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RIGHT TO COUNSEL/CRIMINAL LAW--WISHING FOR RIGHTS: INTERPRETING THE ARTICLE 12 RIGHT TO COUNSEL IN MASSACHUSETTS IN THE AFTERMATH OF MONTEJO v. LOUISIANA

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NOTES

RIGHT TO COUNSEL/CRIMINAL LAW—WISHING FOR RIGHTS: INTERPRETING THE ARTICLE 12 RIGHT TO COUNSEL IN MASSACHUSETTS IN THE AFTERMATH OF *MONTEJO V. LOUISIANA*

INTRODUCTION

Factually, little separated Jesse Montejo from Robert Jackson and Rudy Bladel.[1] All were charged with murder and appointed counsel at their respective arraignments.[2] Before Montejo, Jackson, or Bladel had the opportunity to meet their attorneys, the police sought them out for interrogation purposes, even though all three had been vigorously interrogated prior to arraignment.[3] At the police-initiated interrogation, still prior to meeting their attorneys, Montejo, Jackson, and Bladel signed *Miranda* waivers[4] and thereafter made confessions that were admitted into evidence

1. Montejo v. Louisiana, 129 S. Ct. 2079, 2082 (2009); Michigan v. Jackson, 475 U.S. 625, 627-28 (1986), *overruled by Montejo*, 129 S. Ct. at 2079.

2. *Montejo*, 129 S. Ct. at 2082; *Jackson*, 475 U.S. at 627-28.

3. *Montejo*, 129 S. Ct. at 2082; *Jackson*, 475 U.S. at 627-28. Prior to arraignment, detectives interrogated Jesse Montejo from the afternoon of September 6th into the early morning of September 7th. *Montejo*, 129 S. Ct. at 2082. Prior to Bladel's arraignment, the police interrogated him the evening of his arrest. *Jackson*, 474 U.S. at 627. Notably, when Bladel was arraigned, the detective in charge of Bladel's investigation was present and therefore knew of Bladel's appointment of counsel. *Id.* After Bladel's arraignment he was taken back to the county jail, and three days later two police detectives came to the jail to interrogate him. *Id*. Similarly, Jackson was interrogated at length prior to his arraignment and during the arraignment the police involved in his investigation were present. Therefore, the police were undoubtedly aware that Jackson had been appointed counsel. *Id.* at 628.

4. Under *Miranda v. Arizona*, the Supreme Court created "prophylactic protection of the right against compelled self-incrimination." *Montejo*, 129 S. Ct. at 2089 (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)). Under *Miranda*, a suspect in a custodial interrogation, before being questioned, must be informed that: "(1) they have the right to remain silent; (2) their statements may be used against them at trial; (3) they have the right to the presence of an attorney during questioning; and (4) if they cannot afford an attorney, one will be appointed." *Custodial Interrogations*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 168, 169 (2007). A *Miranda* waiver occurs when an accused gives up his rights to remain silent and have counsel present during questioning. Charles Alan Wright & Andrew D. Leipold, *The* Miranda *Rules—Waiver and Invocation of* Miranda *Rights*, 1 FED. PRAC. & PROC. CRIM. § 76 (4th ed. 2010). Since June of 2010, the Supreme Court has held that defendants' silence is enough to constitute an

against each of them at their individual trials;[5] each was found guilty of murder.[6] All three defendants appealed their convictions, and their cases made it to the United States Supreme Court.[7]

Fortunately for Jackson and Bladel, their appeals were heard together in 1986, at a time when the Supreme Court concluded it was imperative to protect the Sixth Amendment's guarantee of the right to counsel.[8] The Court held that both Jackson's and Bladel's *Miranda* waivers were invalid and that the police-initiated interrogations violated their Sixth Amendment rights.[9] Finding the need to safeguard the Sixth Amendment, the Court established a bright-line rule making post-arraignment waivers of a defendant's right to counsel at a police-initiated interrogation presumptively invalid.[10]

Fast-forward twenty-six years, to 2009, when the Supreme Court heard Jesse Montejo's appeal.[11] Montejo's argument relied on the bright-line rule that had protected both Jackson's and Bladel's Sixth Amendment right to counsel.[12] Unfortunately for Montejo the Court rejected his argument, and did away with the rule that was established twenty-six years earlier.[13] Overruling the *Jackson* rule, the Supreme Court granted defendants in factually similar situations to Montejo, Jackson, and Bladel one glimmer of hope: "[i]f a State *wishes*," it may continue to adhere to the *Jackson* rule under its state constitution.[14]

While *Montejo* has affected "a sea change in the law,"[15] the Massachusetts Supreme Judicial Court (SJC) has held that the Massachusetts Declaration of Rights can afford its citizens greater pro-

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"implicit" *Miranda* waiver, thus eliminating the need for defendants to expressly waive their *Miranda* rights. Berghuis v. Thompkins, 130 S. Ct. 2250, 2261 (2010).

5. *Montejo*, 129 S. Ct. at 2082; *Jackson*, 475 U.S. at 627-28.

6. *Montejo*, 129 S. Ct. at 2082; *Jackson*, 475 U.S. at 627-28. The most serious conviction was that of Jesse Montejo, who was convicted of first-degree murder and sentenced to death. *Montejo*, 129 S. Ct. at 2082.

7. *Montejo*, 129 S. Ct. at 2082-83; *Jackson*, 475 U.S. at 627-28.

8. *See Jackson*, 475 U.S. at 636 (finding the need for additional safeguards to protect a defendant's assertion of the Sixth Amendment's right to counsel at an arraignment).

9. *Id.* at 635-36.

10. *See id.* at 636.

11. *Montejo*, 129 S. Ct. at 2079.

12. *See id.* at 2082-83.

13. *Id.* at 2091.

14. *Id.* at 2089 ("If a State *wishes* to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so.").

15. Commonwealth v. Tlasek, 930 N.E.2d 170, 172 (Mass. App. Ct. 2010). The court used this phrase to describe the difference in the law pre-*Montejo* and post-*Montejo*:

tection than the Bill of Rights to the United States Constitution.[16] This holding gives the Massachusetts judiciary the power to stop the sea change and to protect the right to counsel, which is guaranteed to every criminal defendant in Article 12 of the Massachusetts Declaration of Rights (Article 12).[17] In order to protect the right to counsel, under the state constitution the Massachusetts judiciary should maintain the long-standing prohibition against police-initiated interrogations of represented defendants outside the presence of their attorneys.

Part I of this Note provides an overview of the concept of "judicial federalism," and then takes a historical look at the Massachusetts Constitution. Part I concludes with an in-depth evaluation of Article 12 and instances in which the SJC has afforded Massachusetts citizens greater protection than the Sixth Amendment. Part II focuses on United States Supreme Court decisions interpreting the Sixth Amendment leading up to *Michigan v. Jackson*, and *Jackson's* subsequent overruling in *Montejo v. Louisiana*, and the repercussions for the States. Part III focuses on why it is imperative for the protection of a defendant's Article 12 right to counsel that the SJC continue the prohibition on police-initiated post-arraignment interrogations. Finally, Part IV illuminates the broad implications of following *Montejo*, arguing that sound policy would be advanced by adherence to Massachusetts precedent.

