inmates bringing conditions-of-confinement claims under article I, section 12 would not need to show subjective deliberate indifference, I ultimately agree with the court's decision to refrain from analyzing the constitutional claims OPD gestures towards in its petition: no matter how generous article I, section 12's protections may be, the underdeveloped record in this case cannot support a finding that the Department of Public Safety (DPS) violated inmates' constitutional rights.

I. THIS COURT LACKS THE AUTHORITY TO GRANT PETITIONER THE RELIEF IT SEEKS

A. None of the statutes Petitioner cites authorize us to grant the relief Petitioner seeks

Citing the need to mitigate the risks posed by the ongoing COVID-19 pandemic, the OPD asks us to order trial courts deciding certain inmates' release motions to presume release in the absence of a finding that it would pose a significant risk to the safety of the inmate or the public.[2] This request encompasses motions for release brought by certain individuals serving a term of imprisonment as a condition of felony or misdemeanor probation or deferral. It also encompasses motions for release brought by many pretrial detainees. The OPD also asks us to order trial courts to suspend the custodial portion of intermittent sentences.[3] And to tell the Department of Public Safety how to best mitigate COVID-19 risks in Hawai'i prisons.[4] OPD also wants us to (among other things) order the Hawai'i Paroling Authority to use "remote technology" when conducting parole hearings, consider releasing some classes of individuals, and prepare periodic progress reports.[5]

***33** The OPD's petition cites an array of statutory and constitutional provisions that it says empower the court to grant this relief. None of them do.

Article VI, sections 1 and 7 of the Hawai'i Constitution concern the State's judicial power and the supreme court's role in making rules and regulations governing courts' exercise of judicial power:

> The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.

Haw. Const. art. VI, § 1.

> The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.

Id. at § 7.

The orders the OPD requests are neither "rules and regulations" in civil or criminal cases nor related to court processes, practices, procedures, or appeals. Article VI, section 7 authorizes the supreme court to promulgate, for example, the Hawai'i Rules of Appellate Procedure, the Hawai'i Rules of Professional Conduct, and the Hawai'i Rules of Civil Procedure. But it does not authorize us to dictate what precautions the Department of Public Safety should take in its correctional facilities. Nor does it authorize us to curate a list of crimes from the Hawai'i Penal Code and order that a "presumption of release" applies to motions for release brought by those accused or convicted of crimes on our list. This is pure policy work and it is the domain of others. Not this court.

Any doubt on this point is settled by Hawai'i Revised Statutes (HRS) § 602-11 (2016). The first sentence of that statute is substantively identical to article VI, section 7 of the constitution: "The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law." HRS § 602-11. Its second sentence, however, dictates that rules promulgated by the court may not effect litigants' substantive rights or expand the court's jurisdiction: "Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations." Id. (emphasis added).

The relief the OPD seeks is directly related to inmates' substantive rights. It is therefore not something the court can appropriately grant through the exercise of its Article VI, section 7 power to promulgate "rules" relating to "process, practices, procedure and appeals." Seeid.

Petitioner also cites HRS § 602-4 (2016) as authorizing this court to grant the requested relief. That statute gives the supreme court "general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly

provided by law." This is a broad grant of power within our domain: when it comes to the courts and what happens in courts, we are supreme and may intervene to forestall or fix errors and abuses as we see fit. See, e.g., State v. David, 141 Hawai'i 315, 327, 409 P.3d 719, 731 (2017) (exercising supervisory powers under HRS § 602-4 to address an important question of law presented by appellant even though its resolution was not essential to the case's disposition); State by Off. of Consumer Prot. v. Joshua, 141 Hawai'i 91, 93, 405 P.3d 527, 529 (2017) ("Pursuant to our supervisory powers under [HRS § 602-4], we reinforce our advisement ... that when circuit courts intend their rulings to be final and appealable, they must enter appealable final judgments."). But nothing in the text of HRS § 602-4 or our historical invocations of it suggests we are authorized to enact novel presumptions of law, control correctional facilities, or curb trial courts' statutory discretion in adjudicating motions for release.

***34**HRS § 602-5(a)(5) (2016) also provides no basis for the relief OPD seeks. That statute gives the supreme court the power to "make or issue any order or writ necessary or appropriate in aid of its jurisdiction, and in such case, any justice may issue a writ or an order to show cause returnable before the supreme court...." HRS § 602-5(a)(5) (emphasis added). The court's authority to issue writs under HRS § 602-5(a)(5) is expressly limited: it may issue only those writs necessary or appropriate "in aid of its jurisdiction." This language reflects the fact that though writs are one procedural tool the court may use when exercising power, they are not an independent source of jurisdictional power. Likewise, HRS § 602-5(a)(3)[6] grants the supreme court the jurisdiction to decide writs of mandamus and exercise "such other original jurisdiction as may be expressly conferred by law...." This is a codification of the court's power to address questions properly arising under writs. Not an authorization to exercise legislative or executive power.

Petitioner's strongest argument that this court has the authority to grant the requested relief is found under HRS § 602-5(a)(6). That statute grants the supreme court the jurisdiction to:

> make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

That last clause – "or for the promotion of justice in matters pending before [the court]" – is conceptually capacious.

Petitioner takes up the invitation offered by HRS § 602-5(a)(6)'s expansive language. The OPD suggests a reading of the statute that renders this court effectively omnipotent. Under Petitioner's reading[7] of HRS § 602-5(a)(6), this court may make any order or mandate so long as two conditions are met. First, the order or judgment has some connection, however tenuous, to the subject matter of a case pending before the court. And second, the court thinks its order would promote justice. That's it.

HRS § 602-5(a)(6) gives us broad powers to promote justice "in matters pending before [the court]." But Petitioner reads the statute as authorizing us to promote justice in any domain *related to* matters pending before the court. This reading both skirts the separation of powers doctrine and, arguably, renders the statute facially unconstitutional. To provide but one illustration, the legislature has delegated responsibility for administering correctional facilities to the Department of Public Safety. SeeHRS § 26-14.6(b) (2009 & Supp. 2015). Any reading of HRS § 602-5(a)(6) that authorizes this court to order DPS to, when possible, use liquid or foam soap, instead of bar soap, in correctional facilities[8] would unconstitutionally infringe on the executive's power.[9]

***35** Absent a showing that DPS is violating inmates' constitutional rights or neglecting a nondiscretionary ministerial duty - or that an injunction is necessary to *prevent* a constitutional violation - this court has no authority to tell DPS how to run Hawai'i's correctional facilities.

B. Nothing in SCPW-20-0000509 justifies the relief Petitioner seeks

Petitioner provides one final explanation of this court's jurisdiction to grant the requested relief: this court's orders in connection with OPD's previous petitions. Petitioner's argument is, effectively, that what the court has done before, it may lawfully do again.

Several of the actions the court took in response to the March and August 2020 petitions were not just lawful, they were prudent. For example, in April 2020, the court appointed the Honorable Daniel R. Foley (ret.) as a special master. See Order of Consolidation and for Appointment of Special Master, Office of the Public Defender v. Connors, SCPW-20-0000200 at 6 (April 2, 2020). Judge Foley worked with the interested parties to address the issues raised in the March 2020 petitions and

submitted detailed reports to the court. Judge Foley's appointment was an appropriate exercise of the court's inherent powers.[10]

But the fact that some of the actions the court took in response to the OPD's prior petitions were lawful does not mean that *all* of them were. Portions of our August 17, 2020 "Amended Order Re: Petty Misdemeanor and Misdemeanor Defendants" (the August 17 Order) and our August 27, 2020 "Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants" (collectively the August 2020 Orders) were unjustified, supported by neither the statutes they cited nor by the court's "inherent powers."

In the August 17 Order, the court temporarily suspended *en masse* court orders incarcerating certain pretrial detainees. SeeIn re Individuals in Custody of State of Hawai'i, No. SCPW-20-0000509, 2020 WL 4873285 (Haw. Aug. 17, 2020), clarified on denial of reconsideration, No. SCPW-20-0000509, 2020 WL 5036224 (Haw. Aug. 26, 2020).[11]

***36** The court's August 27 "Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants" (the August 27 Order) went further and *prospectively* prohibited trial courts from setting bail for certain arrestees. The court commanded:

> With regard to individuals who are arrested and detained solely on petty misdemeanor or misdemeanor offenses after the filing date of this order that are not "excluded offenses," the respective trial court shall not set bail but shall release such individuals on their own recognizance or supervised release, and may impose conditions of release under HRS § 804-7.1.

In re Individuals in Custody of State of Hawai'i, No. SCPW-20-0000509, 2020 WL 5057630, at *2 (Haw. Aug. 27, 2020) (emphasis added), amended, No. SCPW-20-0000509, 2021 WL 1236964 (Haw. Mar. 31, 2021).

HRS § 804-9 (Supp. 2019) vests trial courts with discretion to set bail amounts and enumerates factors courts should consider in determining how much bail to impose: "The amount of bail rests in the discretion of the justice or judge ... and shall be set in a reasonable amount based upon all available information, including the offense alleged, the possible punishment upon conviction, and the defendant's financial ability to afford bail."

The August 27 Order effectively nullified HRS § 804-9 and trial courts' discretion under it. While the August 27 Order was in effect, trial courts could not both exercise their discretion under HRS § 804-9*and* comply with the supreme court's edict. There is nothing procedural about the determination that trial courts should be stripped of their statutory discretion to set bail under HRS § 804-9.

The legislative nature of the court's August 27, 2020, order is exemplified by its "excluded offenses" list.

This list – formulated by the court and included in the order – delineates the bounds of the order's applicability. If a person is arrested for an "excluded offense," then the court's new "no bail" rule would not apply to them. The trial court would retain its authority to set their bail pursuant to HRS § 804-9.

The court's curation of an "excluded offenses" list was pure policymaking. The court decided – understandably - that violation of a restraining order or injunction (HRS § 604-10.5 (2016)) would be an "excluded offense." Yet also that harassment by stalking (HRS § 711-1106.5 (2014)) and sexual assault in the fourth degree (HRS § 707-733 (Supp. 2017)) would not be. It picked "violation of interstate or intrastate travel quarantine requirements, as ordered pursuant to HRS ch. 127A" for inclusion on its list. And it left promoting minor-produced sexual images in the first degree (HRS § 712-1215.5 (2014)) off.[12] The court was not *providing process* when it made these decisions, it was legislating.[13]

***37** In her concurrence and dissent to the August 27 Order, Justice McKenna disagreed with the court's decision to put quarantine violation on the "excluded offenses" list. She argued that incarcerating "quarantine violators" might make it harder to "reduce and eventually eliminate COVID-19" in Hawai'i's correctional centers. In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *3 (McKenna, J., concurring and dissenting). This is a cogent argument. But it underscores the ways in which the court's curation of an "excluded offenses" list implicates questions of public health and criminal justice policy, not the provisioning of procedures, the administration of justice, or the exercise of the court's inherent powers.

The August 27 Order cited several statutes that it said justified its rewriting of bail and sentencing laws. The order said it was made "pursuant to this court's authority under Hawai'i Revised Statutes ("HRS") §§ 602-5(3) & (6) [sic] and § 706-625, Governor David Y. Ige's Emergency Proclamations, and HRS § 601-1.5." In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *1.

As discussed above, the first two statutes cited by the August 2020 Orders – HRS §§ 602-5(a)(3) & (6) – do not

authorize the court to extinguish trial courts' discretion under bail or sentencing laws.

It is unclear which portion of HRS § 706-625 (2014) the August 2020 Orders relied on. But that's just a statute concerning the trial court's discretion to revoke and modify probation. It doesn't authorize the supreme court to suspend the custodial portions of intermittent sentences imposed pursuant to HRS § 706-605 (2014 & Supp. 2018).

And HRS § 601-1.5 (2016) merely concerns the chief justice's authority over court deadlines and filing requirements.

The court's inherent powers also do not fully justify the August 2020 Orders.

This court's inherent powers, as codified in HRS § 602-4 and 602-5 are comprehensive, flexible, and far-reaching. There is nothing "narrow" about them. But our inherent powers - versatile and broad though they may be - do not free the court of all constitutional constraints on its actions. We may "provide process where none exists." SeeState v. Moriwake, 65 Haw. 47, 55, 647 P.2d 705, 712 (1982) (cleaned up). But we may not supplant the substance of already-existing laws.

Historically, we have invoked our inherent powers in situations involving the interpretation of laws or litigation logistics, fees, and fines. We have relied on these powers to, for example:[14]

- Provide guidance when the lowers courts have differed in their interpretations of a statute. SeeState v. Moniz, 69 Haw. 370, 742 P.2d 373 (1987).
- Clarify when preliminary hearings may be closed to the public. SeeGannett Pac. Corp. v. Richardson, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978).
- Reduce the fines imposed on a litigant for civil contempt. SeeHaw. Pub. Emp't Rels. Bd. v. Haw. State Tchrs. Ass'n, 55 Haw. 386, 520 P.2d 422 (1974).
- Award attorneys' fees to a party without a statutory entitlement to them. SeeCARL Corp. v. State, Dep't of Educ., 85 Hawai'i 431, 460, 946 P.2d 1, 30 (1997).
- Allow an individual defendant to seek an amendment of the lifetime revocation of his driver's license – even though such a challenge was not contemplated by the relevant statute - because justice so required. SeeFarmer v. Admin. Dir. of Ct., State of Haw., 94 Hawai'i 232, 11 P.3d 457 (2000).

***38** None of our prior invocations of our inherent powers suggest that the August 2020 Orders - to the extent they temporarily frustrated trial courts' ability to carry out their duties under HRS sections 706-624(2) (Supp. 2017), 706-625, and 804-9 - were lawful. Yes, a trial court has the authority to dismiss a manslaughter charge after two mistrials. Cf.Moriwake, 65 Haw. 47, 647 P.2d 705. But it doesn't follow that this court can gut trial courts' statutory discretion under the bail and sentencing laws.

The August 2020 Orders, while assuredly well-intentioned, were an anomaly. In other states, the acceleration of inmate release was accomplished through executive action, not judicial fiat.[15] And some state courts, when faced with petitions seeking relief similar to that sought here, have declined to grant it citing separation of powers concerns. For example, in Matter of Request to Modify Prison Sentences, 231 A.3d 667, 672-73 (N.J. 2020), the New Jersey Supreme Court rejected the Office of the Public Defender and the American Civil Liberties Union of New Jersey's request to "order a framework for the early release of several groups" of inmates on the grounds that "whether to grant parole or to furlough an inmate rests largely with the Executive Branch." See alsoColvin v. Inslee, 467 P.3d 953, 960-64 (Wash. 2020) (denying petition for writ of mandamus that sought to compel Washington's Governor and Department of Corrections Secretary to release certain offenders and lower prison populations in response to COVID-19 and proclaiming that the court would not "usurp" the executive's authority).

The Massachusetts Supreme Judicial Court took a different approach. That court, relying on its general supervisory power, did order the release of a limited group of pretrial detainees. SeeComm. for Pub. Counsel Services v. Chief Justice of Trial C., 142 N.E.3d 525, 530, aff'd as modified, 143 N.E.3d 408 (Mass. 2020). But the court - citing separation of powers concerns - also declined to release anyone serving a term of incarceration post-conviction. Id. at 540-42. The Supreme Judicial Court said that (absent a constitutional violation) it could not revise or revoke sentences "in a manner that would usurp the authority of the executive branch." Id. at 530. It emphasized that "mechanisms to allow various forms of relief for sentenced inmates exist within the executive branch." Id. at 542.[16]

***39** The circumstances surrounding other cases where a state supreme court took action to release pretrial detainees are distinguishable from those of the August

2020 Orders.[17]

In our common law system, precedent is legitimizing: enough wrongs *can* make a right. The snowballing weight of precedent can add the patina of validity to even the puniest legal reasoning. OPD's rote reliance on the court's orders in SCPW-20-0000509 illustrates this point. This is why - though I support the court's denial-in-part of the writ - I do not join the court's order to the extent it implies the court could have even granted OPD much of the relief it seeks.

