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BEYOND BETTENCOURT

*The 8th Amendment and Pension
Forfeitures in Massachusetts*



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MACRS 2016 SPRING CONFERENCE

References in this Presentation

- “SCOTUS” The Supreme Court of the United States.
- “SJC” The Supreme Judicial Court of Massachusetts.
- “EFC” The Excessive Fines Clause of the 8th Amendment to the United States Constitution.
- “The Bill of Rights” The First Ten Amendments to the United States Constitution.
- “Bajakajian” THE SCOTUS decision regarding the EFC, *United States v. Bajakajian*, 524 U.S. 321 (1998).

2

Bettencourt: A Seismic Decision

In a nutshell: A pension forfeiture, as set out in G.L. c. 32, Section 15(4), is a “fine” for purposes of the 8th Amendment to the United States Constitution, and said forfeiture may be halted if it is found to be “excessive.” *Public Employee Retirement Admin. Commission v. Bettencourt*, 474 Mass. 60 (April 6, 2016).

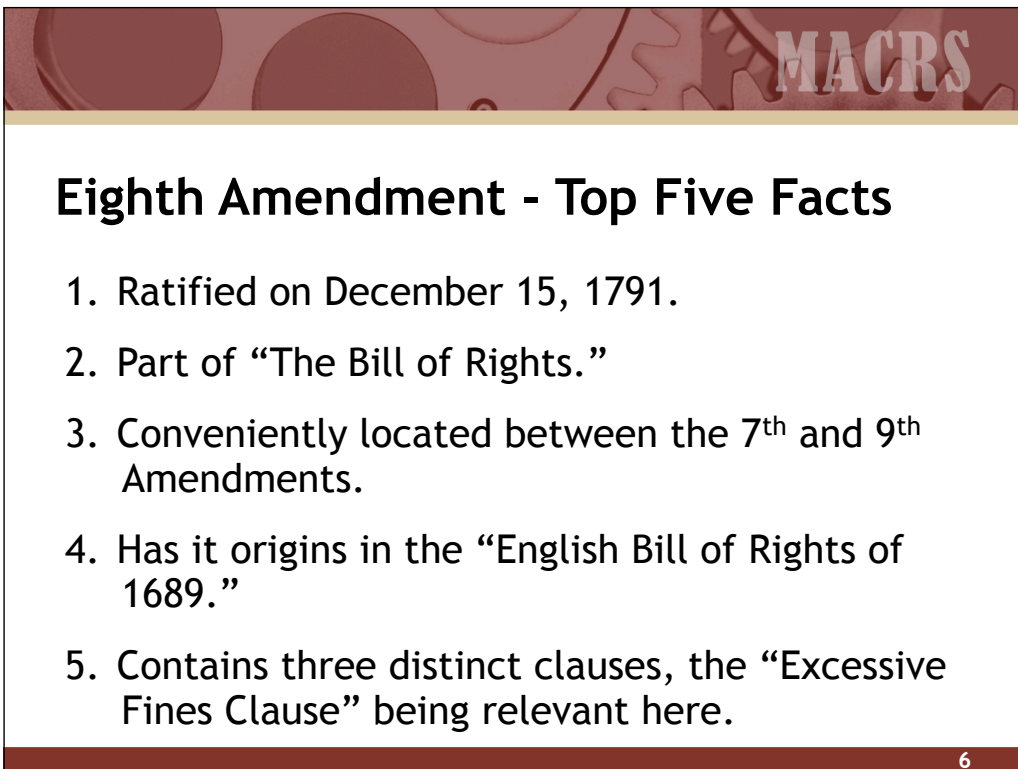
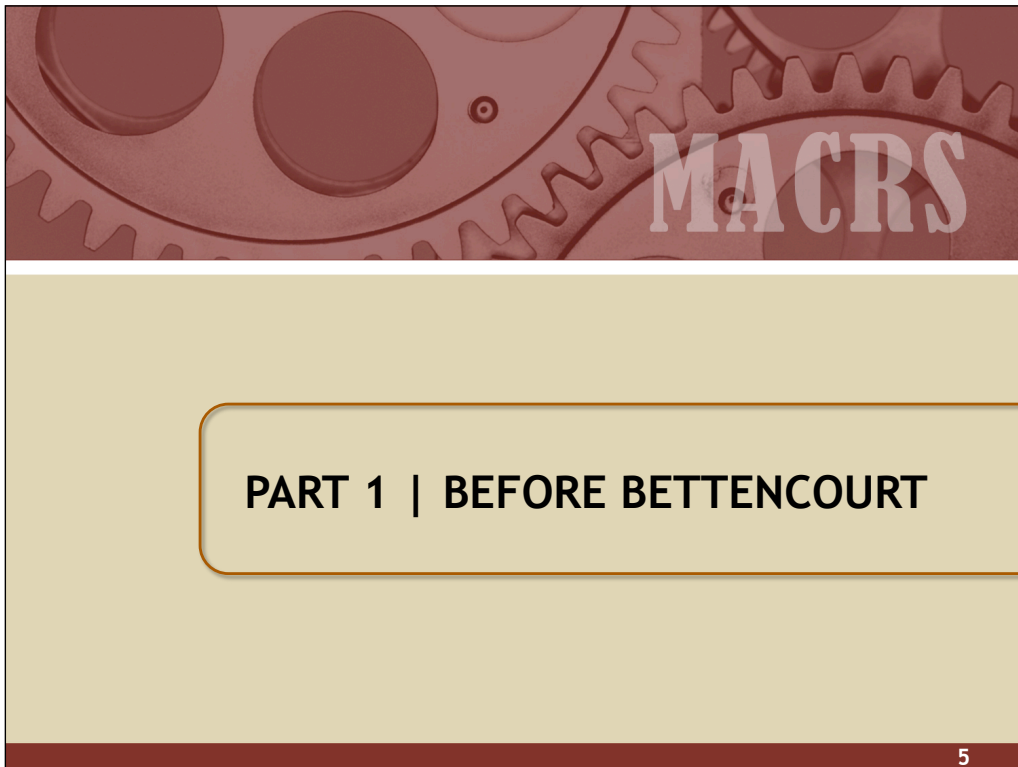
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NOTES:

A Presentation in Four Parts:

- **Part 1- Before Bettencourt:** The 8th Amendment itself, Federal cases, and Massachusetts cases.
- **Part 2- Bettencourt Decision:** The timeline of this case, and the decision in this case.
- **Part 3- Beyond Bettencourt:** What happens now when pension forfeitures arise?
- **Part 4- A Case Study**

NOTES:



NOTES:

The Eighth Amendment to the United States Constitution

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

7

Article 26 of the Massachusetts Declaration of Rights

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

8

NOTES:

Eighth Amendment EFC - Top Five Facts

1. Suffers from “middle child syndrome,” wedged between the oft cited and oft litigated “excessive bail” and “cruel and unusual punishment” clauses.
2. Until recently, not even given the dignity of being mentioned in the first paragraph of the Wikipedia page on the 8th Amendment.
3. Stagnant until 1993. First used by SCOTUS to halt a forfeiture in 1998.
4. The Constitutional vehicle people use to try to stop pension forfeitures.

9

Rising From the Ashes: The Sleeping Clause Awakes

- Drug enforcement laws
- Browning-Ferris (1989)
- Austin (1993)
- Alexander (1993)
- Bajakajian (1998)

10

NOTES:

Bajakajian

- SCOTUS holds for the first time that a *particular* forfeiture constituted an Excessive Fine within the meaning of the 8th Amendment and halts the particular forfeiture.
- And this case began with a family of four prancing around Los Angeles International Airport with \$357,144 in cash in 1994.

11

Bajakajian's Three Pronged Test

1. Government must have extracted payments as a fine.
2. Such extraction or fine must be punitive.
3. Such punitive extraction or fine must be proven to be “grossly disproportional to the gravity of [the criminal] defendant’s offense.”