I. State Court Power and the Massachusetts Constitution

Part I of this Note discusses judicial federalism, a concept that allows states, under their state constitutions, to provide their citizens greater protection than the U.S. Constitution.[18] This Part then delves into the ratification of the Massachusetts Constitution and

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> At the time of the motion judge's ruling, case law clearly established that, absent the consent of counsel, the police could not initiate an interrogation regarding a charge for which the Sixth Amendment right to counsel had attached and been asserted, regardless of whether they had secured a valid Miranda waiver. However, in May, 2009, the United States Supreme Court effected [sic] a sea change in the law when it overruled *Michigan v. Jackson.* Under *Montejo,* a valid Miranda waiver suffices to waive one's Sixth Amendment right to counsel.

Id. (citations omitted).

16. Commonwealth v. Hodge, 434 N.E.2d 1246, 1249 (Mass. 1982) ("The Massachusetts Declaration of Rights can, and in this case does, provide greater safeguards than the Bill of Rights to the United States Constitution.").

17. Mass. Const. pt. 1, art. XII.

18. *See infra* Part I.A.

the history behind the right to counsel in Massachusetts, concluding with SJC decisions in which Article 12 has been held to be more expansive than the Sixth Amendment.

A. *American Federalism*

The Supremacy Clause requires states to afford their citizens "no fewer rights than the U.S. Constitution demands."[19] However, this mandate "do[es] no more than establish the minimum protection owed to individuals against state government actions."[20] State courts have the power, under their own constitutions, to provide greater protection than that afforded by the U.S. Constitution[21] through a process known as "judicial federalism."[22]

One of the best-known articles advocating for state courts to safeguard individual liberties through judicial federalism was written by a Supreme Court Justice.[23] In his famous and influential article, Justice Brennan called on state courts to not be satisfied with affording their citizens the "full protections of the federal Constitu-

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19. Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 55 (2006).

20. Arthur Leavens, *State Constitutionalism: State-Court Deference or Dissonance?*, 33 W. NEW ENG. L. REV. 81, 88-89 (2011) (recognizing that "[s]tate courts are free . . . to interpret and apply the provisions of their respective state constitutions that protect those same rights. If the state court interprets these protections to be greater than their federal counterparts, [they] prevail").

21. *See* Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (acknowledging that "a State is free *as a matter of its own law* to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards"). Not only is a state free to afford more protection, but Justice Brennan was of the belief

> that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law . . . . [F]or only if [the Court's decisions] are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

22. Robert K. Fitzpatrick, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1834 (2004).

23. Brennan, *supra* note 21, at 491. Further, Brennan recognized his approval in the fact that

> more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.

Id. at 495.

tion" and nothing more.[24] Brennan's argument for judicial federalism was supported by the fact that individual liberties guaranteed by state constitutions require protection that "often extend[s] beyond those required by the Supreme Court's interpretation of federal law."[25] To protect constitutional liberties, federalism distributes significant power to both the state and federal governments, enabling "each to monitor and check the abuses of the other."[26] When a state court decides to exercise its power to afford citizens greater protection based on state constitutional provisions, the decision is "not even reviewable by, [sic] the Supreme Court of the United States."[27]

Considering this significant constitutional power given to the states, the question arises as to how state courts should exercise it.[28] This question becomes even more pronounced in a situation where the text of both the state and federal constitutional provisions are virtually identical[29] and even more challenging when the Supreme Court has already interpreted the U.S. Constitution in a particular matter.

There is much scholarly debate as to "whether states should develop their own constitutional traditions or should instead adhere to federal doctrines . . . [with] answers, ranging from always to sometimes to never."[30] Justice Brennan advocated that states should only defer to Supreme Court precedent when the decisions "are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitu-

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24. *Id.* at 491.

25. *Id.*

26. James A. Gardner, *State Constitutional Rights As Resistance to National Power: Toward A Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1007 (2003).

27. Brennan, *supra* note 21, at 501. This is because the United States Supreme Court is "utterly without jurisdiction to review such state decisions." *Id.*

28. *See* Leavens, *supra* note 20, at 89-92 (discussing when state judges should defer to Supreme Court precedent).

29. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 390 (1998) (discussing a state's constitutional "identity" which becomes central in a situation "concerning the construction of provisions in a state constitution that mirror clauses in the Federal Constitution"); *see also* Arthur Leavens, *Prophylactic Rules and State Constitutionalism*, 44 SUFFOLK U. L. REV. 415, 416 (2011) ("Boiled down, the question is, on what basis does a state court interpret a state constitutional provision, couched in virtually the same language and often with the same history as that of its federal counterpart, and decide that the state provision provides greater protection?").

30. Schapiro, *supra* note 29, at 390.

tional guarantees."[31] The remainder of this Note explores how the Massachusetts judiciary has addressed the issue of judicial federalism in the context of the constitutional right to counsel, and recommends that the Massachusetts judiciary continue adherence to Massachusetts precedent and afford their citizens greater protection than provided by *Montejo v. Louisiana*.

B. *The Massachusetts Constitution and Article 12*

When a state court exercises its power to afford greater constitutional protection through judicial federalism, often the court will rely on state constitutional history as a basis for the exercise of this power.[32] However, state courts rarely "resort to the state's constitutional history in the way that federal courts routinely do."[33] This section provides a brief discussion of the ratification of the Massachusetts Constitution, not as a basis for the Massachusetts judiciary to exercise its power through judicial federalism, but rather in an effort to provide an understanding of the constitutional history behind the Massachusetts Declaration of Rights, before focusing on Article 12.

The Massachusetts Constitution holds the distinction as the world's oldest, still-governing constitution.[34] Ratified in 1780,[35] the

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31. Brennan, *supra* note 21, at 502.

32. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 793 (1992).

33. *Id.* In Gardner's article he analyzed seven different states, one of which was Massachusetts. *Id.* Gardner noted that the Supreme Judicial Court has been silent on the Massachusetts Constitution's history, leading to the conclusion that the court does not use the Massachusetts Constitution's history as a basis "for divergent interpretations of the state constitution." *Id. But see* Honorable Roderick L. Ireland, *How We Do it in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U.L. REV. 405, 407 (2004) (discussing that one of the SJC's factors in deciding when to defer to the Supreme Court is the history of the constitution).

34. Fitzpatrick, *supra* note 22, at 1834 (2004); *see also* BENJAMIN W. LABAREE, COLONIAL MASSACHUSETTS–A HISTORY 308-09 (Milton M. Klein & Jacob E. Cooke eds., 1979) ("John [Adams] was in his element, having at last been given the opportunity to put into practice the governmental theories he had cherished all his life . . . . During the autumn and winter of 1779-80 Adams would work a foundation for government in Massachusetts that (with numerous amendments) is still in existence today, two centuries later.").