II. OPD IS NOT ENTITLED TO MOST OF THE RELIEF IT SEEKS BUT IS ENTITLED TO A WRIT OF MANDAMUS ORDERING DPS TO COMPLY WITH HRS § 353-6.2

Despite my conclusion that the court lacks jurisdiction to act in this case, I agree with the court's conclusion that the OPD has not shown an entitlement to mandamus relief.

As this court routinely explains, a writ of mandamus is an extraordinary remedy. And no writ of mandamus will issue absent an indisputable showing that the petitioner is entitled to the requested relief. Petitioners seeking an extraordinary writ must also show that there are no other means of addressing the alleged wrong or obtaining the action sought. And writs of mandamus should not arrogate the discretionary authority of lower courts or displace the normal appellate procedures.

***40** Here, mandamus relief is largely inappropriate. There are other ways to address the alleged wrong. And granting the requested relief would intrude on lower courts' discretion. I do agree with the court though that OPD is entitled to a writ of mandamus ordering DPS to comply with its non-discretionary duties under HRS § 353-6.2 (Supp. 2019).

A. Article I, section 12 grants petitioners the relief they are seeking with respect to the regular employment of no cash bail

Petitioners ask us to:

> Order that the practice of no cash bail, including the release of individuals on their own recognizance, on signature bonds, or on supervised release, should be regularly employed, and pretrial detainees who are not a risk to public safety or a flight risk should not be held simply because they do not have the means to post cash bail.

Petitioner doesn't need an order from the court commanding that pretrial detainees who pose no public safety or flight risk should not be imprisoned simply because they lack the means to post cash bail. Article I, section 12 already endorses this conclusion. This potent provision of our bill of rights forbids both excessive bail and the unreasonable or arbitrary denial of bail. SeeHuihui v. Shimoda, 64 Haw. 527, 539, 644 P.2d 968, 976 (1982). Indeed, article I, section 12's language codifies trial courts' discretion to release nearly all defendants without bail.

The provision's legislative history foregrounds the powerful role it plays in ensuring that cash bail is not used to imprison the poor just because they lack the funds to post bail. Speaking against a 1978 constitutional amendment that would remove this provision from our constitution, Delegate Adelaide Keanuenueokalaninuiamamao "Frenchy" DeSoto spoke passionately about the role its protections play in protecting the poor:

> This amendment [removing what is now article I, section 12 from the state constitution] prejudices the poor.... I am advocating that, in the event there is a charge brought against a poor person, that poor person has just as much right to be released as the rich.... I urge this Convention to vote down this amendment ... I urge all of you to look at this amendment as a declaration against the poor....

Debates in the Committee of the Whole on Bill of Rights Comm. Prop. No. 15, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 651 (1980).

HRS § 804-9 too supports the assertion that *no one* in our state should be incarcerated merely because they cannot pay bail. That statute requires that the "bail amount should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor." For most indigent defendants *any* cash bail would render the privilege useless.

Petitioners do not need a writ from this court ordering that no pretrial detainee should be incarcerated "simply because they do not have the means to post cash bail." They have article I, section 12. Its protections are mighty. They preceded the COVID-19 pandemic. And they will

outlast it.

B. Post-conviction inmates can bring individual motions for release

Post-conviction inmates also have alternative means for seeking relief available to them. They are free, for example, to file individual motions for release. This individualized approach to relief may demand more hustle of OPD lawyers and the private criminal defense bar than a blanket petition for an extraordinary writ. But it is not impossible. It's not even infeasible or impractical. It's doable. Our district, family, and circuit courts have admirably stepped up and met the challenges posed by the ongoing pandemic; they have, and will continue to, expeditiously resolve individual release motions. Petitioner has thus failed to show it lacks alternative means to seek relief.

C. The requested relief would impermissibly infringe on trial courts' discretion

***41** The requested mandamus relief is also unavailable because it would intrude on trial courts' discretion over bail and sentencing. SeeKema v. Gaddis, 91 Hawai'i 200, 204-05, 982 P.2d 334, 338-39 (1999) ("Where a trial court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion....").

A writ of mandamus may issue where the trial court has committed a flagrant and manifest abuse of discretion. Petitioner has not argued that has happened, or will happen, here. Rather, petitioner is asking us to preemptively handicap trial courts' discretion in deciding motions for release, imposing custodial sentences, and employing cash bail. This imposition would be as inadvisable as it is legally unfounded.

Trial courts are the judiciary's boots on the ground (and a lot more). They are familiar with the specific matters before them. They are well positioned to determine what extent the COVID-19 pandemic impacts their bail or sentencing decisions in a given case. And, unlike this court, they can reach an individualized decision that takes into account factors such as public safety, public health, flight risk, and a defendant's age and health status.

D. OPD is entitled to a writ requiring DPS to comply with HRS § 353-6.2

HRS § 353-6.2 requires community correctional centers to review, no less frequently than every three months, "pretrial detainees to reassess whether a detainee should remain in custody or whether new information or a change in circumstances warrants reconsideration of a detainee's pretrial release or supervision." HRS § 353-6.2(a). It also mandates that the centers transmit the findings and recommendations of their periodic reviews to the "appropriate court, prosecuting attorney, and defense counsel." HRS § 353-6.2(b).

The duties HRS § 353-6.2(a) imposes on DPS are clear and nondiscretionary. The community correctional centers must conduct a review of pretrial detainees no less frequently than every three months. DPS has discretion over *how* to conduct the review and *whether* to reconsider a given detainee's supervision. But it may not skip the reviews or do them less frequently than every three months. Similarly, HRS § 353-6.2(b) makes transmitting the review results a mandatory ministerial duty: the results must be shared with the "appropriate court, prosecuting attorney, and defense counsel." HRS § 353-6.2(b).

Because HRS § 353-6.2 imposes clear and nondiscretionary duties on DPS, and because OPD has no other avenues for ensuring DPS's fulfillment of those duties, OPD is entitled to a writ of mandamus ordering DPS's compliance with HRS § 353-6.2.

III. ARTICLE I, SECTION 12 OF THE HAWAI'I CONSTITUTION PROVIDES MORE EXPANSIVE PROTECTIONS THAN THE EIGHTH AMENDMENT, BUT THE SCANT RECORD IN THIS CASE DOES NOT SHOW ANY CONSTITUTIONAL VIOLATIONS

Courts have a duty to "enforce the constitutional rights of all persons, including prisoners." Brown v. Plata, 563 U.S. 493, 511 (2011) (cleaned up). Where there is a showing that the conditions of confinement at a correctional facility violate inmates' Eighth Amendment

or article I, section 12 rights, we are empowered, indeed obligated, to intervene and – if necessary to remedy the constitutional violation – impose specific requirements on prison administrators.[18] "Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." Id.

***42** The Eighth Amendment and article I, section 12 protect inmates against not only punishment that is "cruel or unusual" because it is inhumane, but also against conditions of confinement that pose a substantial risk of serious harm or deprive prisoners of "a single, identifiable human need such as food, warmth, or exercise". Wilson v. Seiter, 501 U.S. 294, 304 (1991).

To succeed with a conditions-of-confinement claim under the Eighth Amendment, a plaintiff must show subjective deliberate indifference to a "substantial risk of serious harm to a prisoner."[19]Farmer v. Brennan, 511 U.S. 825, 836 (1994). As the Supreme Court explained in Farmer:

> We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference.

Id. at 837.

We have never addressed what a plaintiff bringing a conditions-of-confinement claim under article I, section 12 must show. But "[t]his court generously interprets the civil rights bestowed by the Hawai'i Constitution." In re KAHEA, No. SCAP-20-0000110, 2021 WL 4271347, at *10 (Haw. Sept. 21, 2021). And, in the context of conditions-of-confinement claims brought by convicted inmates,[20] I believe that article I, section 12 provides protections at least as expansive as those provided by the "objective deliberate indifference" standard.

In applying the "objective deliberate indifference" standard in the context of conditions-of-confinement claims brought by pretrial detainees[21] under the due process clause, the Second Circuit explained:

> [T]o establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the "subjective prong" (or "*mens rea* prong") of a deliberate indifference claim is defined objectively.

***43**Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017). See alsoCastro v. Cty. of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (observing that under "objective" standard, pretrial detainees asserting failure-to-protect due process claims must "prove more than negligence but less than subjective intent—something akin to reckless disregard").

We have yet to expound on the scope of article I, section 12's protections in the context of conditions-of-confinement claims. But given the gravity of the rights at stake in "cruel or unusual punishment" claims, any future treatment of this issue by the court must account for the analytical difference between excessive force, excessive sanction, and conditions-of-confinement claims. Concepts such as proportionality of punishment, which are fundamental to the protections our state constitution offers against excessive sanctions, are irrelevant in the context of conditions-of-confinement claims.

Though the extent of article I, section 12's protections remains an open question, the scant record before us forecloses our engagement with that question here.[22] The sad statistics in the OPD's petition are a profound testament to the ravages of COVID-19. But they are no substitute for a factual record. And no matter how grave a plaintiff's allegations, the factual record must be established through the adversarial process. The making of declarations, factual stipulations, and judicial findings of fact need not take long. (Actions for injunctive relief, by their nature, should move quickly.) But given the record in this case, regardless of how liberal article I, section 12's protections may be, Petitioner will not be able to show a constitutional violation. For this reason, I concur with the court's decision to refrain from analyzing the constitutional issues raised in Petitioner's application.

All Citations

Not Reported in Pac. Rptr., 2021 WL 4762901

Footnotes

1 Chief Justice Recktenwald and Justices Nakayama, McKenna, and Eddins join in Part One, with Justice McKenna also concurring and dissenting separately, in which Justice Wilson joins as to Sections I and III.A., Justice Wilson concurring and dissenting separately, and Justice Eddins also concurring separately. Chief Justice Recktenwald and Justices Nakayama, McKenna, and Wilson join in Part Two, with Justice Eddins dissenting.

2 The first petition was filed on March 24, 2020 in SCPW-20-0000200. A second petition was filed on March 26, 2020 in SCPW-20-0000213. The two proceedings were thereafter consolidated.

3 As part of the settlement, DPS agreed, among other conditions, to:

> • screen and quarantine people newly admitted to a correctional facility as provided in its PRP, and subject to any conditions, modifications and/or exceptions set forth therein;
>
> • immediately isolate those who exhibit COVID-19 symptoms and those who test positive for COVID-19 infection as medically appropriate and in accordance with the PRP, taking into account available space, structural limitations, and staffing and other resources within each facility;
>
> • provide reasonably sufficient cleaning supplies to allow all inmates in its custody in correctional facilities to wipe down phones before they use them;
>
> • provide a minimum of two cloth or other appropriate face masks per person, as provided in the PRP; and
>
> • require staff to wear appropriate face masks where necessary within the correctional facilities as provided for in the PRP.

4 HRS § 353-6.2 provides as follows:

> Community correctional centers; periodic reviews of pretrial detainees.
>
> (a) The relevant community correctional centers, on a periodic basis but no less frequently than every three months, shall conduct reviews of pretrial detainees to reassess whether a detainee should remain in custody or whether new information or a change in circumstances warrants reconsideration of a detainee's pretrial release or supervision.
>
> (b) For each review conducted pursuant to subsection (a), the relevant community correctional center shall transmit its findings and recommendations by correspondence or electronically to the appropriate court, prosecuting attorney, and defense counsel.
>
> (c) If a motion to modify bail is filed pursuant to a recommendation made pursuant to subsection (b), a hearing shall be scheduled at which the court shall consider the motion.

5 This court notes Hawai'i's constitutional protection prohibiting the imposition of "punishment" pending trial as well as the setting of excessive bail. SeeHaw. Const. art. I, § 12. These constitutional principles should serve as guidance in determining whether to impose bail, particularly in light of the impact of the pandemic.

6 Kevin Dayton, COVID-19 Cases Erupt at OCCC – 70 more inmates, 7 ACOs Test Positive, Civil Beat (Aug. 13, 2020). https://www.civilbeat.org/2020/08/covid-19-cases-erupt-at-occc-70-moreinmates-7-acos-test-positive/.

7 Initial Summary Report and Initial Recommendations of the Special Master (Apr. 9, 2020); Second Summary Report and Recommendations of the Special Master (Apr. 23, 2020); Third Summary Report and Recommendations of the Special Master (Apr. 30, 2020); Fourth Summary Report and Recommendations of the Special Master (May 15, 2020); and Fifth Summary Report and Recommendations of the Special Master (May 28, 2020).

8 The Fifth Summary Report noted, "The parties and stakeholders have acted admirably under difficult circumstances in carrying out this Court's orders. Differences among them have been great at times, but all have done their best to work in a collaborative fashion as encouraged by this Court, despite their differences." Fifth Summary Report and Recommendations of the Special Master (May 28, 2020) at 12.

9 In Moriwake, the court interpreted the trial court's inherent power to "administer justice" pursuant to HRS § 603-21.9(6) (1976) — a provision nearly identical to HRS § 602-5(a)(6) — to include the power to sua sponte dismiss a manslaughter indictment with prejudice after two mistrials. The court held that in deciding when to exercise this power, courts must consider the interest of the public in the proper administration of justice as well as the fundamental fairness owed to a defendant, "with the added ingredient of the orderly functioning of the court system." Moriwake, 65 Haw. at 56, 647 P.2d at 712 (citation omitted).

10 Seeid. at 55 n.13, 647 P.2d at 712 n.13 ("In HRS § 603-21.9 (1976), our legislature has undertaken the enumeration of the inherent powers conferred on our circuit courts by the constitution."); Farmer v. Admin. Dir. of Ct., State of Haw., 94 Hawai'i 232, 241, 11 P.3d 457, 466 (2000) ("[T]he inherent power of the supreme court is codified in HRS § 602-5(7) [presently § 602-5(a)(6)], which acknowledge[s] this court's jurisdiction and power '[t]o make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.' ").

11 See alsoHawai'i Pub. Emp. Rels. Bd. v. Hawai'i State Tchrs. Ass'n, 55 Haw. 386, 520 P.2d 422 (1974) (reducing the fines imposed for civil contempt from $190,000 to $100,000 because, pursuant to HRS § 602-5(7) [presently HRS § 602-5(a)(6)], "the promotion of justice would be better enhanced."); CARL Corp. v. State, Dep't of Educ., 85 Hawai'i 431, 460, 946 P.2d 1, 30 (1997) (recognizing and awarding attorneys' fees based on court's inherent powers "to create a remedy for a wrong even in the absence of specific statutory remedies, and to prevent unfair results").

12 However, this court's cases recognize that courts can use their inherent powers to promote justice even when it implicates authority typically exercised by the executive branch. For example, Moriwake recognized that courts can dismiss cases with prejudice after two mistrials resulting from a hung jury, even though decisions about whether to initiate prosecutions are generally entrusted to the executive branch. 65 Haw. at 48, 647 P.2d at 707.