12

NOTES:

Interesting Fact About Bajakajian

- The USA PATRIOT ACT created a new crime prohibiting bulk cash smuggling.
- So *Bajakajian* has been superseded by the new law. No one can run around an airport boarding an international flight with hundreds of thousands of dollars in their luggage anymore and not lose it all.
- However, SCOTUS analysis of the Excessive Fines Clause, lives on.

13

Massachusetts

- *MacLean* (2000), *Maier* (2008), *Flaherty* (Appeals Court, 2013)
- “Assuming without deciding”
- In these cases, the forfeitures were not found to be disproportional and so were not halted.
- And along comes Bettencourt...

14

NOTES:

PART 2 | THE DECISION: BETTENCOURT

15

Chapter 32, Section 15(4)

(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.

16

NOTES:

Bettencourt *(Summary of Facts From 2012 Appeals Court Case)*

He illegally accessed the files of the other officers while on duty in his official capacity as a watch commander, on department premises, and while using a department computer. Importantly, his job as a watch commander entailed the supervision of other officers, and he impersonated other officers on-line to facilitate his illegal access to the department computer system. Further, although no direct evidence was presented of exactly how Bettencourt obtained the Social Security numbers of the officers he impersonated, it strains credulity to suggest that he did not obtain at least some of this information through some official means. Based on the facts of this case we have no choice but to conclude that the direct link required by *Gaffney* and *Bulger* is present here.

17

G.L. c. 266, Section 120F

- Whoever, without authorization, knowingly accesses a computer system by any means, or after gaining access to a computer system by any means knows that such access is not authorized and fails to terminate such access, shall be punished by imprisonment in the house of correction for not more than thirty days or by a fine of not more than one thousand dollars, or both.
- The requirement of a password or other authentication to gain access shall constitute notice that access is limited to authorized users.

18

NOTES:

Bettencourt: The Timeline

12/25/2004 | THE CRIMES ARE COMMITTED

10/26/2006 | INDICTMENT

4/4/2008 | CONVICTION

5/23/2008 | EVIDENTIARY HEARING BEFORE RETIREMENT BOARD

19

Bettencourt: The First Defense

“The crime is not related to my office or position.”

- Peabody Retirement Board: (5/23/08) Agreed
- PERAC: (9/10/08) Disagreed
- Peabody District Court: (6/15/09) Agreed
- Suffolk Superior Court: (8/7/10) Agreed
- Massachusetts Appeals Court: (2/10/12) Disagreed

20

NOTES:

Bettencourt: The Second Defense

“This pension forfeiture is an Excessive Fine prohibited by the 8th Amendment to the U.S. Constitution.”

- Peabody District Court: **(11/5/12)** Agreed.
- Suffolk Superior Court: **(2/16/14)** Disagreed.
- SJC: Agreed, he gets to keep his pension. **(4/6/2016)**

21

The SJC Decision: There is an Extraction.

- Property exists in both tangible and intangible forms.
- There doesn't have to be a transfer of funds for it to be an extraction.
- By operation of Section 15(4), the pension share of the allowance is transferred to the government, “so it is an extraction of payment from the employee to the sovereign with the meaning of Austin and Bajakajian.”

22

NOTES:

The SJC Decision: This is Punishment.

- A criminal proceeding is required.
- Section 15(4) requires a conviction.
- It cannot be imposed on someone not convicted of a criminal offense.
- “We conclude, therefore, that the forfeiture required by [Section] 15(4) qualifies as ‘punishment.’”