35. LABAREE, *supra* note 34, at 312. The ratification of the Massachusetts Constitution meant that, "[a]t long last Massachusetts had a constitution befitting its status as a free and independent state." *Id.* Before the constitution was ratified, it was sent to the towns for approval and accompanying the constitution was an address which set forth the principles which it was based on: "Only 'by accommodating ourselves to each other, and individually yielding particular and ever favorite opinions of smaller moment

Massachusetts Constitution was used as one of the models when the United States Constitution was drafted in 1787.[36] Markedly, unlike other states whose constitutions were written and enacted by the state legislatures, the Massachusetts Constitution was written by a special convention.[37] This unique arrangement enabled the Massachusetts Constitution to "draw its authority clearly and unequivocally from the sovereign people."[38] Because the Massachusetts Constitution drew its authority directly from the people it embodied their values and aspirations,[39] making it truly a constitution by the people.

The Massachusetts Constitution consists of three distinct parts: the Preamble, the Declaration of Rights, and the Frame of Government.[40] The Preamble ends with the statement: "We . . . the people of Massachusetts . . . do agree upon, ordain and establish, the following," which was later incorporated into the U.S. Constitution.[41] The Declaration of Rights was "the predecessor to the federal Bill of Rights . . . [and] was long regarded by the Supreme Judicial

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to essential principles . . . would Massachusetts soon 'be blessed with such a constitution as those are intitled [sic] to, who have struggled hard for freedom and independence.'" *Id.* at 309.

36. Ireland, *supra* note 33, at 407; *see also* Commonwealth v. Upton, 476 N.E.2d 548, 555 (Mass. 1985) (acknowledging that"[t]he Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth"); PAULINE MAIER, RATIFICATION 140 (2010).

37. MAIER, *supra* note 36, at 139. The constitution that was adopted in 1780 was not the first constitution to be written in Massachusetts. *Id.* Interestingly, the first Massachusetts Constitution was drafted by the legislature in 1778, and was unequivocally rejected by the people of Massachusetts. *Id.* at 138-39. One of the most significant problems with the 1778 constitution was that it was drafted by the legislature, "[a]s the town of Concord explained, the body that forms a constitution has a right to alter it, and a constitution that can be changed by the legislature gives the people no security against legislative encroachments on their rights." *Id.* at 139.

38. *Id.* ("The idea that government received its authority from the people was not new . . . . In 1780, however, Massachusetts transformed popular sovereignty from a theory to a process.").

39. LABAREE, *supra* note 34, at 313 ("To a remarkable degree the Constitution of 1780 reflected the values and endorsed the aspirations expressed by the generations of inhabitants who had helped build the commonwealth.").

40. Notably, the third part of the Massachusetts Constitution, dealing with the frame of government, was unique because, "[o]nly in Massachusetts did the constitution feature three separate articles ('chapters') for the three main branches of government." AKHIL REED AMAR, AMERICA'S CONSTITUTION 207 (2005).

41. MAIER, *supra* note 36, at 140.

Court as a freestanding and vibrant source of protections for individuals against the power of the state."[42]

Contained in the Massachusetts Declaration of Rights, under Article 12, is the right of all criminal defendants to have the aid and advice of counsel for his or her defense.[43] The right to counsel provision provides that: "every subject shall have a right . . . to be fully heard in his defence by himself, or his council [sic], at his election."[44] The SJC has found that the right to be assisted by counsel is imperative "to insure fundamental human rights of life and liberty. It is a right accorded to *every* defendant, rich or poor."[45] While Article 12 is similar to the Sixth Amendment in that the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense,"[46] the SJC has consistently stated "that the right to be assisted effectively by counsel is independently guaranteed by art. 12."[47]

C. *The Right to Counsel in Massachusetts*

Much like the Massachusetts Constitution preceded the adoption of the United States Constitution, Massachusetts was also ahead of the U.S. Constitution regarding the appointment of counsel to indigent criminal defendants.[48] In 1958, the SJC adopted Rule 10–to be followed by the superior courts–mandating the appointment of counsel in all non-capital felony cases.[49] Rule 10's requirement of the appointment of counsel came "five years before

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42. Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 25 (2005).

43. MASS. CONST. pt. 1, art. XII; Guerin v. Commonwealth, 162 N.E.2d 38, 40 (Mass. 1959) ("The fundamental character of the right of a person accused of a serious crime to have the aid and advice of counsel is recognized under the . . . [Massachusetts] Constitution, art. 12 of the Declaration of Rights.").

44. MASS. CONST. pt. 1, art. XII.

45. Commonwealth v. Appleby, 450 N.E.2d 1070, 1076 (Mass. 1983) (emphasis added) (citations omitted).

46. U.S. CONST. amend. VI.

47. Commonwealth v. Hodge, 434 N.E.2d 1246, 1249 (Mass. 1982) (citing Commonwealth v. Soffen, 368 N.E.2d 1030 (Mass. 1979); Commonwealth v. Davis, 384 N.E.2d 181 (Mass. 1978); Commonwealth v. Leslie, 382 N.E.2d 1072 (Mass. 1978)).

48. Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK. U. L. REV. 887, 888 (1980).

49. Rules of Court, 337 Mass. 812, 813 (1958) ("If a defendant charged with a noncapital felony appears in the Superior Court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding . . . .").

[the United States Supreme Court, in] *Gideon v. Wainwright*, imposed that obligation on the States."[50]

While Rule 10 made it an absolute right of a defendant charged with a felony to have counsel at every stage of the proceeding, Rule 10 also acknowledged "the inherent discretionary power of any court to appoint counsel" to any indigent defendant regardless of the crime charged.[51] In 1964, the SJC took Rule 10 one step further, expanding it to include indigent defendants who were charged with any crime, felony or misdemeanor, in which imprisonment might result.[52] It was not until 1972, in *Argersinger v. Hamlin*, that the Supreme Court afforded indigent criminal defendants the same right under the U.S. Constitution.[53]

D. *Article 12 Precedent*

Since 1958, when the SJC adopted Rule 10, the Massachusetts judiciary has continued to be proactive in affording Massachusetts citizens the right to have legal counsel, going so far as interpreting the Massachusetts Constitution more expansively than the U.S. Constitution.[54] The Chief Justice of the SJC, Roderick Ireland, once stated that the SJC often defers to the Supreme Court, but has the power to interpret the Massachusetts Constitution more expansively than the Supreme Court interprets "basically the same lan-

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50. Commonwealth v. Rainwater, 681 N.E.2d 1218, 1227 (Mass. 1997) (citation omitted), *abrogated by* Texas v. Cobb, 532 U.S. 162, 168 (2001). In *Gideon*, the United States Supreme Court recognized for the first time that the Sixth Amendment's guarantee of the right to counsel is a fundamental right, thus made "obligatory upon the States by the Fourteenth Amendment." Gideon v. Wainwright, 372 U.S. 335, 342 (1963). The court reasoned that, "[n]ot only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

51. Edward J. Duggan, *Counsel for the Indigent Defendant in Massachusetts*, 2 BOSTON BAR J. 23, 24 (1958). At the time Massachusetts adopted Rule 10, thirty-nine other states also required the appointment of counsel for indigent defendants in noncapital felony cases. *Id.* at 28.