13 Special Master Foley's work also provided the background that enabled this court to act promptly when COVID "erupt[ed]" in our prisons and jails in August 2020. When the OPD filed its petition on August 12, 2020, it was reported that there were 23 positive cases in OCCC (16 inmates and 7 staff), with the number rising to over 200 positive cases in just a few days. The court held a hearing within 48 hours, and issued its first order addressing the situation that evening.

14 In addition to permitting delay, the narrow interpretation of this court's powers advanced by the concurrence would have precluded action even where no reasonable dispute existed about the need for a prompt, uniform response. For example, information submitted to this court early in the March proceedings indicated that some prisoners were still serving "intermittent" sentences. See Order of Consolidation and for Appointment of Special Master, Office of the Public Defender v. Connors, SCPW-20-0000200 at 3 (April 2, 2020). As the court noted then, "[t]hese sentences involve defendants serving a

sentence that requires them to repeatedly come in and go out of correctional centers, which appear to directly contravene the intent of the current Department of Public Safety Policy of disallowing visits from those in the community in an effort to prevent the introduction of COVID-19 into correctional centers." The court directed that the custodial portion of such sentences be suspended until the conclusion of the pandemic, or deemed satisfied at the discretion of the sentencing judge. Id. at 5-6.

15 SeeComm. for Pub. Couns. Servs. v. Chief Just. of Trial Ct., 142 N.E.3d 525, 543-44 (Mass. 2020); Kentucky Court of Justice Emergency Release Schedule for Pretrial Defendants and Emergency Pretrial Drug Testing Standards in Response to COVID-19 Emergency, 2020-27 (April 23, 2020), https://www.kacdl.net/Files/COVID19% 20updates/week% 20*o*f% 204.20/order% 20202027.pdf [hereinafter, Kentucky 2020-27 Order].

16 HRS § 602-11 provides, in part:

> The supreme court shall have power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitations.

17 The Supreme Judicial Court of Massachusetts cited to two statutes. Mass. Gen. Laws. Ch. 276 § 57 outlines the factors to take into consideration for bail, and § 58 sets forth the court's discretion to consider "changed circumstances or other factors not previously known" in issuing or revoking bail. Mass. Gen. Laws. Ch. 276 §§ 57 and 58.

18 The exclusions were defendants who were being held without bail under Mass. Gen. Laws. § 58(A), or who were charged with an "excluded offense (i.e., a violent or serious offense enumerated in Appendix A to this opinion)."

19 Scott Souza, Plymouth County Jail Population Down 20 Percent Since Court Order, Patch (May 20, 2020), https://patch.com/massachusetts/hingham/plymouth-county-jail-population-down-20-percent-court-order; Jimmy Bentley, Norfolk County Jail Population Down 27 Percent Since Court Order, Patch (May 20, 2020), https://patch.com/massachusetts/foxborough/norfolk-county-jail-population-down-27-percent-court-order; Scott Souza, Bristol County Jail Population Down 11 Percent Since Ruling, Patch (May 20, 2020), https://patch.com/massachusetts/attleboro/bristol-county-jail-population-down-11-percent-ruling.

20 The Washington Supreme Court took a similar action as Massachusetts. There, the court relied on its broad "authority to administer justice and to ensure the safety of court personnel, litigants, and the public" and issued an order that provided "a uniform, coordinated response from Washington courts to prevent further outbreak and to maintain consistent and equitable access to justice[.]" In the Matter of Statewide Response By Washington State Courts to the COVID-19 Public Health Emergency, Amended Order No. 25700-B-607 (March 20, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme% 20Court% 20Orders/Supreme% 20Court% 20Emergency% 20Order% 20re% 20CV19% 2003 1820.pdf. The Washington Supreme Court ordered, inter alia, that COVID-19 may constitute a "material change in circumstances" as a factor for judges to consider in motions for pre-trial release. Id.

21 Memorandum (March 16, 2020), https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461.

22 Id.

23 Maryland Const. art. IV, section 18.

24 Maryland Rules of Practice and Procedure Rule 16-1001.

25 Administrative Order Guiding the Response of the Trial Courts of Maryland to the COVID-19 Emergency As It Relates to Those Persons Who Are Incarcerated Or Imprisoned (April 14, 2020), https://mdcourts.gov/sites/default/files/admin-orders/20200414guidingresponseoftrialcourts.pdf.

26 Id.

27 Kentucky 2020-27 Order at 2.

In its 2020-27 Order, the Kentucky Supreme Court did not cite its statutory or constitutional authority. Justice Eddins' concurrence refers to Kentucky's 2020-45 Amended Order in which the Kentucky Supreme Court referenced Section 116 of the Kentucky Constitution and its own Supreme Court Rule 1.010 as authority to issue its order. In Re: Kentucky Court of Justice Response to COVID-19 Emergency: Amended Release Schedule and Pretrial Drug Testing Standards, 2020-45 (May 29, 2020), https://kycourts.gov/Courts/Supreme-Court/Supreme% 20Court% 20Orders/202045.pdf.

According to Section 116, "The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar." Ky. Const., section 116.

In Rule 1.010, "The policy-making and administrative authority of the Court of Justice is vested in the Supreme Court and the Chief Justice. All fiscal management, personnel actions and policies, development and distribution of statistical information, and pretrial release services come with that authority." Ky. R. Sup. Ct. 1.010.

Both authorities cited by the Kentucky Supreme Court align with this court's own constitutional mandates. SeeHaw. Const. Art. VI, sections 6 and 7. Like Kentucky, our court "shall have power to promulgate rules and regulations" and the chief justice "shall be the administrative head of the courts." Haw. Const. Art. VI, sections 6 and 7.

28 Id.

29 James Mayse, Data Show Most Inmates Released Haven't Committed New Offense, Messenger-Inquirer (Oct. 3, 2020), https://www.messenger-inquirer.com/news/local/data-show-most-inmates-released-havent-committed-new-offense/article_dce5925b-7ff4-5df1-a40e-975aaffef440.html.

30 According to the Kentucky Constitution, the governor shall have the power to "commute sentences ... and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection." Ky. Const., section 77.

31 Exec. Order No. 2020-699 (Aug 25, 2020),

https://governor.ky.gov/attachments/20200825_Executive-Order_2020-699_Commutations.pdf (reducing the sentences of 646 identified inmates); Exec. Order No. 2020-293 (April 24, 2020), https://governor.ky.gov/attachments/20200424_Executive-Order_2020293_Conditional-Commutation.pdf (reducing the sentences of 352 identified inmates); Exec. Order No. 2020-267 (April 2, 2020), https://governor.ky.gov/attachments/20200402_Executive-Order_2020-267_Conditional-Commutation-of-Sentence.pdf (reducing the sentences of 186 identified inmates).

1 HCR 85 Task Force, Creating Better Outcomes, Safer Communities: Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai'i Legislature 2019 Regular Session 1 (Dec. 2018) ("HCR 85 Task Force Report"), available at https://www.courts.state.hi.us/wpcontent/uploads/2018/12/HCR-85_task_force_final_report.pdf, also available at https://perma.cc/YDH5-PM9W.

2 Lezlie Kī'aha, Thinking Outside the Bars: Using Hawaiian Traditions and Culturally-Based Healing to Eliminate Racial Disparities Within Hawai'i's Criminal Justice System ("Kī'aha"), 17 Asian-Pac. L. & Pol'y J. 1 (2016).

3 Kī'aha, supra note 2, at 4-5 (footnotes omitted) (emphasis added).

4 Ten states have incarceration rates lower than Hawai'i: Utah (435), Connecticut (394), New York (376), Minnesota (342), New Jersey (341), Maine (328), New Hampshire (328), Rhode Island (289), Vermont (288), and Massachusetts (275). Id.

5 Through section 15 of Act 314 of 1986, consistent with national trends, Hawai'i adopted a sentencing model that tends to prioritize punishment and incarceration over rehabilitation, which was enacted as the current version of Hawai'i Revised Statutes § 706-606:

> **§ 706-606 Factors to be considered in imposing a sentence.** The court, in determining the particular sentence to be imposed, shall consider:
>
> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) The need for the sentence imposed:
>
> (a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
>
> (b) To afford adequate deterrence to criminal conduct;
>
> (c) To protect the public from further crimes of the defendant; and
>
> (d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) The kinds of sentences available; and
>
> (4) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

6 The 5,602 Hawai'i prisoners as of 2016 reported by Kī'aha included people placed in custody by federal and state courts as of the end of 2016. Jennifer Bronson & E. Ann Carson, Prisoners in 2017 4, (U.S. Dep't of Justice: Bureau of Justice Statistics Bulletin NCJ

252156, April 2019) available at https://bjs.ojp.gov/content/pub/pdf/p17.pdf, also available at https://perma.cc/8LSQ-EWYE. As of December 31, 2016, the state DPS reported a total of 5,325 people incarcerated by state courts. Thus, 95% of Hawai'i's prisoner population was in state custody as of the end of 2016.

7 *Operational capacity*, Bureau of Justice Statistics: Glossary, https://bjs.ojp.gov/glossary?title=operational+capacity#glossary-terms-block-1-irrqipyxfvlnp-ak, also available at https://perma.cc/EKH5-4GJE (last visited Sept. 29, 2021).

8 In Huihui v. Shimoda, 64 Haw. 527, 644 P.2d 968 (1982), this court acknowledged that as "there is no evidence in history that bail was ever intended as a deterrent against the commission of crimes between indictment and trial and in view of the difficulty in accurately estimating one's dangerous propensities, [some] courts generally maintain that bail may not constitutionally be denied solely on an estimated likelihood of danger to the community or interference with the judicial process." Huihui, 64 Haw. at 542, 644 at 978. This court then ruled, however, that "this state has a legitimate interest in protecting its communities from those who threaten their welfare, and that this interest may be taken into account in the setting of pretrial bail. But the manner in which the legislature allows this and other legitimate, recognized state concerns to be reflected in the bail decision, should it choose to do so by statute, must also be reasonable and satisfy the minimal demands of procedural due process as necessitated by the fact that pretrial detention denies an accused his liberty without a formal adjudication of guilt." Id.

9 In my opinion, this would also be true for a person who is unable to receive a vaccination due to underlying physical conditions or due to a religious objection.

10 I believe we should revisit this court's per curiam opinion in Sakamoto v. Chang, 56 Haw. 447, 451, 539 P.2d 1197, 1200 (1975), which stated that "bail is not excessive merely because defendant is unable to pay it." It cited to only to one federal case, Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966), and I believe this statement is an incorrect interpretation of the Hawai'i constitution.

11 Seesupra note 8.

12 Our recent caselaw appears to have missed the distinction. See alsoState v. Davia, 87 Hawai'i 249, 252 n.3, 953 P.2d 1347, 1350 n.3 (1998) ("Article I, section 12 of the Hawai'i Constitution provides in relevant part that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.' ") (emphasis added.)

13 Even if our language was identical to the federal Constitution, we are able to provide greater protection under the Hawai'i constitution. State v. Lopez, 78 Hawai'i 433, 445, 896 P.2d 889, 901 (1995) ("[A]s long as we afford defendants the minimum protection required by the federal constitution, we are free to provide broader protection under our state constitution.").

14 Alaska Const. art. I, § 12; Ariz. Const. art. II, § 15; Colo. Const. art. II, § 20; Fla. Const. art. I, § 17; Ga. Const. art. I, § 1, ¶ 17; Idaho Const. art. 1, § 6; Ind. Const. art. I, § 16; Iowa Const. art. I, § 17; Md. Declaration of Rights art. 16 (prohibiting "cruel and unusual pains"); Mo. Const. art. I, § 21; Mont. Const. art. II, § 22; Neb. Const. art. I, § 9; N.J. Const. art. I, ¶ 12; N.M. Const. art. II, § 13; N.Y. Const. art. I, § 5; Ohio Const. art. I, § 9; Or. Const. art. I, § 16; Tenn. Const. art. I, § 16; Utah Const. art. I, § 9; Va. Const. art. I, § 9; W. Va. Const. art. III, § 5; Wis. Const. art. I, § 6.

15 Ala. Const. art. I, § 15; Ark. Const. art. II, § 9; Cal. Const. art. I, § 17; Haw. Const. art. I, § 12; Kan. Const. Bill of Rights § 9; La. Const. art. I, § 20 (prohibiting "cruel, excessive, or unusual punishment"); Me. Const. art. I, § 9(prohibiting neither "cruel nor unusual punishments"); Mass. Const. pt. 1, art. XXVI; Mich. Const. art. I, § 16; Minn. Const. art. 1, § 5; Miss. Const. art. III, § 28; Nev. Const. art. I, § 6; N.H. Const. pt. 1, art. XXXIII; N.C. Const. art. I, § 27; N.D. Const. art. I, § 11; Okla. Const. art. II, § 9; S.C. Const. art. I, § 15 (prohibiting neither "cruel, nor corporal, nor unusual punishment"); Tex. Const. art. I, § 13; Wyo. Const. art. I, § 14.

16 Fla. Const. art. I, § 17; Md. Declaration of Rights arts. 16, 25; Del. Const. art. I, § 11; Ky. Bill of Rights § 17; Pa. Const. art. I, § 13; R.I. Const. art. I, § 8; S.D. Const. art. VI, § 23; Wash. Const. art. I, § 14.

17 Fla. Const. art. I, § 17; Md. Declaration of Rights arts. 16, 25.

18 Conn. Const.; Ill. Const.; Vt. Const.

19 It is unclear to me whether California's test for cruel or unusual punishment has since evolved. In People v. Cage, 362 P.3d 376, 405 (Cal. 2015) (cleaned up), the California Supreme Court stated:

> To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. If the court concludes that the penalty imposed is grossly disproportionate to the defendant's individual culpability, or, stated another way, that the punishment shocks the conscience and offends fundamental notions of human dignity, the court must invalidate the sentence as unconstitutional.

20 Past Massachusetts case law, however, appears to have misquoted the state's constitution and its actual use of "or" rather than "and." More recent case law seems to correct this error by simply replacing the "and" with "[or]" when quoting past precedent.

21 Kī'aha, supra note 2, explains:

> A number of social and historical factors play into this disparity, including contact with Western civilization and the on-going effects of colonization.
>
> ....
>
> According to the Office of Hawaiian Affairs' 2010 Report on *The Disparate Treatment of Native Hawaiians in the Criminal Justice System*, Native Hawaiians make up only 24% of Hawai'i's general population, while comprising 39% of the state's prison population. This number includes both the male and female population, both of which are disproportionately overrepresented in Hawai'i's prisons. Some advocates in the field of criminal justice reform argue that, today, the number of Native Hawaiians that make up the incarcerated population is closer to 60%. For Native Hawaiian women, the percentage is at an alarming 44%, while Native Hawaiian youth are arrested more frequently than any other ethnic group for nearly every offense. Moreover, research done by the National Council on Crime and Delinquency found that children of incarcerated parents are five to six times more likely to become incarcerated than their peers.
>
> Native Hawaiians are more likely to receive a prison sentence following a determination of guilt. This is due in part to the discretionary nature of sentencing. Pa'ahao also have the highest recidivism rate due to limited access to reentry services that

> would assist them in returning to society. As a result, pa'ahao are denied parole because they are unable to complete the necessary programs[ ].... Additionally, OHA's report reflects that 41% of Hawai'i's prisoners sent to out-of-state facilities are Native Hawaiian. Perhaps the most detrimental disproportion is that Native Hawaiians go to prison more often for drug offenses than any other ethnic group.
>
> Id.