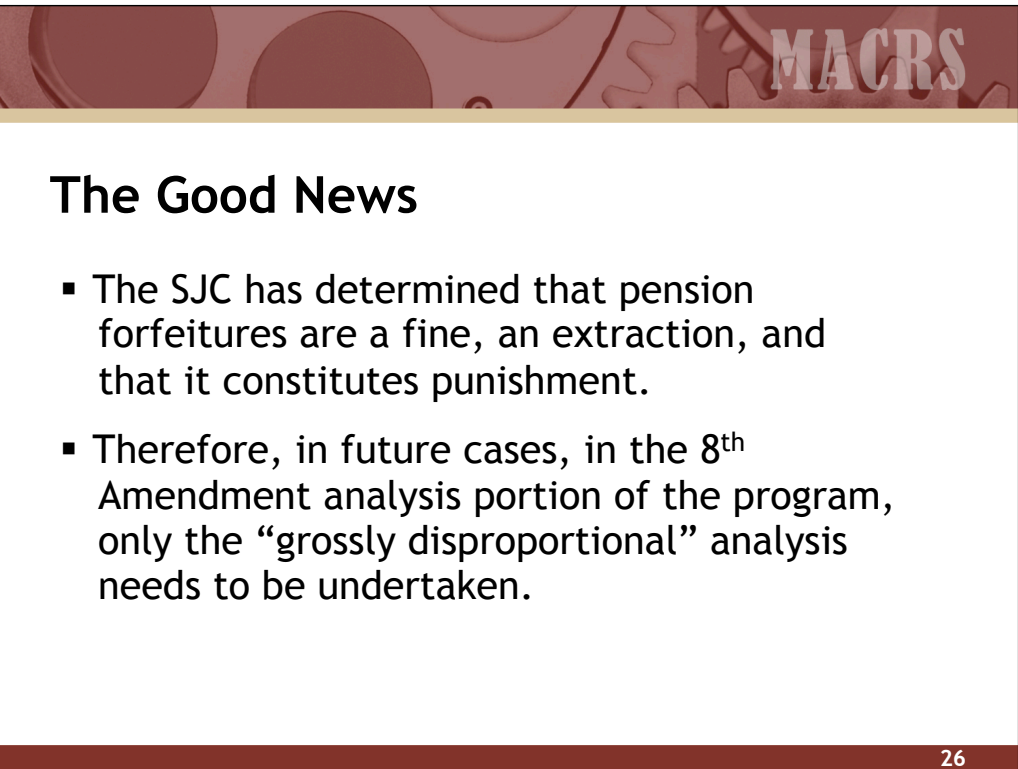
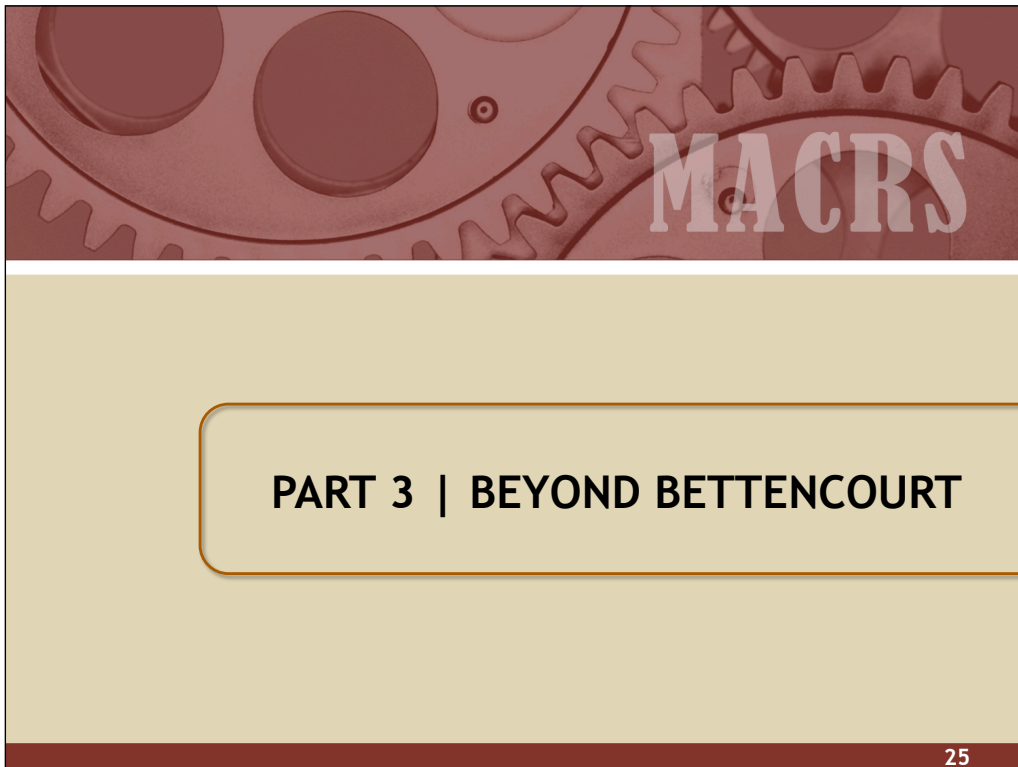
23