52. *Rainwater*, 681 N.E.2d at 1227. The amended text of Rule 10 stated:

> If a defendant charged with a crime, for which a sentence of imprisonment may be imposed, appears in any court without counsel, the judge shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Rules of Court, 347 Mass. 808, 809 (1964).

53. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("[N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

54. *See infra* note 58 and accompanying text.

guage in the United States Constitution."[55] Chief Justice Ireland explained that the SJC uses a "blended" methodology in determining whether to defer to the Supreme Court.[56] This methodology takes into consideration the history of the Massachusetts Constitution, text, prior interpretations, and jurisprudence already existing in the Commonwealth and other states.[57] In applying that methodology the SJC has, in numerous instances, interpreted the Article 12 right to counsel provision to provide greater protection than the Sixth Amendment.[58]

The SJC has also been proactive in taking steps to ensure that indigent criminal defendants have all of the benefits that accompany legal representation.[59] To this end, the court has strived to give meaning to their words that "[t]he right to counsel means the right to effective assistance of counsel."[60] The court's efforts to ensure that a defendant receives effective representation can be traced to the court's broad protective approach to the attorney-client relationship.[61]

One of the SJC's attempts to safeguard the right to have the assistance of counsel appears in *Commonwealth v. Mavredakis*, where the SJC imposed a duty on police to inform an accused of his attorney's effort to render assistance.[62] The Supreme Court had already decided the issue and held that under the Fifth and Sixth

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55. Ireland, *supra* note 33, at 407 (quoting District Attorney for the Suffolk District v. Watson, 411 N.E.2d 1247, 1300 (Mass. 1980)).

56. *Id.* at 409.

57. *Id.*; *see also* D. Christopher Dearborn, *"You Have the Right to an Attorney," but Not Right Now: Combating* Miranda*'s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 400-01 (2011) (discussing the factors the SJC uses when interpreting the Massachusetts Constitution to provide greater protection than the United States Constitution).

58. *See* Commonwealth v. Murphy, 862 N.E.2d 30, 41 (Mass. 2007); Commonwealth v. Mavredakis, 725 N.E.2d 169, 178-179 (Mass. 2000); Commonwealth v. Hodge, 434 N.E.2d 1246, 1249 (Mass. 1982).

59. Commonwealth v. Rainwater, 681 N.E.2d 1218, 1227 (Mass. 1997), *abrogated by* Texas v. Cobb, 532 U.S. 162, 168 (2001). .

60. Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 903 (Mass. 2004).

61. *Murphy*, 862 N.E.2d at 42 (discussing the court's efforts in protecting the attorney-client relationship).

62. *Mavredakis*, 725 N.E.2d at 179. The SJC saw a concrete and substantive difference between "the abstract right to speak with an attorney mentioned in the Miranda warnings, and a concrete opportunity to meet 'with an identified attorney actually able to provide at least initial assistance and advice.'" *Id.* at 178. The court believes that the *absence* of a duty to inform would encourage and tacitly condone, "affirmative police interference with the attorney-client relationship." *Id.* at 179.

Amendments the police had no such duty.[63] The SJC looked to the prior interpretations of Article 12, which had afforded more protection than the U.S. Constitution, and concluded that in this instance Article 12 "requires a higher standard of protection."[64] The court reasoned that it "prefer[s] to view the 'role of the lawyer . . . as an aid to the understanding and protection of constitutional rights,' rather than 'as a nettlesome obstacle to the pursuit of wrongdoers.'"[65] The court's opinion in *Mavredakis* is just one piece of evidence establishing the SJC's efforts to ensure that criminal defendants have the benefit of the assistance of counsel.

The SJC has taken steps to ensure that when a defendant has the assistance of counsel, that assistance is effective.[66] In *Commonwealth v. Hodge*, the defendant, Hodge, alleged ineffective assistance of counsel.[67] Under Supreme Court precedent, the defendant had the burden of proving that there was an actual conflict of interest that adversely affected his counsel's performance.[68] Conversely, the SJC held that Hodge only had to show that there was a conflict, not that the conflict adversely affected his counsel's performance.[69] The court reasoned that "such a fundamental right should not de-

63. *Id.* at 176 ("In *Moran* [*v. Burbine*] the United States Supreme Court ruled that, under the Fifth and Sixth Amendments . . . the police had no duty to inform a suspect of an attorney's efforts to render legal services when the suspect had not personally requested such legal representation.").

64. *Id.* at 178-79. In regard to the text of Article 12, the court concluded that "[t]he precise wording of art.12 was a subject of debate at the Constitutional Convention of 1779-1780 [and i]t is a standard principle of constitutional interpretation that '[a]ll [the] words [of the Constitution] must be presumed to have been chosen advisedly.'" *Id.* at 178 (citation omitted) (quoting Town of Mount Washington v. Cook, 192 N.E. 464, 465 (Mass. 1934)). The court went on to note that the text of Article 12 has often been interpreted broadly. *Id.* at 178.

65. *Id.* at 179 (citation omitted) (quoting Moran v. Burbine, 475 U.S. 412, 468 (1986)). Viewing the role of the lawyer in that light, the court acknowledged that 'the day is long past . . . where attorneys must shout legal advice to their clients, held in custody, through the jailhouse door.'" *Id.* (quoting People v. McCauley, 645 N.E.2d 923, 929 (Ill. 1994)).

66. *See generally* Commonwealth v. Hodge, 434 N.E.2d 1246, 1247 (Mass. 1982) (holding that the defendant was denied the effective assistance of counsel because his attorney had a conflict of interest throughout the representation).

67. *Id.* at 1248-49.

68. In *Cuyler v. Sullivan* the United Stated Supreme Court held that the Sixth Amendment required that the defendant present evidence that there was an actual conflict of interest, and that the conflict thereafter adversely affected the defendant's attorney's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

69. *Hodge*, 434 N.E.2d at 1249. The court started with the Supreme Court's standard set out in *Cuyler*, and then held that even if the defendant could not meet the burden of *Cuyler*, the court's inquiry was not complete, because in this instance Article 12 provides broader protection than that set out in *Cuyler*. *Id.*

pend upon a defendant's ability to meet such an impossible burden" to entitle him to a new trial under Article 12.[70]

The SJC's efforts to safeguard the attorney-client relationship were apparent in both *Commonwealth v. Hilton*[71] and *Commonwealth v. Howard*.[72] In both cases the court provided concrete meaning to the Supreme Court's proscription against any "'knowing exploitation by the State of an opportunity to confront the accused without counsel being present.'"[73] In *Hilton*, the court held that a court officer must be viewed as a government agent for purposes of determining a violation of the right to counsel.[74] Thus, the court concluded that questioning by a court officer outside the presence of a defendant's attorney would be an effort to circumvent the Sixth Amendment and a violation of the Sixth Amendment right to counsel.[75] Similarly, in *Howard*, the court held that an investigator with the Department of Social Services had, because of her status as a government agent, engaged in "prohibited governmental interrogation" of the defendant.[76]