22 Melody Kapilialoha MacKenzie et al., Native Hawaiian Law: A Treatise 1020 (2015).

23 In Lono v. Ariyoshi, 63 Haw. 138, 621 P.2d 976 (1981), this court held that a prisoner's transfer to a mainland penal institution did not violate the due process clauses of the United States and Hawai'i constitutions as well as applicable administrative law. The rights of Native Hawaiians under article XII, section 7 of the Hawai'i constitution were not raised or discussed.

24 To repeat, in my opinion, this would also be true for a person who is unable to receive a vaccination due to underlying physical conditions or due to a religious objection.

25 Seesupra note 26.

1 See COVID-19 Emergency Proclamation, Off. of Governor of Haw. (Mar. 4, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf (last visited Oct. 6, 2021).

2 See Order of Consolidation and for Appointment of Special Master at 3, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020; Interim Order at 2–6, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

3 It would be four months before the DPS reported its first positive case of COVID-19. DPS reported its "first confirmed inmate case within the [DPS]" on August 7, 2020 at O'ahu Community Correctional Center ("OCCC"). Press Release, DPS, Dep't of Pub. Safety Confirms First COVID-19 Positive Inmate (Aug. 7, 2020), https://dps.hawaii.gov/wpcontent/uploads/2020/03/RELEASE-PSD-confirmes-COVID-19-OCCC-inmate-and-3-ACOs-8.7.20.pdf. DPS reported that three correctional officers at Halawa Correctional Facility ("HCF") and Waiawa Correctional Facility ("WCF") had been confirmed positive for COVID-19 several days earlier on August 4 and August 6. Id.

4 Order of Consolidation and for Appointment of Special Master at 3, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020.

5 Resp'ts Answer at 10, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #7, filed Mar. 31, 2020.

6 Order of Consolidation and for Appointment of Special Master at 4, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed

Apr. 2, 2020; Interim Order at 2–6, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

7 I concur with part I of Justice McKenna's concurring and dissenting opinion, which concludes that the State suffers from an "over-incarceration epidemic." Concurring and Dissenting Opinion of Justice Sabrina McKenna at 6, In re Individuals in Custody of Hawai 'i, SCPW-21-0000483, docket #45, filed October 12, 2021 [hereinafter "McKenna Concurrence & Dissent"].

8 On March 31, 2020, DPS reported a total population of 3393 and 901 people held pretrial in its Hawai'i facilities. Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Mar. 31, 2020), https://dps.hawaii.gov/wp-content/uploads/2020/04/Pop-Reports-EOM-2020-0331.pdf. On September 30, 2021, DPS reported a total population of 2951 and 909 people held pretrial. Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Sept. 30, 2021), https://dps.hawaii.gov/wpcontent/uploads/2021/10/Pop-Reports-EOM-2021-09-30.pdf.

9 See Sept. 23, 2020 Decl. of Pablo Stewart, M.D. ¶ 27, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #94, filed Oct. 27, 2020 [hereinafter "Sept. 2020 Stewart Decl."]; Apr. 7, 2021 Decl. of George Cordero ¶ 8–9, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #162, filed Apr. 8, 2021 [hereinafter "Cordero Decl."]; Decl. of Lisa O. Jobes ¶ 6–8, Chatman v. Otani, No. CV 21-00268 JAO-KJM, docket #6-4, filed June 9, 2021; Decl. of Ryan Tabar ¶ 7, Chatman v. Otani, No. CV 21-00268 JAO-KJM, docket #6-6, filed June 9, 2021 [hereinafter "Tabar Decl."].

10 Tabar Decl. ¶ 7–8, Chatman v. Otani, No. CV 21-00268 JAO-KJM, docket #6-6, filed June 9, 2021; Decl. of Erin Loredo ¶ 12–13, 15–16, Chatman v. Otani, No. CV 21-00268 JAO-KJM, docket #6-8, filed June 9, 2021.

11 See Kevin Dayton, 2 Inmates Killed in 2 Weeks In Hawaii Correctional System, Honolulu Civil Beat (Sept. 1, 2020), https://www.civilbeat.org/2020/09/2-inmates-killed-in-2-weeks-in-hawaii-correctional-system/; Cordero Decl. ¶ 10.

12 See Dep't of Pub. Safety, COVID-19 Information (updated 10/4/21), https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/. There are currently 35 active positive cases among incarcerated persons and 17 among staff. Id.

13 This number was reported to the court by Deputy Attorney General Craig Y. Iha during oral argument in this proceeding on September 22, 2021.

14 See Dep't of Pub. Safety, COVID-19 Information (updated 9/23/21), https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/. The 7 incarcerated persons who died were all being detained at HCF. This number does not include the 2 incarcerated persons who died while being held at Saguaro Correctional Center, which is operated by a DPS contractor in Arizona.

15 See Tiana Herring & Maana Sharma, Prison Policy Initiative, States of emergency: The failure of prison system responses to COVID-19 (Sept. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency. html; seealso Nicole Pasia, Hawaii's incarcerated population 5.5 times more likely to die of COVID-19, report finds, State of Reform (Sept. 10, 2021), https://stateofreform.com/news/hawaii/2021/09/hawaiis-incarcerated-population-5-5-times-more-likely-to-die-of-covid-19-rep

ort-finds/.

16 McKenna Concurrence & Dissent at 23-25.

17 On February 3, 2021, DPS announced that the death of a male "between 50 to 60-years old" was being classified as a "COVID-19-related death." DPS, Third Hawaii Inmate Death Classified as COVID-19 Related (Feb. 3, 2021), https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-HCF-COVID19-Inmate-Death-2.3.21.pdf. DPS made similar announcements on February 5, 2021 for five incarcerated males "all above the age of 65" who died in January, DPS, Five Hawaii Inmate Deaths Classified as COVID-19 Related (Feb. 5, 2021), https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-HCF-COVID19-Inmate-Death-2.5.21.pdf, and on February 22, 2021 for a male "between 60 to 70 years old" who died in early February, DPS, Hawaii Inmate Death Classified as COVID-19 Related (Feb. 22, 2021), https://dps.hawaii.gov/wpcontent/uploads/2020/03/RELEASE-HCF-7th-COVID-related-death-2.22.21.pdf. In all three death announcements, DPS stated that "[n]o additional information is being provided to protect individual medical privacy." This comprises the totality of the information DPS has released about these seven deaths.

For example, we know, based solely on Deputy Attorney General Iha's representations at oral argument, that all 7 men were hospitalized before they died. We do not know, however, where they were hospitalized, for how long, or what kind of care they required while hospitalized. We do not know when they were diagnosed with COVID-19 and what kind of care they received prior to being hospitalized.

18 DPS officials claim they are prohibited by the federal Health Insurance Portability and Accountability Act from publicly releasing information about the deaths of incarcerated persons. See Kevin Dayton, Death Behind Bars: In Hawaii, The Death Of A Prisoner Is Often A Closely Held Secret, Civil Beat (Mar. 3, 2021), https://www.civilbeat.org/2021/03/death-behind-bars-in-hawaii-the-death-of-a-prisoner-is-often-a-closely-held-secret/. Under current law, the director of DPS is required to submit a death report to the governor, who must, in turn, submit the report to the state legislature. HRS § 353C-8.5 (Supp. 2019). However, the director retains discretion to "withhold disclosure of the decedent's name or any information protected from disclosure by state or federal laws[,]" HRS § 353C-8.5(d), and in practice, when reports are released by state lawmakers to the media, they are commonly heavily redacted. See Dayton, Death Behind Bars.

Newly proposed legislation would amend HRS § 353C-8.5 to require that reports include the decedent's race, cite state or federal authority that supports withholding information about the decedent from the public, and are made publicly available, first to the decedent's family, and then to the press. H.B. 796, 31st Leg., Reg. Sess. (Haw. 2021). Unsurprisingly, DPS "strongly opposes" H.B. 796. Testimony on H.B. 796 Before the H. Comm. on Judiciary & Haw. Affs., 31st Leg., Reg. Sess. (Haw. 2021) (statement of Max Otani, Dir. of DPS); Testimony on H.B. 796 Before the H. Comm. on Corr., Mil., & Veterans, 31st Leg., Reg. Sess. (Haw. 2021) (statement of Max Otani, Dir. of DPS).

19 HRS § 353-6.2 requires DPS, "on a periodic basis but no less frequently than every three months," to "conduct reviews of pretrial detainees to reassess whether a detainee should remain in custody or whether new information or a change in circumstances warrants reconsideration of a detainee's pretrial release or supervision." HRS § 353-6.2(a). DPS is required to transmit "its findings and recommendations" for each review "to the appropriate court, prosecuting attorney, and defense counsel." HRS § 353-6.2(b). Based on DPS' recommendation, defense counsel may then bring a motion to modify bail, and a hearing will be scheduled at which the court shall consider the motion. HRS § 353-6.2(c).

20 On September 10, 2021, Hawaii News Now reported that DPS had initiated a "death investigation" after "a 30-year-old inmate sick with COVID was found unresponsive in his cell at [HCF] on [September 9]." Allyson Blair, Death investigation underway after Hawaii inmate with COVID found unconscious in cell (Sept. 10, 2021, 3:28 PM), https://www.hawaiinewsnow.com/2021/09/11/death-investigation-underway-after-hawaii-inmate-with-covid-found-unconsciou

s-cell/. According to Hawaii News Now, DPS officials would not confirm if the man had been diagnosed with COVID-19 prior to his death, id.; there has been no official death announcement from DPS and Deputy Attorney General Iha disputed during oral argument that a recent COVID-19-related death had occurred. If DPS rules this a COVID-19-related death, the number of people who have died of COVID-19 in DPS custody would increase to 10.

21 HCSOC, Hawai'i Correctional Facilities - Infectious Disease Emergency Capacities (Sept. 2020), https://ag.hawaii.gov/wp-content/uploads/2020/09/FINAL-REPORT-091120.pdf.

22 See Dissent to Amended Order Re: Felony Defendants (filed August 18, 2020); Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants at Maui Community Correctional Center, Hawai'i Community Correctional Center, and Kaua'i Community Correctional Center (filed August 24, 2020); Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants (filed August 27, 2020); and Order Denying Petitioner's "Motion to Compel Compliance with This Court's Orders" (filed September 1, 2020) at 12–20, In re: Individuals in Custody of the State of Hawai'i, SCPW-20-0000509, docket #110, filed Feb. 18, 2021 [hereinafter "Omnibus Dissent"].

23 Chatman v. Otani, No. CV 21-00268 JAO-KJM, 2021 WL 2941990 (D. Haw. July 13, 2021) (Order (1)Granting Plaintiffs' Motion for Provisional Class Certification and (2)Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order) at *15–17 [hereinafter "Otake Order"].

24 See Interim Order, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #88, filed Apr. 15, 2020.

25 SeeEmergency Proclamation Related to the COVID-19 Response, Off. of Governor of Haw. (Aug. 5, 2021), https://governor.hawaii.gov/wpcontent/uploads/2021/08/2108026-ATG_Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf.

26 Order at 10, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #45, filed October 12, 2021.

27 Interim Order at 3, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #13, filed Aug. 14, 2020; seealso Order of Consolidation and for Appointment of Special Master at 2, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #22, filed Apr. 2, 2020.

I concur with the Majority that this court has constitutional and statutory authority to grant relief in this proceeding and as granted in previous orders in response to the petitions of the Office of Public Defender for protection of Hawaii's incarcerated people from the pandemic emergency Order, Part II, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #45, filed October 12, 2021 (citing this court's inherent powers vested by article VI, section 1 of the Hawai'i Constitution, its authority "[t]o make or issue any order or writ ... in aid of its jurisdiction" under Hawai'i Revised Statutes ("HRS") § 602-5(a)(5) and "[t]o make and award such judgments, decrees, orders and mandates ... as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it" under HRS § 602-5(a)(6), and its supervisory powers under HRS § 602-4). For the reasons stated by the Majority refuting the contention that, as a matter of law, no record would ever justify emergency intervention by this court absent a finding of a constitutional violation, I join Part II of the Majority opinion.

Justice Eddins does not dispute the authority of this court to intervene where Hawai'i's incarcerated people are subjected to cruel and/or unusual conditions of confinement in violation of the Eighth Amendment of the United States Constitution and

article I, section 12 of the Hawai ‘i Constitution or where there is a violation of the due process rights of people incarcerated before a trial to be free from punishment in violation of the Fourteenth Amendment of the United States Constitution and article I, section 5 of the Hawai‘i Constitution. He contends that the record upon which this court based its previous intervention to protect incarcerated people was inadequate to find such constitutional violations and order remedial action. Under this analysis, the record considered by the District Court for the District of Hawai‘i in Chatman, was also insufficient to authorize its intervention. Seesupra note 23. Respectfully, this proposition is untenable. The record supporting the emergency measures taken by this court and the federal district court to protect Hawai‘i’s incarcerated people is exhaustive. Since the filing of Off. of Pub. Def. v. Ige, SCPW-20-0000213, over one year ago on March 26, 2020, this court has received unrebutted affidavits from medical expert Dr. Pablo Stewart testifying as to the cruel and unusual conditions at OCCC; reports by DPS chronicling the size of the pretrial and convicted incarcerated population for the last two years, with separate population counts for felony and misdemeanor offenders; affidavits from the American Civil Liberties Union of Hawai‘i Foundation as amicus curiae relaying statements from incarcerated persons recounting the conditions of incarceration; and reports by the special master, who coordinated with the parties for two months on the status of the incarcerated population and the actions taken by the parties to comply with this court’s orders identifying categories for consideration of release. The federal district court received sworn testimony and conducted a hearing and several status conferences before granting Plaintiffs’ motion for a preliminary injunction. The record here has established that DPS and the Judiciary have failed to (1) reduce the incarcerated population, and (2) institute measures consistent with DPS’ Pandemic Response Plan and Centers for Disease Control standards to protect incarcerated persons against contracting COVID-19. The consequences have also become part of the record. Thousands of incarcerated people have contracted COVID-19 and a disproportionate number of those people, in comparison to the general population, have died as a result. Seeinfra note 17 and accompanying text. Based on this record, further delay should not be countenanced by this court before intervening to protect incarcerated people from the risk of infection and death posed by the unconstitutionally cruel and/or unusual conditions of incarceration. Time--during this emergency-cannot be viewed as though there is no emergency. It is untenable to await the filing of unspecified future legal claims in state or federal court either by individuals or a class and thereafter postpone action until the completion of discovery that would predictably occur, including depositions of parties and experts. The results of such a strategy to create a new and more extensive record are evident: more disease and more death. Respectfully, the unprecedented public health emergency declared by the Governor, the right to be free from cruel and unusual punishment under the United States Constitution and the right to be free from cruel or unusual punishment under the Hawai‘i constitution preclude such a dangerously delayed approach.

Respectfully, Justice Eddins’ position declaring an insufficient record to intervene to protect incarcerated people contradicts his decision to intervene to protect judges and court personnel from infection by inmates. The Majority’s sua sponte emergency intervention suspending pretrial incarcerated people’s right to appear in person for preliminary hearings and arraignments pursuant to Rules 5 and 10 of the Hawai‘i Rules of Penal Procedure (“HRPP”) was done with no hearing, no affidavits, and no on-the-record input by the OPD or the prosecutor’s office.

28 HRPP Rule 5(c)(3) provides:

> The court shall conduct the preliminary hearing within 30 days of initial appearance if the defendant is not in custody; however, if the defendant is held in custody for a period of more than 2 days after initial appearance without commencement of a defendant’s preliminary hearing, the court, on motion of the defendant, shall release the defendant to appear on the defendant’s own recognizance, unless failure of such determination or commencement is caused by the request, action or condition of the defendant, or occurred with the defendant’s consent, or is attributable to such compelling fact or circumstance which would preclude such determination or commencement within the prescribed period, or unless such compelling fact or circumstance would render such release to be against the interest of justice.