The SJC Decision: This Was “Grossly Disproportional” to the Gravity of the Offense.

- The amount of the forfeiture: \$659,000 plus an underdetermined amount of health insurance.
 - The nature and circumstances of the offense
 - Unrelated to other illegal activities
 - Maximum potential penalties show legislature not that concerned: \$1,000 per count, 30 days in jail per count
 - “The aggregate maximum penalty that could have been imposed on Bettencourt - imprisonment in the house of corrections for 630 days and a fine of \$21,000 - does not indicate a substantial level of culpability for purposes of this analysis...”

24

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NOTES:

Future Pension Forfeiture Cases

1 st , "Was the Crime Related to the Person's Office or Position?"	"Should the 8 th Amendment Halt the Forfeiture?"
• District Court	• District Court
• Superior Court	• Superior Court
• Appeals Court, possibly SJC	• Appeals Court, possibly SJC
<i>If this question answered in the affirmative, then on to --</i>	

27

Is It Grossly Disproportional to the Gravity of the Offense?

Four factors, after establishing the amount of the forfeiture:

1. Consider the nature and circumstances of the offense.
2. Was it related to any other illegal activities?
3. The aggregate maximum sentence that could have been imposed here.
4. The harm resulting from offenses.

28

NOTES:

Who Decides If It Is “Grossly Disproportional?”

Retirement boards (and PERAC) can’t pass on constitutional issues. A court of law must do so.

⇒ What is the retirement board’s role, then?

- To make as good a record as possible for review above, even though the burden of establishing that the 8th Amendment has been violated purportedly belongs to the member.

29

Remember

As the SJC noted in *MacLean*:

“[i]n any forfeiture case it would be helpful for the judge to make a finding of the total value of the forfeiture involved.”

MacLean v. State Board of Retirement,
432 Mass. at 348, note 11

Where will a judge get that information?
Most likely from you.

30

NOTES:

Danger, Will Robinson!



- Now that some people will lose their pensions under Section 15(4) in Massachusetts, and others may not lose their pensions under Section 15(4), there could be a problem which may be distilled as follows:

“Poor and meek” vs. the “rich and powerful.”

NOTES:

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PART 4 | A CASE STUDY

32

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A Case Study

- Imagine you are a judge, what will you decide:
 - Applying the four factors to the case study, is this forfeiture grossly disproportional to the nature of the offense?



33

NOTES:



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WITH A DASH OF DIMASI...



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June 8, 2016

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What We Will Cover In the Next Few Minutes...

- The recent SJC decision in *DiMasi v. State Board of Retirement*, 474 Mass. 194 (4/21/16) and, by way of background...
 - G.L. c. 32, Section 15(4)
 - *Flaherty v. Justices of the Haverhill Dist Ct.*, 83 Mass. App. Ct. 120 (2013)

2

G.L. c. 32, Section 15(4)

(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. (Emphases supplied).

3

NOTES:

Flaherty v. Justices of Haverhill Dist. Ct., 83 Mass. App. Ct. 120 (2013)

- James Flaherty was convicted of larceny for stealing paving supplies from the city highway department which he supervised.
- He made an unsuccessful argument that his loss of pension benefits worth \$940,000 was an excessive fine prohibited by the 8th Amendment to the U.S. Constitution.
- He retired on April 6, 2007 and was convicted on June 2, 2009.
- He received his retirement allowance between those two dates.
- He wanted to keep the pension payments made before his conviction, which exceeded the amount he was due for his actual pension contributions, but the Appeals Court said, in effect, “no way.”