In dealing with other provisions of Article 12, the SJC has similarly found Article 12 to be more expansive than the Sixth Amendment.[77] In *Commonwealth v. Amirault*, it was the defendant's position that Article 12 provided greater protection than the Sixth Amendment and "by its very words, guarantee[d] a defendant a face-to-face confrontation."[78] Based on this, the defendant argued that a unique seating arrangement used for child witnesses denied him the right to confront the witness against him, face-to-face,

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70. *Id.*

71. Commonwealth v. Hilton, 823 N.E.2d 383, 400 (Mass. 2005).

72. Commonwealth v. Howard, 845 N.E.2d 368, 372 (Mass. 2006).

73. Commonwealth v. Murphy, 862 N.E.2d 30, 42 (Mass. 2007) (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).

74. *Hilton*, 823 N.E.2d at 400.

75. *Id.* at 401. The court reached this decision by placing emphasis on the rules set out in *Massiah* and its progeny, which stand for the proposition that after the Sixth Amendment right to counsel attaches anyone acting on the government's behalf is forbidden from eliciting information from the accused. *Id.* at 399. By including court officers in the group of government officials the prohibition applies to, the court put to rest the concern that secret interrogation tantamount to government interrogations would be taking place. *Id.* at 399.

76. Commonwealth v. Howard, 845 N.E.2d 368, 372-73 (Mass. 2006). The court's decision in *Howard* was based on the principles set forth in *Hilton*. *Id.* at 372. Again, the court relied on the Supreme Court's command in *Massiah* and the ever-present concern with "the constitutional implications of questioning on matters concerning pending charges" by agents of the state. *Id.*

77. Commonwealth v. Amirault, 677 N.E.2d 652, 660 (Mass. 1997).

78. *See id.* at 658.

thereby violating Article 12.[79] The court agreed with the defendant and held that Article 12 was broader than the Sixth Amendment in that it guaranteed a defendant a face-to-face confrontation.[80]

In contrast to the cases in which the SJC has found that Article 12 was more expansive than the Sixth Amendment, in *Commonwealth v. Whelton,* the SJC deferred to the Supreme Court's reading of the Sixth Amendment.[81] *Whelton* examined whether the admission of hearsay evidence, under the spontaneous utterance exception, without a showing that the declarants were unavailable, violated the defendant's Article 12 right to confront the witnesses against him.[82] The court considered its prior holdings, finding it dispositive that in regards to the hearsay rule, it had consistently held "that art. 12 provide[d] no greater protection than the Sixth Amendment."[83] The court also placed emphasis on the fact that the defendant failed to provide any evidence to support his position that "art. 12 provide[d] greater protection against hearsay than the Sixth Amendment."[84] Therefore, the court concluded that in this instance, Article 12 was not more expansive than the Sixth Amendment.[85]

II. THE SIXTH AMENDMENT, BEFORE AND AFTER *MONTEJO V. LOUISIANA*

The SJC's precedent regarding the Article 12 right to counsel discussed in Part I.D establishes that the SJC has taken a broad protective approach to the right to counsel. This approach stems from safeguarding the attorney-client relationship and a defendant's right to rely on the assistance of counsel at all critical stages of a criminal prosecution, including post-arraignment interroga-

79. *Id.* at 656.

80. *Id.* at 662 (holding that "[w]e have no doubt that the seating arrangements in these cases violated the confrontation rights of the accused under art. 12 . . . [t]he witness must give his testimony to the accused's face, and that did not happen here").

81. Commonwealth v. Whelton, 696 N.E.2d 540, 545 (Mass. 1998). The spontaneous utterance exception to the hearsay rule allows an otherwise inadmissible statement to be admitted into evidence "'if its utterance was spontaneous to a degree which reasonably negated premeditation or possible fabrication and if it tended to qualify, characterize and explain the underlying event.'" *Id.* at 544 (quoting Commonwealth v. Crawford, 629 N.E.2d 1332, 1334 (Mass. 1994)).

82. *Id.* at 543.

83. *Id.* at 545.

84. *Id.*

85. *Id.* (holding "that art. 12, like the Sixth Amendment . . . does not require a showing that the declarant is unavailable to testify at trial before a statement is admitted under the spontaneous utterance exception to the rule against hearsay").

tions. For a more complete understanding of the SJC's approach, it is necessary to compare Article 12 with the Sixth Amendment, and the Supreme Court's decision in *Montejo v. Louisiana*.[86] This Note argues that application of the *Montejo* decision in Massachusetts courts would be inconsistent with the SJC's efforts to protect Article 12, and that therefore the Massachusetts judiciary should continue to afford Massachusetts citizens greater protection than their federal counterparts.

Part II discusses both the past and present state of federal law in the right to counsel context beginning with the Supreme Court's interpretations of the Sixth Amendment and ending with the Court's opinion in *Montejo v. Louisiana*.[87] On the journey to *Montejo*, this section addresses *Maine v. Moulton*[88] and *Michigan v. Jackson*;[89] cases decided a year apart during a time when the Supreme Court placed limits on the government's efforts to circumvent the right to counsel. This section then concludes with a recent Massachusetts case that grapples with the implications that *Montejo* has for state courts.

A. *The Road to* Michigan v. Jackson

Under Supreme Court precedent, the Sixth Amendment attaches once adversarial proceedings have been initiated against a defendant, and guarantees a defendant the right to "have counsel present at all 'critical' stages of the criminal proceedings."[90] Because the Court views the arraignment as the initiation of adversarial proceedings against an accused, the arraignment is considered the event that triggers the Sixth Amendment's protection.[91] After an arraignment, "the adverse positions of government and defendant have solidified" and the defendant is "immersed in the intrica-

86. Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009).

87. *Id.*

88. Maine v. Moulton, 474 U.S. 159, 180 (1985).

89. Michigan v. Jackson, 475 U.S. 625, 636 (1986), *overruled by Montejo*, 129 S. Ct. at 2091.

90. *Montejo*, 129 S. Ct. at 2085. Stressing the importance of the Sixth Amendment right to counsel the Court has stated that: "[t]he right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice." *Moulton*, 474 U.S. at 168-69.