HRPP Rule 5(c)(3).

29 HRPP Rule 10 provides:

> (a) A defendant who has been held by district court to answer in circuit court shall be arraigned in circuit court within 14 days after the district court’s oral order of commitment following (i) arraignment and plea, where the defendant elected jury trial or did not waive the right to jury trial or (ii) initial appearance or preliminary hearing, whichever occurs last.
>
> (b) Following service of grand jury warrant, a defendant arrested in the jurisdiction or returned to the jurisdiction shall be

arraigned not later than 7 days following the arrest or return.

(c) Following service of an information charging warrant of arrest, a defendant arrested in the jurisdiction or returned to the jurisdiction shall be arraigned not later than 7 days following arrest or return.

HRPP Rule 10.

30 See Second Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #143, filed Sept. 30, 2021; Ninth Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #141, filed Sept. 30, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai 'i Rules of Penal Procedure Rule 5(c)(3) (First Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #133, filed Aug. 19, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai 'i Rules of Penal Procedure Rule 5(c)(3) (Third Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #135, filed Aug. 19, 2021; seealso Dissent Re: Order Regarding Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #115, filed June 1, 2021; Concurrence and Dissent Re: Order Re: Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c) at 1, In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #45, filed Aug. 20, 2020.

31 The suspension of HRPP Rules 5 and 10 also constitutes a violation of pretrial detainees' right to due process of law. See Omnibus Dissent at 27-37.

32 SeeHaw. Const., art. I, § 12 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."); U.S. Const., amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). An in-depth constitutional argument can be found in the dissent filed in the OPD's last proceeding. See Omnibus Dissent at 12–20.

The Hawai'i Constitution uses the disjunctive "or" in prohibiting "cruel or unusual punishment" while the United States Constitution uses the conjunctive "and" in prohibiting "cruel and unusual punishments[.]"

33 Under the Eighth Amendment, a punishment that does not lead to death can still be deemed cruel and unusual. Seeid. at 104 (holding that "deliberate indifference to serious medical needs of prisoners constitutes" cruel and unusual punishment); Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam) (finding cruel and unusual conditions where a detainee was held in a cell flooded with human waste and raw sewage for six days); Helling v. McKinney, 509 U.S. 25, 35 (1993) (detainee stated a cause of action under the Eighth Amendment where he alleged exposure to levels of environmental tobacco smoke that "pose[d] an unreasonable risk of serious damage to his future health"); Hutto v. Finney, 437 U.S. 678, 681–82 (1978) (evidence sustained a finding of cruel and unusual punishment where it was practice to detain four to eleven people, some with hepatitis and venereal disease, for indeterminate periods of time in windowless 8'x10' "isolation cells" containing a single toilet and feeding them less than 1000 calories per day).

34 Otake Order at *13-19 (citing Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010))

35 Otake Order at *18.

36 Id. For example, the federal district court noted that the HCCC warden admitted that new detainees were not tested for COVID-19 or quarantined upon arrival and were instead placed with other new detainees in areas separated by chain-linked fences ("dog cages") before being moved to a room with forty to sixty other people (the "fishbowl"). Id. at *15–16. The court noted Plaintiffs' claims that detainees eat in chow halls and sleep shoulder-to-shoulder, and lack access to bathrooms, running water, and cleaning supplies. Id. at *16-17. The court also emphasized Plaintiffs and DPS employees' claims that DPS failed to identify and isolate older incarcerated persons or those with underlying medical conditions who were at higher risk of contracting COVID-19. Id. at *17.

37 Id. at *18–19. As an example of DPS' "complete disregard" for its PRP, the federal district court cited DPS' decision to transport dozens of incarcerated people from HCCC to facilities on O'ahu, explaining:

> [DPS] knowingly (1) transported symptomatic inmates from a facility with an active COVID-19 outbreak, (2) who told staff they were ill, (3) who were infected, (4) but whose infections were unconfirmed due to late or no testing, (5) on an airplane, (6) to a facility with no active COVID-19 cases that previously experienced an outbreak, and (7) then housed those inmates with COVID-negative inmates. There is almost no clearer an example of complete disregard for the [PRP] and abandonment of precautionary measures to prevent the spread of COVID-19 between DPS facilities and islands.

Id. at *19.

38 Id. at *24.

39 Haworth v. State, 60 Haw. 557, 563, 592 P.2d 820, 824 (1979); see Omnibus Dissent at 16-18.

40 With an eye toward future claims of cruel or unusual punishment under article I, section 12 of the Hawai'i Constitution, I concur with part III.A of Justice McKenna's concurring and dissenting opinion, which concludes that the law concerning cruel or unusual punishment must be developed in conjunction with our Constitution's mandate to act with "an understanding and compassionate heart toward all the peoples of the earth." McKenna Concurrence & Dissent at 22.

41 Dep't of Pub. Safety, Department of Public Safety Weekly Population Report (Sept. 20, 2021), https://dps.hawaii.gov/wpcontent/uploads/2021/09/Pop-Reports-Weekly-2021-09-20.pdf.

42 SeeHaw. Const., art. I, § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws ..."). An in-depth constitutional argument related to pretrial detainees being subjected to unconstitutional punishment can be found in the dissent filed in the OPD's last proceeding. See Omnibus Dissent at 18–20.

43 OCCC recently experienced an outbreak of COVID-19, peaking at 168 active positive cases on September 20, 2021. See DPS, Pub. Safety Dep't COVID-19 Testing Data - Active and Recovered (as updated on Sept. 20, 2021), https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/. Since August 2020, there have been large outbreaks in OCCC (256 active positive cases at its peak on August 28, 2020), WCF (162 active positive cases at its peak on November 27, 2020), HCF (300 active positive cases at its peak on December 23, 2020), Maui Community Correctional Center ("MCCC") (43 active positive cases at its peak on March 5, 2021), and Hawai 'i Community Correctional Center ("HCCC") (136 active positive cases at its peak on June 5, 2021). See Press Release, DPS, Dep't of Pub. Safety COVID-19 Update for 8/28/20 (Aug. 28, 2020), https://dps.hawaii.gov/wpcontent/uploads/2020/03/RELEASE-PSD-COVID19-Update-8.28.20.pdf; Dep't of Pub. Safety,

Department of Public Safety COVID-19 Update for 11/27/20, https://dps.hawaii.gov/wp-content/uploads/2020/03/DND-submission-11.27.20.pdf; Dep't of Pub. Safety, Department of Public Safety COVID-19 Update for 12/23/20, https://dps.hawaii.gov/wp-content/uploads/2020/03/DND-submission-12.23.20.pdf; Dep't of Pub. Safety, Department of Public Safety COVID-19 Update for 3/5/21, https://dps.hawaii.gov/wp-content/uploads/2020/03/DND-submission-3.5.21.pdf; Dep't of Pub. Safety, Department of Public Safety COVID-19 Update, https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-UPDATED-mass-testing-HCCC-positive-cases-6.5.21.pdf.

44 See Apr. 6, 2021 Decl. of Pablo Stewart, M.D. ¶ 6–32, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #162, filed April 8, 2021 [hereinafter Apr. 2021 Stewart Decl."]; Sept. 2020 Stewart Decl. ¶ 8–35; Apr. 13, 2020 Decl. of Pablo Stewart, M.D. ¶ 12–30, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #80, filed April 13, 2020 [hereinafter "Apr. 2020 Stewart Decl."].

45 Apr. 2020 Stewart Decl. ¶ 19. The Majority's contention that the record is "insufficient" also conflicts with its conclusion that the infection of incarcerated people from COVID-19 constitutes a threat to the safety of judges and Judiciary personnel so extreme as to require emergency measures suspending HRPP Rules 5 and 10 to protect judges and Judiciary personnel from exposure to inmates. See Dissent Re: Order Regarding Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #115, filed June 1, 2021; Concurrence and Dissent Re: Order Re: Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c) at 1, In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #45, filed Aug. 20, 2020; seealso Omnibus Dissent at 27-37. This sua sponte emergency intervention was ordered by the Majority with no hearing, no affidavits, and no on-the-record input by the OPD or the prosecutor's office.

46 See DPS, Dep't of Pub. Safety COVID-19 Update (Sept. 21, 2021), https://dps.hawaii.gov/wp-content/uploads/2020/03/PSD-COVID-19-Update-for-9.21.21.pdf (reporting vaccination rates across DPS facilities and staff). Despite the Majority's reliance on DPS' contention that it has made vaccines "readily available" to the incarcerated population, we do not know what DPS' vaccination procedures look like in practice; this is information that should be provided to a public health expert. Answer of Resp'ts Otani & Hyun at 2, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #13, filed Sept. 7, 2021. Contrary to Respondents' contentions in briefing and during oral argument that protection from COVID-19 via vaccination "is entirely within the control" of incarcerated people, id., it remains the State's responsibility to keep the people in its custody safe.

The Majority concludes that a 66% vaccination rate is sufficient to protect the incarcerated population from the threat of COVID-19. However, as of September 22, 2021, 85% of Judiciary employees were partially or fully vaccinated, see Press Release, Haw. State Judiciary, Judiciary Announces COVID-19 Vaccination and Testing Program (Sept. 22, 2021), https://www.courts.state.hi.us/news_and_reports/2021/09/judiciary-announces-covid-19-vaccination-and-testing-program, and yet, the Majority found the "continued need to protect the health and safety of court users and Judiciary personnel" and extended the suspension of the rights of pretrial detainees to appear in person for arraignments and preliminary hearings under HRRP Rules 5 and 10. See Second Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c) (Circuit Court of the Third Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #143, filed Sept. 30, 2021; Ninth Extension of Order Re: Temporary Extension of the Time Requirements Under Hawai'i Rules of Penal Procedure Rule 10(a), (b), and (c), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #141, filed Sept. 30, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai 'i Rules of Penal Procedure Rule 5(c)(3) (First Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #133, filed Aug. 19, 2021; Order Re: Temporary Extension of the Time Requirements Under Hawai 'i Rules of Penal Procedure Rule 5(c)(3) (Third Circuit), In re Judiciary's Response to the COVID-19 Outbreak, SCMF-20-0000152, docket #135, filed Aug. 19, 2021.

47 OCCC recently experienced an outbreak of COVID-19, peaking at 168 active positive cases on September 20, 2021. DPS, Pub. Safety Dep't COVID-19 Testing Data - Active and Recovered (as updated on Sept. 20, 2021),

https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/. HCCC experienced an outbreak in late May/early June, peaking at 136 active positive cases on June 5, 2021. Dep't of Pub. Safety, Department of Public Safety COVID-19 Update, https://dps.hawaii.gov/wp-content/uploads/2020/03/RELEASE-UPDATED-mass-testing-HCCC-positive-cases-6.5.21.pdf.

48 See Press Release, Dep't of Health, Vaccine Eligibility Expands to Residents 16 and Older Statewide (Apr. 19, 2021), https://health.hawaii.gov/news/newsroom/vaccine-eligibility-expands-to-residents-16-and-older-statewide/. Under the State Department of Health's updated COVID-19 vaccination plan published on January 8, 2021, incarcerated people were not listed as a priority group for vaccination. See Press Release, Dep't of Health, Haw. Dep't of Health Issues Updated COVID-19 Vaccination Plan, (Jan. 8, 2021), https://health.hawaii.gov/news/newsroom/hawaii-department-of-health-issues-updated-covid-19-vaccination-plan/; Dep't of Health, Executive Summary, https://hawaiicovid19.com/wp-content/uploads/2021/01/Executive-Summary_Final1_010721.pdf (prioritizing health care personnel (Phase 1a), long-term care facility residents (Phase 1a), adults 75 years of age and older (Phase 1b), frontline essential workers (Phase 1b), adults aged 64-74 years (Phase 1c), persons aged 16-64 years with high-risk medical conditions (Phase 1c), and all other essential workers (Phase 1c)). Incarcerated people had previously fallen under Stage 2 (of 4 total stages) under the Department's original COVID-19 vaccination plan published in October 2020. See Dep't of Health, Draft COVID-19 Vaccination Plan (Oct. 16, 2020), https://hawaiicovid19.com/wp-content/uploads/2020/11/Hawaii-COVID-19-Vaccination-Plan_Initial-Draft_101620.pdf.

49 CDC, "Delta Variant: What We Know About the Science" (last updated Aug. 26, 2021), https://www.cdc.gov/coronavirus/2019ncov/variants/delta-variant.html.

50 Dep't of Health, "Hawaii sequencing and variants of SARS-Cov-2" (Aug. 18, 2021), https://health.hawaii.gov/coronavirusdisease2019/files/2021/08/Variant_report_20210818.pdf. In Governor David Ige's own words, "the delta variant changed everything"; the Governor's office is no longer using a 70% vaccination rate to remove vaccination, testing, and social gathering restrictions. Dan Nakaso, Potential surge could bring tighter rules, Honolulu Star Advertiser, Sept. 28, 2021, at A6.

51 New Variants of Coronavirus: What You Should Know, Johns Hopkins Medicine (updated July 23, 2021), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/a-new-strain-of-coronavirus-what-you-should-know (noting that "[a]s long as the coronavirus spreads through the population, mutations will continue to happen").

52 Ex. A to Answer of Resp'ts Otani & Hyun ¶ 5, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #15, filed Sept. 7, 2021.

53 The Monitoring Panel is comprised of: Tommy Johnson (DPS Deputy Director for Corrections), Gavin Takenaka (DPS Healthcare Administrator), Dr. Kim Thorburn (former Hawai'i corrections medical director), Dan Foley (retired Intermediate Court of Appeals Judge and former Special Master for this court), and Dr. Homer Venters (epidemiologist and former chief medical officer of the New York City Correctional Health Services). See Answer of Resp'ts Otani & Hyun at 11–12, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #13, filed Sept. 7, 2021; Kevin Dayton, Panel Will Oversee Efforts By Prisons And Jails To Manage Pandemic Threat, Civil Beat (Sept. 3, 2021), https://www.civilbeat.org/2021/09/panel-will-oversee-efforts-byprisons-and-jails-to-manage-pandemic-threat/.

54 See Ex. A to Answer of Resp'ts Otani & Hyun ¶ 5, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #15, filed

Sept. 7, 2021.

55 Id. ¶ 27-28.

56 Id. ¶ 5.

57 The Settlement may be extended to, at latest, March 31, 2022, and only by the mutual consent of the parties or the written agreement of the majority of the Monitoring Panel. Id. ¶ 27.

58 SeeEmergency Proclamation Related to the COVID-19 Response, Off. of Governor of Haw. (Aug. 5, 2021), https://governor.hawaii.gov/wpcontent/uploads/2021/08/2108026-ATG_Emergency-Proc-for-COVID-19-Response-distribution-signed.pdf.

59 See Dep't of Pub. Safety, COVID-19 Information (updated 10/4/21), https://dps.hawaii.gov/blog/2020/03/17/coronavirus-covid-19-information-and-resources/. This number does not include the 2 people who died of COVID-19 while incarcerated at Saguaro. Seesupra note 14.

60 See Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus at 17–19, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #1, filed August 27, 2021; Petition for Writ of Mandamus at 14-16, In re Individuals in Custody of Hawai'i, SCPW-20-0000509, docket #1, filed Aug. 12, 2020; Petition for Writ of Mandamus at 16–19, Off. of Pub. Def. v. Ige, SCPW-20-0000213, docket #1, filed Mar. 26, 2020.