4

Flaherty v. Justices of Haverhill Dist. Ct., 83 Mass. App. Ct. 120 (2013) (Cont'd)

- *Reimbursement of excess pension funds.* Flaherty next challenges the Superior Court judge's order that he repay the \$64,008.02 he received in excess of his actual pension contributions. The crux of Flaherty's argument is that the Legislature's use of the phrase, “after final conviction,” in [G.L. c. 32, § 15\(4\)](#), entitles him to retain any pension monies paid to him until his conviction became final on June 2, 2009. Flaherty's theory would entitle him to keep pension payments disbursed to him after the discovery of his thefts and during the ensuing criminal investigation and prosecution. The practical effect of Flaherty's interpretation would be to bestow upon Flaherty a windfall of \$64,008.02 beyond what he paid into the pension system. Had the Legislature envisioned this type of exception in the forfeiture statute, it could have so stated in [G.L. c. 32, § 15\(4\)](#). Courts do not “read into the statute a provision which the Legislature did not see fit to put there.”

5

NOTES:

DiMasi v. State Board of Retirement **474 Mass. 194 (4/21/16)**

- Salvatore F. DiMasi, once Speaker of the Massachusetts House of Representatives, was convicted of “several violations of Federal law.”
- DiMasi was sentenced on September 9, 2011.
- State Board of Retirement (“the Board”) unanimously voted to forfeit DiMasi’s pension in accordance with the provisions of G.L. c. 32, Section 15(4).
- DiMasi had been paid his retirement allowance from February 27, 2009 through the end of August, 2011 (although the Board had unsuccessfully attempted to stop paying him after he was indicted and then again prior to his being sentenced).
- Even though the Board had voted to do so, DiMasi’s total accumulated deductions were not returned to him.
- The employee contributions DiMasi had made throughout his career = \$127,010.05.

6

DiMasi v. State Board of Retirement, **474 Mass. 194 (4/21/16) (Cont’d)**

DiMasi appealed on the following grounds:

1. A “final conviction” of a criminal offense for purposes of Section 15(4) occurs at the conclusion of the appellate process, not when a sentence is imposed.
2. The Board had improperly withheld his accumulated total deductions since September, 2011.

7

NOTES:

DiMasi v. State Board of Retirement, 474 Mass. 194 (4/21/16) (Cont'd)

Held: DiMasi's convictions became final for purposes of G.L. c. 32, Section 15(4) when he was sentenced on September 9, 2011.

Interpreting the language of Section 15(4) as requiring pension forfeiture only after the conclusion of the appellate process, as DiMasi suggests, would contravene the Legislature's intent and lead to absurd results. Such a reading would encourage frivolous appeals and delaying tactics...

8

DiMasi v. State Board of Retirement, 474 Mass. 194 (4/21/16) (Cont'd)

Held: DiMasi is entitled to a return of his accumulated total deductions, in the amount of \$127,010.05, with interest on those deductions from September, 2011 until such time as payment is made.

*Nothing in Section 15(4) requires that a member repay the retirement benefits that the member received **prior** to a final criminal offense, or that the board subtract such retirement benefits from the accumulated total deductions that must be returned to the member...*

9

NOTES:

DiMasi End Notes

- Section 15(6) has no applicability to DiMasi, because of his effective date of retirement.
- *DiMasi* explicitly overrules that portion of *Flaherty*, as set out on slide 5, which required Flaherty to repay amounts he was paid prior to conviction.
- The remainder of the *Flaherty* decision, involving the 8th Amendment and pension forfeiture, remains good law.
- The SJC erred in setting the amount to be returned to DiMasi as \$127,010.05, his total employee contributions. DiMasi had received a retirement allowance, consisting of a pension and an annuity, for a period of 2 years and 6 months, so his annuity account had of course been drawn down. The Board has filed a petition for rehearing on this issue.

10

NOTES:

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