91. *Jackson*, 475 U.S at 629.

cies of substantive and procedural criminal law,"[92] complexities which the law presumes a defendant cannot handle on his own.[93]

In *Maine v. Moulton*, the Supreme Court placed limits on the investigatory rights of the government by holding that once the Sixth Amendment attaches the government has "an affirmative obligation to respect" it.[94] That affirmative obligation mandates that the government cannot "act in a manner that circumvents" the Sixth Amendment[95] and assures the defendant "the right to rely on counsel as a 'medium' between him and the state."[96] The Court in *Moulton* acknowledged the government's investigatory right after arraignment, but held that it is limited by, and must yield to, the defendant's right to counsel.[97] Therefore if the government, in an effort to investigate an accused, knowingly and intentionally circumvents the defendant's right to counsel, the government has violated the defendant's Sixth Amendment right.[98]

A year after the Supreme Court set out the boundaries of the right to counsel in *Moulton*, the Court placed further limits on the government's investigatory rights under the Sixth Amendment in *Michigan v. Jackson*.[99] The *Jackson* Court addressed whether the defendants "validly waived their right to counsel at the post-ar-

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92. *Moulton*, 474 U.S. at 170 (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

93. *See Jackson*, 475 U.S. at 633 n.7.

94. *Moulton*, 474 U.S. at 171. The Court further stated "[o]nce the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel." *Id.* at 170-71.

95. *Id.* at 171. To this end, "[t]he determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light" of the affirmative obligation not to circumvent the accused's right to counsel. *Id.* at 176. Applying this standard, the Court in *Moulton* held that the defendant's Sixth Amendment right was violated when the police arranged to record conversations between the defendant and an agent of the state. *Id.*

96. *Id.*

97. *See id.*

98. *Id.* The policy behind this type of rule is to prevent "abuse by law enforcement personnel in the form of fabricated investigations [thereby] risk[ing] the evisceration of the Sixth Amendment right." *Id.* at 180. To this end, the Court—quoting from *Spano v. New York*—inquired "'what use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?'" *Id.* at 171 (quoting Spano v. New York, 360 U.S. 315, 326 (1959)).

99. *See generally* Michigan v. Jackson, 475 U.S. 625, 636 (1986), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009) (holding that any waiver made by a defendant of the right to counsel in a post-arraignment police-initiated interrogation is invalid).

raignment custodial interrogations."[100] This issue prompted the Court to consider whether the rule established in *Edwards v. Arizona*, aimed at protecting Fifth Amendment rights, applied equally to a Sixth Amendment context.[101] The rule in *Edwards* prohibited police from further interrogating a suspect in custody once the suspect had invoked his right to speak with an attorney.[102]

After considering the applicability of the *Edwards* rule, the Court looked at the lawyer's role in the post-arraignment context.[103] The Court stressed that the justifications for not allowing police to interrogate unrepresented suspects after they have asked to speak with a lawyer are even stronger once adversarial proceedings have been initiated and a lawyer has been appointed.[104] Relying on *Maine v. Moulton*'s holding that affords defendants the right to rely on their attorney as an intermediary between them and the government,[105] the Court stated that after an accused has been charged, the right to counsel mandates that "the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier

100. *Id.* at 630. There was no issue in *Jackson* over whether the defendant had a *right* to counsel at the post-arraignment police-initiated interrogation because "[t]he existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at post-arraignment interrogations." *Id.* at 629 (citation omitted).

101. *Id.* at 626. The rule established in *Edwards* was rooted in the Fifth Amendment's protection against self-incrimination and the request for counsel in *Edwards* was made directly to the police during the custodial interrogation. *Id.* at 630. In contrast to *Edwards*, the defendant in *Jackson*, made his request for counsel to the judge during the arraignment, "and the basis for the Michigan Supreme Court opinion was the Sixth Amendment's guarantee of the assistance of counsel" not the Fifth Amendment as in *Edwards*. *Id.*

102. *Id.* at 626.

103. *Id.* at 631-33. The government had argued in *Jackson* that applying an *Edwards* rule to a Sixth Amendment context would not be appropriate due to the "differences in the legal principles underlying the Fifth and Sixth Amendments." *Id.* at 631. The Court disagreed with the government, stating that the purpose behind the *Edwards* rule, protecting an unrepresented accused, is just as, if not more important in a Sixth Amendment context when the accused is now a represented defendant. *Id.* Therefore, the court determined that post-arraignment interrogations, require at least as much protection as is given in a pre-arraignment interrogation. *Id.* at 632.

104. *Id.* at 631.

105. *Id.* at 632 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)). The Court reasoned that after formal proceedings have been initiated the individual goes from being a "suspect" to an "accused"—entitling the accused to more constitutional protection. *Id.*

stage of their investigation."[106] The Court then created a bright-line rule, analogous to the rule in *Edwards*, prohibiting police-initiated post-arraignment interrogations and making any waiver of the right to counsel in such interrogations presumptively invalid.[107]

B. *The Downfall of* Jackson*:* Montejo v. Louisiana

The *Jackson* bright-line rule prohibiting police-initiated post-arraignment interrogations met its demise in 2009 when the Supreme Court, *sua sponte*,[108] considered whether *Jackson* should be overruled.[109] In *Montejo v. Louisiana*, the defendant, Jesse Montejo, was arrested in connection with a murder and robbery and was appointed counsel at a preliminary hearing as required under Louisiana state law.[110] Later that same day, the police went to the prison where Montejo was being held and convinced him to accompany them on an expedition to find the murder weapon.[111] Thereafter, Montejo signed a *Miranda* waiver, waiving his right to have counsel present, and during the expedition wrote an inculpatory letter of apology that was admitted into evidence at his trial.[112] Notably, Montejo did not meet his court-appointed attorney until *after* he returned from the police excursion and wrote the inculpatory letter.[113]

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106. *Id.* After laying out the principles as to why a defendant should be entitled to just as much Sixth Amendment constitutional protection as a suspect, the Court concluded that, "the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances." *Id.*

107. *Id.* at 635. Relying on *Edwards* for the decision, the Court said: "[j]ust as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis." *Id.* It is important to note that under *Edwards*, and *Jackson*, if the accused initiates "communication, exchanges, or conversations with the police," subsequent to his invocation of the right to counsel, the waiver can be deemed valid. *Id.* at 626 (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)). What both *Edwards* and *Jackson* protect against, are *police-initiated* interrogations. *Id.*

108. The term *sua sponte* means "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY 1560 (9th ed. 2009).

109. Montejo v. Louisiana, 129 S. Ct. 2079, 2088 (2009).

110. *Id.* at 2082. At the preliminary hearing, the judge appointed Montejo an attorney without a request by Montejo; Montejo stood mute during the entire proceeding. *Id.* at 2083.

111. *Id.* at 2082.

112. *Id.* Montejo objected to the admittance of the letter of apology at trial. *Id.*

113. *Id.* (emphasis added) ("Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.").