61 Petition for Extraordinary Writ Pursuant to HRS §§ 602-4, 602-5(5), and 602-5(6) and/or for Writ of Mandamus at 18, In re Individuals in Custody of Hawai'i, SCPW-21-0000483, docket #1, filed August 27, 2021.

1 In Hawaii Insurers Council, the court explained that under the separation of powers doctrine, no branch of government may "exercise powers not so constitutionally granted, which from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions." 120 Hawai'i at 70, 201 P.3d at 583 (cleaned up).

2 OPD's first request is that we:

> Order the Circuit, Family and District courts that when adjudicating motions for release: (a) release shall be presumed unless the court finds that the release of the individual would pose a significant risk to the safety of the individual or the public; (b) design capacity (as opposed to operational capacity) of the correctional facility shall be taken into consideration; (c) the health risk posed by the COVID-19 pandemic should be taken into consideration. Motions for release based on the foregoing are for the following categories of incarcerated persons:
>
> > a. Individuals serving a sentence (not to exceed eighteen months) as a condition of felony deferral or probation, except for: (i) individuals serving a term of imprisonment for a sexual assault conviction or an attempted sexual assault conviction; or (ii) individuals serving a term of imprisonment for any felony offense set forth in HRS Chapter 707, burglary

> in the first degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS §§ 709-906(7) and (8)), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1) and (2)), including attempt to commit those specific offenses (HRS §§ 705-500, 705-501).
>
> b. Individuals serving sentences for misdemeanor or petty misdemeanor convictions, except those convicted of abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).
>
> c. All pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, except those charged with abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5).
>
> d. All pretrial detainees charged with a felony, except those charged with a sexual assault or an attempted sexual assault, any felony offense set forth in HRS Chapter 707, burglary in the first degree (HRS §§ 708-810, 708-811), robbery in the first or second degree (HRS §§ 708-840, 708-841), abuse of family or household members (HRS §§ 709-906(7) and (8)), and unauthorized entry in a dwelling in the first degree and in the second degree as a class C felony (HRS §§ 708-812.55, 708-812.6(1), including attempt to commit those specific offenses (HRS §§ 705-500, 705-501)[])].

3 OPD asks us to "[o]rder the Circuit, Family and District courts to suspend the custodial portions of such sentence until the conclusion of the COVID-19 pandemic or until deemed satisfied for individuals serving intermittent sentences."

4 OPD asks us to:

> Order the Circuit, Family and District courts, DPS, and the HPA to reduce the population of Hawai'i's correctional facilities to allow for the social separation and other measures recommended by the CDC to prevent the spread of COVID-19 by taking immediate steps to reduce the population [of] those facilities to their design capacity and/or Infectious Disease Emergency Capacity as recommended by the Hawai'i Correctional System Oversight Commission.

It also requests that we "[a]ppoint a public health expert to enter into all of Hawai'i correctional facilities and review protocols, the ability to social distance and make recommendations" and "[o]rder testing for COVID-19 for all incarcerated persons and staff at Hawai'i correctional facilities...." OPD further asks that we Order DPS to adhere to: (1) the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities; and (2) "its Pandemic Response Plan – COVID-19 (May 28, 2021 rev.)."

5 OPD asks us to:

> Order the HPA to expeditiously address requests for early parole consideration, including conducting hearings using remote technology. The HPA should also consider release of incarcerated persons who are most vulnerable to the virus, which includes individuals who are 65 years old and older, have underlying health conditions, who are pregnant, and those individuals being held on technical parole violations (i.e. curfew violations, failure to report as directed, etc.) or who have been designated as having "minimum" or "community" security classifications and are near the maximum term of their sentences. The HPA shall prepare and provide periodic progress reports to the parties of their efforts and progress in the aforementioned areas. The reports should include a list of the names of individuals who have been granted release, the names of the individuals who are under consideration for release, and the names of the individuals who were considered for release but for whom release was denied.

6 HRS § 602-5(a)(3) provides that the supreme court has the jurisdiction and power to:

> exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before

> the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law....

7 The OPD's petition does not explain how HRS § 602-5(a)(6) authorizes the court to grant the OPD the relief it seeks. But its catholic requests coupled with its assertion that this court may grant those requests pursuant to HRS § 602-5(a)(6), implies this reading.

8 Petitioner asks us to "Order DPS to adhere to the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities in all Hawai'i correctional facilities." The CDC guidance Petitioner references includes this soap-related recommendation: "Liquid or foam soap when possible. If bar soap must be used, ensure that it does not irritate the skin and thereby discourage frequent hand washing. Ensure a sufficient supply of soap for each individual." See Center for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://www.cdc.gov/coronavirus/2019-ncov/community/correctiondetention/guidance-correctional-detention.html [https://perma.cc/98UZ-2WHH].

9 It is not just executive power the OPD asks us to infringe upon. The laws governing sentencing and bail are codified largely in HRS Chapters 706 and 804. The supreme court has the final say on the *interpretation* of these laws. But it cannot - even in the midst of a global pandemic - use its power to issue writs of mandamus and other extraordinary writs to rewrite them by, for example, establishing a presumption in favor of granting motions for release brought by certain individuals serving a term of imprisonment as a condition of felony or misdemeanor probation or deferral.

10 Another example of a lawful exercise of the court's inherent powers in response to the COVID-19 pandemic comes from the court's August 18, 2020 "Amended Order Re: Felony Defendants." In that order, the court established an "expedited process ... to address the issues related to release and temporary suspension of incarceration" for a large number of convicted felons and pretrial detainees charged with a felony. In re Individuals in Custody of State of Hawai'i, No. SCPW-20-0000509, 2020 WL 4816344, at *1 (Haw. Aug. 18, 2020), clarified on denial of reconsideration, No. SCPW-20-0000509, 2020 WL 5036224 (Haw. Aug. 26, 2020). The court said that "motions for release and temporary suspension of incarceration will be presumed to have been filed" by these inmates. Id. at *2. It also provided guidance about how trial courts should decide these motions (on a non-hearing basis except in extraordinary circumstances) and set a deadline (August 24, 2020) by which the lower courts had to enter their orders on the motions. Id. at *2-*3. These are procedural, logistical, and scheduling directions and it is within this court's power to issue them.

11 The court ordered that, subject to certain conditions:

> With regard to pretrial detainees charged with a petty misdemeanor or a misdemeanor offense, the respective court orders for detaining the individuals are temporarily suspended and, by Wednesday, August 19, 2020, the Department of Public Safety ("DPS") shall release from OCCC such pretrial detainees, except those charged with abuse of family or household members (HRS § 709-906), violation of a temporary restraining order (HRS § 586-4), violation of an order for protection (HRS § 586-11), or violation of a restraining order or injunction (HRS § 604-10.5)....

In re Individuals in Custody of the State of Hawai'i, 2020 WL 4873285, at *1 (footnote omitted).

12 The court's "no bail" rule applied only to those arrested for petty misdemeanors and misdemeanors that were not on the "excluded offenses" list. But the court's order (and "excluded offenses" list) also contemplated felony arrests and offenses.

Certain felony offenses – like those in Chapter 707 – were "excluded." Others, like sex trafficking (HRS § 712-1202 (Supp. 2016)) were not. The court's order "encouraged" the trial courts - when dealing with those arrested of non-excluded felony offenses - to "regularly employ the practice of releasing defendants without imposing bail." In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *2. This "encouragement" was appropriate. And it did not infringe on trial courts' statutory discretion. But the decision to encourage the trial courts to take this approach when dealing with those arrested of *certain felonies* (like sex trafficking (HRS § 712-1202)), *but not others* (like labor trafficking in the second degree (HRS § 707-782 (2014))) is a policy-fraught judgment call of the sort typically left to the legislature.

13 The August 27, 2020 Order also effectively negated trial courts' sentencing discretion under HRS §§ 706-621, 706-624(2), and 706-625 by commanding that:

> To the extent there are individuals serving intermittent sentences, the custodial portion of such defendants' intermittent sentence shall be suspended while Governor Ige's Emergency Proclamations remain in effect, or alternatively the sentences may be deemed satisfied at the discretion of the sentencing judge.

In re Individuals in Custody of the State of Hawai'i, 2020 WL 5057630, at *2.

14 Another apparent example of our inherent authority to provide process in ways that promote justice is found in this court's March 24, 2020 order in SCPW-20-0000200. There, the court said that it had reviewed a letter received from the Office of the Public Defender and would deem the letter – which asked the court to consider an order "designed to commute or suspend" jail sentences being served by certain inmates in Hawai'i correctional facilities – "as a petition for writ of mandamus pursuant to HRAP Rule 21." See Order, Office of the Public Defender v. Connors, SCPW-20-0000200 at 1 (Mar. 24, 2020).

15 For example, Illinois's Governor Jay Pritzker issued an executive order suspending statutory limitations on the permissible length of time and justifications for furloughs. See Ill. Exec. Order No. 2020-21 (Apr. 6, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder202021.aspx [https://perma.cc/C36N-3QU9]. In Colorado, Governor Jared Polis issued an executive order temporarily suspending various criminal statutes aimed to reduce the incarcerated population. See Co. Exec. Order No. D 2020 016 (Mar. 25, 2020), https://www.colorado.gov/governor/sites/default/files/inlinefiles/D% 202020% 20016% 20Suspending% 20Certain% 20Regulatory% 20Statutes% 20Concerning% 20Criminal% 20Justice_0.pdf [https://perma.cc/W2UM-YRLW].

16 The Massachusetts Supreme Court's action is distinguishable from that undertaken by the Washington Supreme Court in response to COVID-19. While the former released certain pretrial detainees, the latter merely provided guidance to its lower courts about the interpretation of a Washington law concerning the release of the accused. SeeIn the Matter of Statewide Response By Washington State Courts to the COVID-19 Public Health Emergency, Amended Order No. 25700-B-607 (March 20, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme% 20Court% 20Orders/Supreme% 20Court% 20Emergency% 20Order% 20re% 20CV19% 20031820.pdf [https://perma.cc/2HSB-FM2G]. Unlike the Massachusetts Supreme Court (and this court), the Washington Supreme Court did not directly order the release of any pretrial detainees.

17 For example, in Kentucky, the Supreme Court issued an order releasing some pretrial detainees. See 2020-45 Amended Order, In Re: Kentucky Court of Justice Response to Covid-19 Emergency: Amended Emergency Release Schedule and Pretrial Drug Testing Standards (May 29, 2020), https://kycourts.gov/Courts/Supreme-Court/Supreme% 20Court% 20Orders/202045.pdf[https://perma.cc/4QCY-KJB4]. But Kentucky's Rules of the Supreme Court provide that: "The policy-making and administrative authority of the Court of Justice is vested in the Supreme Court and the Chief Justice. All fiscal management, personnel actions and policies, development and distribution of statistical information, and pretrial release services come within that authority." KY ST S CT Rule 1.010 (emphases added). There is no analogous rule in Hawai'i.

In Maryland, Chief Judge Mary Ellen Barbera issued an administrative order directing judges to "identify at-risk incarcerated

persons for potential release," "expedite the handling of motions for review of bonds," and consider COVID-19-related factors in making release and sentencing decisions. But Chief Judge Barbera did not set forth specific categories of covered or excluded offenses. See Administrative Order Guiding the Response of the Trial Courts of Maryland to the Covid-19 Emergency as It Relates to Those Persons Who Are Incarcerated or Imprisoned (Apr. 14, 2020), https://mdcourts.gov/sites/default/files/adminorders/20200414guidingresponseoftrialcourts.pdf [https://perma.cc/9BHD-LFGN].

Additionally, although the Supreme Court of South Carolina's Chief Justice Donald W. Beatty issued a "memorandum" directing magistrates and municipal judges to release certain pretrial detainees, the memorandum is silent on the chief justice's authority to do so. Memorandum, Re: Coronavirus (Mar. 16, 2020), https://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=2461[https://perma.cc/CA6V-6ECH].

18 We may also intervene if there is a showing that injunctive relief is necessary to forestall a constitutional violation.

19 This is a *lower* standard than that applied to Eighth Amendment excessive force claims where a plaintiff alleges a prison official of using excessive physical force. In such cases, the key question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 503 U.S. 1, 6 (1992) (cleaned up).

20 Pretrial detainees asserting their article I, section 5 due process rights have been violated because the conditions of their confinement are punitive face a lower bar for establishing a due process violation. They do not need to show that the conditions at issue pose a "substantial risk of serious harm." They can succeed on a showing that: "(1) there is a showing of an expressed intent to punish on the part of detention facility officials; (2) the condition or restriction is not reasonably related to a legitimate goal; or (3) the condition or restriction is excessive in relation to the alternative purpose assigned to it." Gordon v. Maesaka-Hirata, 143 Hawai'i 335, 358, 431 P.3d 708, 731 (2018) (cleaned up).

21 In Kingsley v. Hendrickson, 576 U.S. 389, 392 (2015), the Supreme Court held that a pretrial detainee may prove that their federal due process rights were violated by a jail officer's use of excessive force by showing that the force was *objectively* unreasonable. Our constitution's due process protections for pretrial detainees bringing excessive force claims are at least as great, if not greater, than those provided by the federal constitution.

22 The OPD attaches the district court's preliminary injunction order in Chatman v. Otani, No. CV 21-00268 JAO-KJM (D. Haw. 2021), to its petition. Chatman is a putative class action initiated by several individuals incarcerated or detained in Hawai'i's correctional facilities. Chatman v. Otani, No. CV 21-00268 JAO-KJM, 2021 WL 2941990, at *1-*2 (D. Haw. July 13, 2021). The Chatman plaintiffs alleged that DPS violated their Eighth and Fourteenth Amendment rights by mishandling the pandemic and failing to implement DPS's Pandemic Response Plan. Id. at *1. Before the settlement agreement was entered, the district court granted plaintiffs' motion for provisional class certification and granted in part and denied in part plaintiffs' motion for preliminary injunction and temporary restraining order. Id. at *25. The court ordered DPS to fully comply with its Pandemic Response Plan; it also imposed additional conditions. Id. at *22-*24. On September 9, 2021, the district court granted the parties' joint motion for preliminary approval of the settlement agreement. Chatman v. Otani, No. CV 21-00268 JAO-KJM, ECF No. 97 (D. Haw. Sep. 9, 2021).

The OPD treats the district court's preliminary injunction order in Chatman as if it is a substitute for a fully developed factual record. But it isn't: the Chatman court did not hold an evidentiary hearing and its analysis is conclusory and based on an assortment of declarations. The contents of those declarations are not subject to judicial notice by this court. SeeHawai'i Rules of Evidence Rule 201; Uyeda v. Schermer, 144 Hawai'i 163, 172, 439 P.3d 115, 124 (2019) ("Factual allegations, conclusions, and findings, whether authored by the court, by the parties or their attorneys, or by third persons, should not be noticed to prove the

truth of the matters asserted even though the material happens to be contained in court records." (cleaned up)).

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State Policies Governing Termination or Garnishment of Public Pensions

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Add. 114

Alabama	Act 2012-412 requires members of TRS, ERS and JRF convicted of a felony offense related to their public position to forfeit their right to lifetime retirement benefits. However, the employee would receive a refund of his or her retirement contributions. This legislation is not retroactive and does not affect any member that has already been found guilty of an offense.
Alaska	A public officer, legislator, or a person employed as a legislative director, who is convicted of a federal or state felony, bribery, receiving a bribe, perjury, subornation of perjury, scheme to defraud, fraud, mail fraud, misuse of funds, corruption, or evasion may not receive a state pension benefit if the offense was in connection with the person's duties. Pension benefits and employee contributions that accrue to a person the date of the person's commission of the offense are not diminished or impaired. The act excludes insurance, voluntary wage reductions, involuntary wage reductions, or supplemental or health benefits and member or employee contributions from the forfeiture, and provides protection for certain spousal or dependent benefits, depending upon circumstances including spousal complicity. The law also provides that a person whose offense results in a pension forfeiture may not subsequently accrue service credit in public service.
Arizona	Arizona Revised Statutes §13-713: Notwithstanding any other law, if a member of a state retirement system or plan is convicted of or pleads no contest to an offense that is a class 1, 2, 3, 4 or 5 felony and that was committed in the course of the member's employment as a public official or for a public employer, the court shall order the person's membership terminated and the person shall forfeit all rights and benefits earned under the state retirement system or plan. A member who forfeits all rights and benefits earned pursuant to this section is entitled to receive, in a lump sum amount, the member's contribution to the state retirement system or plan plus interest as determined by the board of that state retirement system or plan, less any benefits received by the member.
Arkansas	A system beneficiary convicted of murdering a member of a public retirement system in the state forfeits their right to a benefit from that system.
California	California law, under the Public Employees' Pension Reform Act, states that members, on or after January 1, 2013 (or elected officers elected/reelected to public office on or after January 1, 2006) who have been convicted by a state or federal trial court of any felony under the law for conduct arising out of or in the performance of his or her official duties, in pursuit of the office or appointment, or in connection with obtaining salary, disability, service retirement, or other benefits, must forfeit all accrued rights and benefits in any public retirement system they are a member of at the time the felony is committed retroactive to the first commission date of the crime. The earliest date of the commission of the crime is the date that was used in the court proceeding. The conviction date is the date that the member pleads guilty, or when the judge or jury makes a decision on a case. The member and the prosecuting agency are required by law to notify the employer within 60 days of the felony conviction. The employer is required by law to notify the California Public Employees' Retirement System (CalPERS) within 90 days of the member's conviction. CalPERS can also be notified by the media, CalPERS ethics hotline, third parties, and members themselves. When this occurs, CalPERS will reach out to the employer and ask for felony conviction information.
Colorado	Public pension assets may be garnished "for restitution for the theft, embezzlement, misappropriation, or wrongful conversion of public property, or in the event of a judgment for a willful and intentional violation of fiduciary duties to a public pension plan where the offender or a related party received direct financial gain." Per COPERA: This statute "does not explicitly require a Colorado member to forfeit their PERA benefit."
Connecticut	A state judge may revoke or reduce state and municipal pensions for criminal convictions arising out of on-the-job corruption regarding embezzlement of public funds; felonious theft from the state, a municipality or quasi-public agency; bribery; or felonies committed through the misuse of a government office or job. The law requires that the state attorney general apply for a court order to reduce or revoke a pension. Effective October 1, 2008.

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Delaware	A surviving beneficiary convicted of murdering a member of a public retirement system in the state forfeits their right to a survivor benefit.
Dist. of Columbia	No law enabling forfeiture of a public pension.
Florida	Members of public pension plans must forfeit their entitlement to future retirement benefits when they commit certain crimes, including commission of any felony under laws governing misuse of public office, any felony against a victim younger than 16 years of age, or any felony involving sexual battery against a victim younger than 18 years of age, or by a public officer or employee through the use or attempted use of power, rights, privileges, duties, or position of his or her public office or employment position.
Georgia	Georgia law stipulates that if a public employee, who was in service on July 1, 1985 and remained in service, commits a public employment related crime on or after July 1, 1985, and is convicted of such crime, the employee's membership in any public retirement system is terminated as of the date of final conviction and such individual shall not be eligible for membership in any public retirement system thereafter. For any such public employee finally convicted for the commission of a public employment related crime, the right to any benefit or any other right under any public retirement system in which the employee is a member shall be determined as of the date of final conviction. For public employees first or again becoming members after July 1, 1985, upon conviction for the commission of a public employment related crime in the capacity of a public employee such person's benefits under a public retirement or pension system, including any survivor's benefits if applicable, shall be reduced by an amount equal to three time the economic impact of the crime, as determined by a prescribed method by law. Payment of such individual's benefits shall cease until such amount has been forfeited, after which benefits shall be restored. If the person has not begun to receive a benefit, the deduction shall commence at the time benefits would normally begin.
Hawaii	Statute provides for the forfeiture of one-half of the ERS benefits of an ERS member, former member, or retiree upon conviction of the member for a felony related to their state or county employment. Statute further prohibits designated beneficiaries from receiving benefits if convicted under a felony under the same set of circumstances as the individual who was subject to forfeiture of ERS benefits.
Idaho	No law enabling forfeiture of a public pension.
Illinois	No public pension benefits "shall be paid to any person, any person who otherwise would receive a survivor benefit, who is convicted of any felony relating to or arising out of or in connection with his or her service as a member." The trustees of each pension fund make the determination if the felony plea of conviction of the member met this standard. Those convicted of a felony may receive their contributions.
Indiana	Upon conviction of a misdemeanor or felony, a "member's contributions or benefits, or both, may be transferred to reimburse his employer for loss resulting from the member's criminal taking of his employer's property by the board if it receives adequate proof of the loss."
Iowa	No law enabling forfeiture of a public pension.
Kentucky	Statute provides that any "member hired on or after August 1, 2002" who is convicted of a felony that is related to his or her employment shall forfeit his or her retirement benefits, and shall be entitled instead only to a refund of his or her account balance with any accumulated interest. An appeal will stay the payment of the forfeited retirement allowance, and in the event that the appeal overturns the conviction the member is entitled to all retirement benefits. KRS 161.470(5)(e)
Louisiana	Pension benefits may be garnished for misconduct associated with service as an elected official or public employee for which credit in the system, plan, or fund was earned or accrued.
Maine	Courts may order forfeiture of pension benefits of those convicted or pleading guilty to a crime committed in connection with the member's public office or public employment. Also, amounts credited to the account of a member of the retirement system are available to pay any court-ordered restitution for economic loss suffered by the State or a political subdivision of the State as the result of the crime.

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Maryland	Public employees who are convicted of a felony in the commission of their public duties forfeit their retirement benefit.
Massachusetts	Generally, retirement boards are required to deny or rescind the pensions of any public employee convicted of a crime related to his or her duties. A member may be entitled to receive their accumulated retirement contributions. In certain instances a member of a retirement system could be subject to forfeiture of any rights to benefits or their accumulated retirement contributions. Separately, a retirement board is required to suspend a disability retirement allowance for the period a member is incarcerated as a result of a felony conviction http://www.mass.gov/legis/laws/mgl/32-15.htm
Michigan	"A member or retirant who is convicted of or who enters a *nolo contendere* plea accepted by a court for a felony arising out of his or her service as a public employee is considered to have breached the public trust and may have his or her rights to an otherwise vested retirement benefit and all accumulated contributions standing to that person's credit in the retirement system forfeited as provided in this act. This act applies only to the retirement system of which the person was a member or retirant at the time the felony was committed and only to the retirement system established by the entity affected by the felony" The statue provides for the forfeiture of benefits accrued to the member or retirant "after the time the act or acts that resulted in the felony were committed."
Minnesota	Minnesota statutes forbid a survivor convicted of causing the death of a public pension plan member, from collecting survivor benefits under that account. If convicted, the benefit is forfeited and the pension plan can attempt to recover the benefit previously paid.
Mississippi	No law enabling forfeiture of a public pension.
Missouri	Effective 8/28/14, a participant in a public employee retirement system established by the state or any political subdivision who is found guilty of a felony committed in direct connection with or directly related to the participant's duties is ineligible to receive any retirement benefits from the system. The participant may request a refund of his or her contributions to the system including any credited interest. Effective 8/28/99, any member who serves as a member of the general assembly or as a statewide elected official, shall not be eligible to receive any retirement benefits from the system … if such member is convicted of a felony that is determined by a court of law to have been committed in connection with the member's duties either as a member of the general assembly or as a statewide elected official, unless such conviction is later reversed by a court of law. Also, any board member, plan participant, or employee who is found guilty of a plan-related felony is prohibited from receiving a benefit from the plan.
Montana	Nothing regarding malfeasance in office or employment-related criminal conduct unless disability or death result. **19-2-804.** Limitations on payment of benefits to person causing member's death or disability. If a person is convicted of knowingly, purposely, or intentionally causing a (retirement system) member's death or disability, that person may not receive benefits or payments from a retirement system and the benefits must be payable as otherwise provided in statute. **19-2-906.** Limitations on disability or survivorship benefits. If the board determines that the disability or death of a (retirement system) member of a defined benefit plan is proximately caused by the gross negligence, willful misconduct, or violation of the law by the member, the board may revoke, suspend, or refuse to grant benefits except an annuity that is the actuarial equivalent of the member's accumulated contributions with regular interest to the day the benefit commences.
Nebraska	No law enabling forfeiture of a public pension.

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Agenda Item 11

Nevada	For persons who become members of PERS, JRS or LRS on or after 7/1/15, retirement benefits are forfeited (with limited exceptions) among conviction or plea of guilty to a felony. For all others, retirement benefits can be voided only in cases involving a person convicted of murder or making a false statement in order to receive benefits.
New Hampshire	Per state law, the NHRS board is authorized to correct the benefit level and to adjust future payments so that the actuarial equivalent of overpayments shall be repaid, for any person whose benefit is affected through false statements or falsification of records of the retirement system.
New Jersey	The board of trustees of any State or locally-administered pension fund or retirement system is authorized to order the forfeiture of all or part of the pension or retirement benefit of any member of the fund or system for misconduct occurring during the member's public service which renders the member's service or part thereof dishonorable. Also, public officers or employees convicted of certain crimes—including sex-related offenses—involving or touching their office or employment face mandatory forfeiture of pension and retirement benefits. Contributions are considered part of the employee's salary and not part of the pension benefit. A state, county or local employer participating in a pension fund or retirement system would be responsible for reimbursement to the pension fund or retirement system of all pension costs incurred by the pension fund or retirement system following any settlement agreement between the employer and an employee that provides for the employer not to pursue any civil or criminal charges or an action for misconduct against the employee.
New Mexico	Elected and appointed officials may be fined an amount up to their total salary and pension benefits if they are convicted of felony corruption charges.
New York	For crimes committed on or after 1/1/18, a judge may strip or reduce the pension of a public official convicted of a felony related to their official duties. Public official is defined as any elected official, state official appointed by the governor, judge and certain employees involved in policy making. For crimes committed prior to the effective date, those convicted of a felony related to their public office who entered the public retirement system after Nov. 12, 2011, can have their pensions stripped.
North Carolina	Elected officials who are members of the Legislative Retirement System, the Local Governmental Employees' Retirement System, the Teachers' and State Employees' Retirement System, or the Consolidated Judicial Retirement System shall forfeit their pensions upon conviction of a State or Federal offense involving public corruption or a felony violation of election laws. Member contributions will be returned.
Ohio	Ohio Revised Code Section 2929.192 provides for forfeiture of retirement benefits by a member who was serving in a position of honor, trust, or profit after conviction for bribery, theft in office, and engaging in a pattern of corrupt activity. This forfeiture applies to all of the five (5) public pension plans in Ohio. Ohio Revised Code Section 3307.373 provides for forfeiture for members of the State Teachers Retirement System of Ohio convicted of rape, sexual battery, unlawful sexual contact with a minor or gross sexual imposition if the victim was a student
Oklahoma	State & county officers and employees are removed from office and lose their jobs upon conviction of a felony in state or federal court. If the crime involves a "violation of the oath of office," their pension is forfeited for any service earned after 1981 (the original effective date of the law).
Oregon	No law enabling forfeiture of a public pension.
Pennsylvania	A public employee convicted of using his or her position or office to commit a crime relating to theft, bribery, forgery, perjury, etc., or who is convicted of a state felony or other crime punishable by five or more years in prison, forfeits their right to receive the employer-funded portion of their pension benefit. Such employees may receive their contributions, without interest, and contributions may be reduced to pay fines and make restitution associated with their conviction. Although a felony, conflict of interest does not result in an automatic forfeiture of pension benefits.

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Rhode Island	"Any retirement or other benefit or payment of any kind to which a public official or public employee is otherwise entitled … shall be revoked or reduced, … if, the public official or public employee is convicted of or pleads guilty or nolo contendere to any crime related to his or her public office or public employment. Any such conviction or plea shall be deemed to be a breach of the public officer's or public employee's contract with his or her employer."
South Carolina	Retirement benefits payable from the Retirement Systems are generally not subject to garnishment, attachment or other legal process. However, a lien can be made against a member's retirement benefits if the member is convicted of embezzlement of public funds pursuant to Section 8-1-115 of the S.C. Code of Laws.
South Dakota	No law enabling forfeiture of a public pension.
Tennessee	For employees hired or elected after July 1, 1982 and convicted in state court of malfeasance in office felony, pension is forfeited. For employees hired after May 30, 1993 and convicted in state or federal court of malfeasance in office felony, pension is forfeited. Elected officials elected or re-elected beginning in 2006 or after, such election should be deemed to be consent to forfeiture without respect to the original membership date.
Texas	Elected officials who participate in the ERS of Texas and who are convicted of certain qualifying felonies associated with corruption or abuse of office, lose eligibility for their pension benefit.
Utah	Public employees convicted of a felony related to the performance of their position shall forfeit their retirement benefit.
Vermont	The Attorney General or State's Attorney is required to petition a judge to order the partial or total civil forfeiture of retirement payments to public officials convicted of crimes related to their employment.
Virginia	From Virginia statutes: "No member shall be entitled to the benefits of this subsection if his employer certifies that his service was terminated because of dishonesty, malfeasance, or misfeasance in office. The certification may be appealed to the Board." For elected officials, a member of the state house or senate would be required to certify that service was terminated for reasons of malfeasance.
Washington	No general provision for forfeiture of a pension. There is a "slayer provision" that will preclude a person from receiving a pension as the beneficiary of a person that they are convicted of killing.
Wisconsin	2019 Wisconsin Act 71 authorizes the Department of Employee Trust Funds (ETF) to withhold money from a participant's Wisconsin Retirement System (WRS) annuity or lump sum payment if ETF is ordered to do so by a court in a restitution order. ETF is required under the act to deliver any amount that it withholds in accordance with the restitution order. The act also specifically provides that a court's restitution order may require ETF to withhold the amount of restitution from any payment of the defendant's WRS annuity or lump sum and deliver any amount that is withheld in accordance with the current process for delivering restitution payments1, if all of the following apply: The crime for which the restitution is ordered is both theft and misconduct in public office; the crime resulted in loss of property for the defendant's employer that participates in the WRS; and the value of the property exceeds $2,500. Wisconsin law also permits annuity payments and lump sum payments to have child support withheld and may be attached to satisfy delinquent tax obligations. Also, "corrections" may be made to service credits, contributions, premium payments and benefit payments if the amounts on record for an employee are the result of fraud.
Wyoming	No law enabling forfeiture of a public pension.