Under the bright-line rule established in *Jackson*, Montejo's waiver should have been presumptively invalid.[114] However, the Supreme Court, in overruling *Jackson*, held that a defendant may waive his right to counsel as long as the waiver is made knowingly, voluntarily, and intelligently.[115] In so holding, the majority rejected the dissent's view that there was a categorical distinction between an unrepresented defendant and a represented one.[116] The majority reasoned that there are "three layers of prophylaxis" that protect the right to counsel in a custodial interrogation, and therefore the rule in *Jackson* was considered unnecessary.[117]

The Court in *Montejo* believed overruling *Jackson* was appropriate because the slight benefits of the *Jackson* rule substantially outweighed the "costs to the truth-seeking process and the criminal justice system."[118] The Court stated that the purpose of *Jackson* was to prevent police from badgering represented defendants into waiving their right to counsel, which was adequately served by *Miranda* and *Edwards.*[119] Under *Miranda* and *Edwards*, if a represented defendant did not want to speak to the police outside his counsel's presence, all he had to do was say so.[120] The main cost the Court saw was that the rule deterred the government from attempting to obtain voluntary confessions, thus making it more

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114. *Id.* at 2083. The Louisiana Supreme Court distinguished *Jackson*, pointing out that *Jackson* required the defendant to *request* the appointment of an attorney before its protections were triggered. *Id.* Since the judge appointed Montejo counsel without a request by Montejo, *Jackson*'s protections were not triggered. *Id.*

115. *Id.* at 2091-92.

116. *Id.* at 2092. Justice Stevens writing for the dissent believed that, "[i]f a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer." *Id.* at 2095 (Stevens, J., dissenting).

117. *Id.* at 2090.

> Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*'s prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."

Id. at 2089-90 (citations omitted) (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

118. *Id.* at 2091.

119. *Id.* at 2089-90.

120. *Id.*

likely that the guilty would go free.[121] Therefore, the Court concluded, the *Jackson* rule did not "pay its way."[122]

Justice Stevens authored the majority opinion in *Jackson* and wrote a strong dissent in *Montejo*.[123] Writing for the dissent, Justice Stevens reasoned that the purpose of the *Jackson* rule was not to prevent police badgering, but rather "to safeguard a defendant's right to rely on the assistance of counsel."[124] Further, because the decision to waive the right to counsel is a "momentous one," Justice Stevens believed that *Miranda* warnings, while adequate to inform Montejo of his Fifth Amendment right to remain silent, were insufficient to ensure that Montejo was aware of the consequences of waiving his Sixth Amendment right to counsel.[125] Stevens thought that the majority's decision to overrule *Jackson* caused irreparable harm to the "integrity of the . . . right to counsel," and that even under pre-*Jackson* law, Montejo's Sixth Amendment right to counsel was violated.[126]

C. Montejo*'s Applicability to the States*

State courts have been grappling with the *Montejo* decision[127] due to the substantial change it wrought in Sixth Amendment

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121. *Id.* at 2090-91.

122. *Id.* at 2091 (quoting United States v. Leon, 468 U.S. 897, 906 n.6 (1984)). Notably, the decision in *Montejo* was 5-4. *Id.* at 2081.

123. *Id.* at 2101 (Stevens, J., dissenting); Michigan v. Jackson, 475 U.S. 625, 626 (1986), *overruled by Montejo*, 129 S. Ct. at 2092.

124. *Montejo*, 129 S. Ct. at 2097 (Stevens, J., dissenting). Stevens also stated that *Jackson*'s purpose was to "'protec[t] the unaided layman at critical confrontations with his adversary' by giving him 'the right to rely on counsel as a 'medium' between him[self] and the State.'" *Id.* at 2096 (quoting Michigan v. Jackson, 475 U.S. 625, 631-32 (1985)).

125. *Id.* at 2100-01. Stevens believed that the Majority accused *Jackson* of doing the same thing the Majority did with their holding in *Montejo*: blurring the line between the Fifth and Sixth Amendments. *Id.* at 2100. The Majority "commit[ed] the same error by assuming that the *Miranda* warnings given in this case, designed purely to safeguard the Fifth Amendment right against self-incrimination, were somehow adequate to protect Montejo's *more robust* Sixth Amendment right to counsel." *Id.* (emphasis added).

126. *Id.* at 2101. The "pre-*Jackson*" law Stevens was referring to was the precedent established in *Maine v. Moulton* that

> makes clear that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." The Sixth Amendment entitles indicted defendants to have counsel notified of and present during critical confrontations with the state throughout the pretrial process.

Id. at 2099 (citation omitted) (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).

127. *See, e.g.*, Williams v. State, 38 So.3d 188, 190 (Fla. Dist. Ct. App. 2010).

law.[128] Explicit in the *Montejo* ruling is the right of each individual state to exercise its power through judicial federalism and continue, under the state constitution, "to abstain from requesting interviews with represented defendants when counsel is not present."[129] Thus, although *Montejo* resolved the issue under the Sixth Amendment, it did not resolve the issue under the parallel right to counsel provisions in state constitutions.[130]

Following the Supreme Court's recognition that states could continue abstaining from police-initiation post-arraignment interrogations, the state court decisions have been split as to whether *Montejo* should be followed.[131] The dispositive factor for the state courts has been whether the defendant has relied on the right to counsel provision in the state constitution or its federal counterpart, the Sixth Amendment.[132] Notably, the power to afford greater protection under the state constitution has been fully discussed in only three state courts: Wisconsin,[133] Florida,[134] and Massachusetts.[135]

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128. *See* People v. Vickery, 229 P.3d 278, 281 (Colo. 2010) (recognizing that due to *Montejo* "[t]he Supreme Court's interpretation of the Sixth Amendment right to counsel has undergone substantial changes").

129. *See Montejo*, 129 S. Ct. at 2089; *see also Williams*, 38 So.3d at 192 ("Although *Montejo* resolved the issue under Sixth Amendment jurisprudence, the Supreme Court acknowledged that the states were free to continue prohibiting these types of police-initiated interrogations under their own constitutions.").

130. *Williams*, 38 So.3d at 192.

131. *Compare Vickery*, 229 P.3d at 281 (holding *Montejo* should be followed), *with Williams*, 38 So.3d at 193 (considering "state constitutional claims . . . under the assumption that our high court will adhere to its precedent, despite *Montejo*").

132. *See Ex parte* Cooper, 43 So.3d 547, 548, 550-51 (Ala. 2009) (holding that after *Montejo*, when a defendant pursues a Sixth Amendment argument "a court must no longer presume a waiver of a right to counsel executed after the right to counsel has attached is invalid"); *Vickery*, 229 P.3d at 280-81 (holding that because Vickery argued that the interrogation violated Sixth Amendment rights, *Montejo* is controlling and "[a]fter *Montejo* we cannot presume waiver is involuntary simple because the defendant is represented by counsel for pending charges"); Hughen v. State, 297 S.W.2d 330, 335 (Tex. Crim. App. 2009) (holding that due to defendant's reliance on *Jackson* and the pursuit of a Sixth Amendment argument, *Montejo* is controlling, making defendant's waiver valid).