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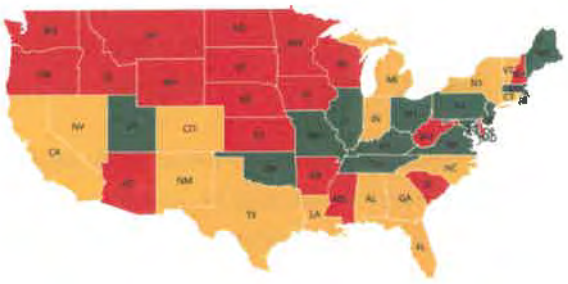

Reason Foundation

DATA VISUALIZATION

What Happens to Taxpayer-Funded Pensions When Public Officials Are Convicted of Crimes?

The police officer charged with killing George Floyd is eligible for his full taxpayer funded pension. In fact, a majority of states provide retirement benefits to officers and public servants convicted of serious crimes.

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Even before the recent nationwide calls for police reform, one question that was frequently asked following the conviction of a public official or employee: What will happen to their taxpayer-funded pension?

The answer depends on whether or not the state that employee lives in has a law on the books requiring pension garnishment or forfeiture. For example, Minnesota does not have a pension forfeiture or garnishment law. Thus, Derek Chauvin, one of the Minneapolis police officers formally charged with killing George Floyd, will be entitled to his full, partially taxpayer-funded, pension benefits when he's eligible for the benefits—even if convicted of killing Floyd.

Contrast this with Illinois, which does have a pension forfeiture policy. Former Illinois Gov. Rod Blagojevich is losing out on what would've been his $65,000 annual state pension because he was convicted of felony crimes stemming from his time as governor. As WMAQ reported at the time:

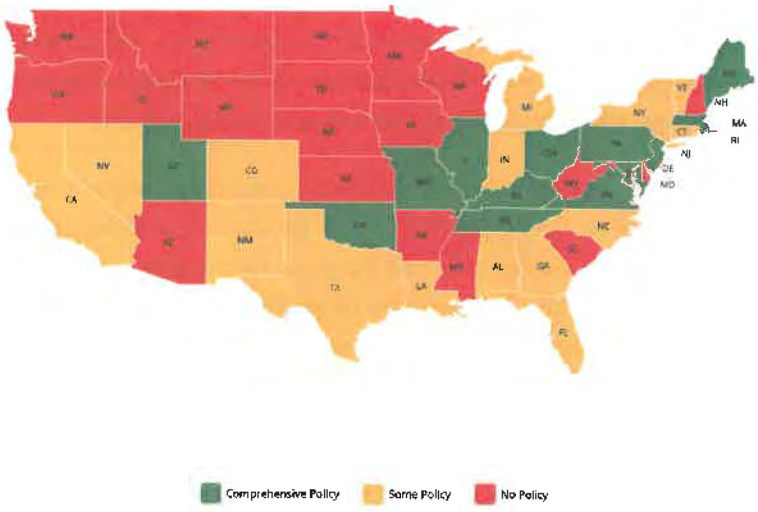
> In her 10-page statement (.pdf), [Illinois Attorney General Lisa] Madigan relates Pension Code to the charges with which Blagojevich was ultimately convicted: "None of the benefits herein provided for shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a member," Section 2-156 of the Pension Code states.

Across the country, 30 states have some sort of public pension garnishment or forfeiture laws. Of those 30, only 15 states will revoke or garnish an employee's pension benefit if he or she is convicted of a felony related to their misconduct on the job (Figure 1).

The other 15 states with public pension garnishment or forfeiture laws will only revoke a public employee's pension benefits, including police officers, for what are considered "financial crimes" such as fraud, embezzlement, theft, and bribery.

Additionally, some states have public pension forfeiture and garnishment laws but they are written so that they do not apply to police officers. The states with garnishment or forfeiture laws that exempt police, or only apply the laws to financial crimes should not be seen as having a *comprehensive policy* that would apply to common police misconduct cases. This leaves only 13 states with comprehensive policies for most police convictions, as displayed in the map below.

Public Pension Forfeiture and Garnishment Policies by State



Scroll down to Figure 1 below for a more in-depth description of each state's specific forfeiture and garnishment laws.

What Is Pension Garnishment and Forfeiture?

Pension *garnishment* is the policy of using a convicted elected official's or public employee's taxpayer-funded pension benefit to offset the cost of

his or her incarceration, pay for restitution for bodily injury or loss of property, or to help pay settlements in a civil suit. Garnishment is typically the less severe punishment for the employee, as they are still eligible to receive any benefit above the amount owed due to their misconduct. In addition, any beneficiaries of that benefit would not be shut out from future payments.

Pension *forfeiture,* on the other hand, is the policy of revoking any taxpayer-funded pension benefit the convicted member has earned in their civil service. Any potential pension payment the government employee would have earned is erased, and the pension system itself would absorb any contributions his or her employer (and thus taxpayers) made on their behalf. In some states, the public employee would be entitled to receive the amount they themselves paid into the pension fund.

The majority of the states shown in Figure 1 with pension garnishment or forfeiture laws require the public employee to be found guilty, plead guilty, or plead *no* contest to felonious criminal charges before any garnishment or forfeiture can occur. Because this standard is set so high, these policies are rarely used outside of headline-grabbing cases.

Forfeiture is the more common method states have used to withhold pensions for convicted public employees. Of the 30 states with laws on the books, 27 of them include at least some form of pension forfeiture. Only three states expressly permit garnishment while excluding any kind of forfeiture.

Another interesting statistic is the dispersion of forfeiture and garnishment laws. The vast majority of states with no laws are in the northwest and the north-central United States. Only 5 of the 23 states east of the Mississippi River do not have laws permitting the garnishment or forfeiture of a public employee's pension.

Do Forfeiture and Garnishment Policies Affect the Solvency of a Public Pension System?

Garnishing or revoking an individual employee's pension will have a near-zero impact on the public pension fund's solvency due to the sheer size of most public sector defined-benefit plans in the United States.

Arguments Over Legality and Morality

Garnishment and forfeiture are better understood as issues of legality and morality, and the arguments surrounding these policies aim to address two questions.

First, are pensions part of compensation, or are they gifts from the state?

Keith Brainard of the National Association of State Retirement Administrators (NASRA) proposed this question back in 2012 when the

Jerry Sandusky case was major news. Sandusky, a longtime defensive coordinator for the Penn State football team, was found guilty of 45 counts of child sexual abuse and amid the scandal, there were questions about Sandusky's pension. If pensions are earned parts of compensation, they would typically follow the same policies and laws that govern other parts of compensation. Brainard, at the time, stated that "normally, an employer wouldn't and probably couldn't go claim back wages that were paid" and "pension benefits are part of the compensation just as much as wages."

Second, does somebody who has committed a felony while performing a public sector job deserve to be supported in his or her old age at taxpayers' expense?

In Illinois, the state with the oldest forfeiture laws dating back to 1955, the Supreme Court answered this question by stating that the policy was designed for the purpose of "ensuring the public's right to conscientious service from those in governmental positions."

If the legality in the first question is found to be valid in state court—implying that pensions are eligible to be forfeited or garnished—then one might expect that most state legislatures would push forward with enacting some form of a pension forfeiture proposal as a deterrent to bad behavior by public employees.

States that have expressly rejected the legal validity of pension garnishment and forfeiture, such as Washington state in *Leonard v. Seattle*, 81 Wn.2d 479 (1972), may require a new court case before the legislature would feel comfortable pushing such policies forward.

Would Pension Forfeiture Laws Reduce Police Misconduct?

Anecdotal evidence of pension forfeiture laws dissuading law enforcement officers from committing misconduct was found in a 2017 study in the *Journal of Law, Economics, and Policy*. The study concluded that "initial and admittedly casual evidence suggests that states with stronger pension forfeiture laws experience lower rates of police misconduct."

Conclusion

Regardless of the justification for using pension garnishment and forfeiture policies, it is important that lawmakers understand the impacts and function of these pension policies.

While these policies will neither help nor hurt the overall solvency of large public pension systems, they can add transparency, accountability, and be used as a deterrent from any misconduct by public employees.

The effectiveness of pension garnishment and forfeiture laws is currently difficult to quantify and largely anecdotal, but allowing courts the ability

to modify public employee benefits could be an important policy pursuit to help prevent further taxpayer dollars from going to public employees who have disgraced their positions and failed to properly serve the taxpayers partially funding those retirement benefits.

Figure 1

State-by-State Breakdown

State	Policy	Law	Does This Policy Apply to Police?	Does This Policy Only Apply to Financial Crimes?
Alabama	Members of the teachers, public employees, and judicial retirement plans would forfeit their right to retirement benefits if convicted of certain felony offenses related to their public position. Members would instead receive a refund of their retirement contributions.	Forfeiture	Yes	Yes
Alaska	A public officer who is convicted of a federal or state felony, bribery, receiving a bribe, perjury, subornation of perjury, scheme to defraud, fraud, mail fraud, misuse of funds, corruption, or evasion may not receive a state pension benefit if the offense was in connection with the person's duties. Members would instead receive a refund of their contributions. Members who forfeit their pension are unable to accrue future service credit in any state-pension covered position.	Forfeiture	Yes	Yes
Arizona	No policy	None	-	-
Arkansas	A beneficiary of the retirement system will have their benefit forfeited if they murder an active member of a public retirement system. For the purposes of this study, AR will be listed as not having a policy.	None	-	-
California	Any elected official or employee who is convicted for bribery, embezzlement, extortion, perjury, or conspiracy to commit those crimes in the course of their service will have their pension forfeited. Members would instead receive a refund of their contributions, minus the accrued interest on those contributions.	Forfeiture	Yes	Yes
Colorado	Pension benefits may be garnished for restitution for the theft, embezzlement, misappropriation, or wrongful conversion of public property, or in the event of a judgment for a willful and intentional violation of fiduciary duties to a public pension plan where the offender or a related party received direct financial gain.	Garnishment	Yes	Yes
Connecticut	Pension benefits may be forfeited or garnished by court order for convictions of embezzlement, theft, bribery, or felonies committed through misuse of a government office or job.	Forfeiture and Garnishment	Yes	Yes
Delaware	A beneficiary of the retirement system will have their benefit forfeited if they murder an active member of a public retirement system. For the purposes of this study, DE will be listed as not having a policy.	None	-	-
District of Columbia	No policy	None	-	-
Florida	Members forfeit their pension benefits if they are convicted of committing felonies related to misuse of public office, crimes where the victim was under 16 years of age, sexual battery when the victim is under 18 years of age, or use/misuse of power, rights, privileges, duties as it relates to their public position.	Forfeiture	Yes	Yes
Georgia	Public employees who are convicted of committing crimes related to their employment will forfeit any benefit after the date of conviction.	Forfeiture	Yes	Yes
Hawaii	No policy.	None	-	-
Idaho	No policy.	None	-	-
Illinois	Pension benefits are forfeited for members who are convicted of a felony relating to their service as an employee. The member is entitled to a refund of their contributions.	Forfeiture	Yes	No
Indiana	Pension benefits may be garnished upon conviction of a misdemeanor or felony relating to an offense which causes their employer financial loss. Member forfeits any future benefit.	Forfeiture and Garnishment	Yes	Yes

State	Policy	Law	Does This Policy Apply to Police?	Does This Policy Only Apply to Financial Crimes?
Iowa	No policy.	None	-	-
Kansas	No policy.	None	-	-
Kentucky	Members who are convicted of a felony that is related to their public service shall forfeit all retirement benefits. Members are entitled to a refund of their contributions, plus interest.	Forfeiture	Yes	No
Louisiana	Pension benefits may be garnished if a public employee or elected official is convicted of misconduct detrimental to their position.	Garnishment	Yes	Yes
Maine	Members who are convicted of a crime relating to their employment may have their pension benefits forfeited by court order. In addition, any dollars in the members pension account is available to pay for any court-ordered restitution for economic loss to the State or local government due to the members crime.	Forfeiture and Garnishment	Yes	No
Maryland	Public employees who are convicted of a felony arising out of the misuse of their position forfeit their retirement benefits.	Forfeiture	Yes	No
Massachusetts	Members who are convicted of a crime related to their duties as a public employee forfeit their pension benefits. In certain cases, that members contributions may be garnished to pay restitution to the state or employer.	Forfeiture and Garnishment	Yes	No
Michigan	A member who is convicted of certain felonies relating to their public service may have their rights to a pension benefit forfeited, along with the forfeiture of their contributions into the system.	Forfeiture	Yes	Yes
Minnesota	No policy.	None	-	-
Mississippi	No policy.	None	-	-
Missouri	A member of any state or local public retirement system will forfeit their right to pension benefits if convicted of a felony in 'direct relation' to the employee's duties. The member is entitled to a refund of their contributions, plus interest.	Forfeiture	Yes	No
Montana	Pension benefits may be partially or fully forfeited if a member causes the death or disability to a member of any state-covered retirement plan. For the purposes of this study, MT will be listed as not having a policy.	None	-	-
Nebraska	No policy.	None	-	-
Nevada	Public employees hired after 2015, and convicted of a felony, forfeit their rights to a retirement benefit.	Forfeiture	Yes	Yes
New Hampshire	No policy.	None	-	-
New Jersey	Any state or local board-administered retirement system can cause the forfeiture of retirement benefits for members who are convicted of misconduct. Members who are convicted of sexual offenses relating to their service face mandatory forfeiture.	Forfeiture	Yes	No
New Mexico	Elected and appointed officials are subject to garnishment up to an amount of their entire salary and pension benefit if they are convicted on felony corruption charges.	Garnishment	No	Yes
New York	For any felonious crime committed after 2017, an elected or appointed official may have their pension benefits forfeited.	Forfeiture	No	No
North Carolina	Any elected official who is convicted on state or federal corruption charges shall forfeit their retirement benefits.	Forfeiture	No	Yes
North Dakota	No policy.	None	-	-
Ohio	A member of one of the state retirement plans will forfeit their retirement benefit is convicted of bribery, theft, or engaging in a pattern if corrupt activity.	Forfeiture	Yes	No
Oklahoma	State and county employees who are convicted of a state or federal felony forfeit any future accrued retirement benefits and are subject to a return of their contributions or a reduced pension benefit.	Forfeiture	Yes	No
Oregon	No policy.	None	-	
Pennsylvania	Any public employee who commits theft, bribery, forgery, perjury, or is convicted of a felony relating to their position will forfeit their right to a pension benefit. The employee will have their contributions reimbursed. In addition, those reimbursed contributions may be used to fines or to make restitution for the victims of any of those crimes.	Forfeiture and Garnishment	Yes	No

State	Policy	Law	Does This Policy Apply to Police?	Does This Policy Only Apply to Financial Crimes?
Rhode Island	Any retirement or OPEB benefit earned by a public employee will be reduced or forfeited if that employee is convicted to any crime related to their position.	Forfeiture	Yes	Yes
South Carolina	No policy.	None	-	-
South Dakota	No policy.	None	-	-
Tennessee	Any employee hired after 1981 and covered under a state retirement plan will forfeit their pension benefit if convicted of a felony in the state court of malfeasance.	Forfeiture	Yes	No
Texas	Elected officials in the public employee retirement system will forfeit their pension benefits if convicted of felonious corruption or abuse of office.	Forfeiture	No	No
Utah	Public employees convicted of a felony related to the performance of their position shall forfeit their retirement benefit.	Forfeiture	Yes	No
Vermont	Public officials will have their full or partial pension benefit revoked if convicted of crimes related to their employment.	Forfeiture	No	Yes
Virginia	No pension benefit may be paid to a public employee who was terminated because of dishonesty or malfeasance.	Forfeiture	Yes	No
Washington	No policy.	None	-	-
West Virginia	No policy.	None	-	-
Wisconsin	No policy.	None	-	-
Wyoming	No policy.	None	-	-

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