133. State v. Forbush, 796 N.W.2d 741, 754-55 (Wis. 2011). In *State v. Forbush*, the trial court found that the post-arraignment, police-initiated interrogation of Forbush violated his right to counsel, but the appellate court, relying on *Montejo*, reversed the decision. *Id.* at 754. The case then made it to the Wisconsin Supreme Court where the court read *Montejo* as only applying in cases where the defendant had not invoked his right to counsel. *Id.* Because Forbush had invoked his right to counsel prior to interrogation, the court concluded that *Edwards* was controlling and *Edwards* prohibited interrogating "a defendant who has invoked his right to counsel." *Id.* at 757. While the outcome of Forbush was accurate, the applicability of the *Edwards* rule was not. Notably, the *Edwards* rule only applies "when an accused has invoked his right to have counsel present during *custodial interrogation*." Edwards v. Arizona, 451 U.S. 477, 484-

While *Montejo* changed Sixth Amendment jurisprudence,[136] state courts must decide if *Montejo* also altered state law regarding the right to counsel. In July of 2010, the Massachusetts Court of Appeals decided a case that was factually similar to *Montejo*.[137] In *Commonwealth v. Tlasek*, Tlasek was arrested in connection with a housebreak and subsequently interrogated by the police while he was in custody, awaiting arraignment.[138] At the time of his arrest and interview, the police were aware that Tlasek was represented by counsel regarding drug charges from a different case, but did not notify Tlasek's counsel.[139] Failing to notify Tlasek's counsel, the police secured a *Miranda* waiver from Tlasek and then proceeded to ask him questions relating solely to the pending drug charges.[140]

At trial for the drug charges, the judge denied Tlasek's motion to suppress the statements he made during the police interrogation.[141] The trial court reasoned that Tlasek's Sixth Amendment right to counsel had not attached because the purpose of the inter-

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85 (1981) (emphasis added). In *Forbush* the court found that because Forbush had invoked his right to counsel, the *Edwards* rule was controlling. *Forbush*, 796 N.W.2d at 757. However, Forbush invoked his right to counsel prior to the custodial interrogation, not during, as required for *Edwards* to apply. *Id.* at 744. Therefore, *Edwards* did not prohibit the questioning, and Forbush would have had to re-invoke his right to counsel during the interrogation for *Edwards* to apply, contrary to the court's opinion. *Id.* at 757 (stating that "Forbush was not required to 're-invoke' his right to counsel when the investigators initiated interrogation").

134. *Williams*, 38 So.3d at 192. In *Williams v. State*, the defendant argued that the police-initiated interrogation violated his right to counsel under both the Florida and United States Constitutions because it occurred outside of his counsel's presence. *Id.* at 190. Observing *Montejo*'s acknowledgment that "states were free to continue prohibiting these types of police-initiated interrogations under their own constitutions," the court noted that "'the decisions of the [United States Supreme] Court are not, and should not be dispositive of questions regarding rights guaranteed by counterpart provisions of state law.'" *Id.* at 192. Ultimately, the court did not address whether the waiver of Williams' right to counsel was valid under the Florida Constitution, finding that Williams never initially invoked his right to counsel. *Id.* at 193.

135. Commonwealth v. Tlasek, 930 N.E.2d 170, 173 (Mass. App. Ct. 2010).

136. *Vickery*, 229 P.3d at 281.

137. *Tlasek*, 930 N.E.2d at 171.

138. *Id.*

139. *Id.* While Tlasek was "in custody, but before he had been arraigned on the Canton housebreak, the Canton police came unannounced to interview" Tlasek at the jail where he was being held. *Id.*

140. *Id.* During the interrogation Tlasek made inculpatory statements. *Id.* Immediately after making the statements he acknowledged his error stating, "'he knew that he shouldn't have spoken with [the Canton police] and now he's hurt his [drug] case'"; Tlasek then ended the interview. *Id.* Notably, throughout the interview the police asked no questions relating to the housebreak, which was the basis for Tlasek's arrest and interrogation. *Id.*

141. *Id.* at 172.

rogation was to question him about the housebreak, charges on which he had not been arraigned.[142] On appeal, the court held that Tlasek's Sixth Amendment right had attached, but that under *Montejo* Tlasek had waived it by signing the *Miranda* waiver.[143] The appellate court made it clear that "[Tlasek's] waiver of his Sixth Amendment right [did] not mean that he also necessarily waived his parallel right under art. 12."[144]

Although the court recognized that Tlasek had not automatically waived his Article 12 right to counsel, the court did not address the issue further,[145] because on appeal Tlasek relied solely on a Sixth Amendment argument, even though *Montejo* had made that argument moot.[146] Therefore, the court concluded that the Article 12 issue was not properly before them.[147]

This recognition by the Massachusetts Court of Appeals, that Tlasek's waiver of his Sixth Amendment right did not automatically imply that he waived his Article 12 right, serves as the basis for the remainder of this Note. This Note argues that based on prior Massachusetts case law concerning Article 12 and the Massachusetts judiciary's steps to preserve the attorney-client relationship, Massachusetts citizens should continue to be afforded greater protection under Article 12 than that currently afforded by the *Montejo* opinion.

III. Wishing to Abstain: Interpreting Article 12 to Protect the Sanctity of the Attorney-Client Relationship

Part III of this Note analyzes the Massachusetts judiciary's affirmative steps in safeguarding the sanctity of Article 12 by taking a broadly protective approach to the attorney-client relationship. This Note argues that based on this approach the Massachusetts judiciary should continue to construe Article 12 as requiring a bright-line rule that prohibits police-initiate interrogations in the

142. *Id.*

143. *See id.* Implicit in the court's holding that Tlasek waived his Sixth Amendment right is the fact that it had attached at the time of the police interview. *Id.*

144. *Id.* at 172-73.

145. *Id.* at 173.

146. *Id.*

147. *Id.* at 173 n.6. However, the court did discuss that in prior cases the SJC has held that Article 12 affords Massachusetts citizens greater protection than that provided by the Sixth Amendment. *Id.*

post-arraignment context and rejects *Miranda* waivers in the same context.

The initial question that must be addressed in deciding whether Massachusetts should afford their citizens greater protection than that afforded by *Montejo* is: does the rule in *Montejo* "adequately protect[ ] the rights of the citizens of Massachusetts?"[148] When this question is answered in the affirmative, there is no need to create a separate state law rule.[149] This Note argues that the *Montejo* rule does not adequately protect the citizens of Massachusetts. The remainder of the Note will show why the federal rule is inadequate. The starting point in answering this question is an evaluation of the text of Article 12 and its federal counterpart, the Sixth Amendment.

The textual similarities between the right to counsel provisions in Article 12 and the Sixth Amendment are striking.[150] By their words, both guarantee an accused the right to have counsel for his defense.[151] Article 12 provides that "every subject shall have a right . . . to be fully heard in his defence by himself, or his council [sic], at his election."[152] Similarly, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[153] Even though the texts are alike, textual similarities alone do not create a presumption that Massachusetts courts should defer to Supreme Court precedent.[154] Rather, textual similarity is but one factor to be taken into consideration along with the "history . . . [and] prior interpretations of art. 12, as well as the jurisprudence existing in the Commonwealth."[155]

Although there may not be any notable textual difference between Article 12 and the Sixth Amendment, the history of Article

148. Commonwealth v. Mavredakis, 725 N.E.2d 169, 177-78 (Mass. 2000).

149. Commonwealth v. Simon, 923 N.E.2d. 58, 69 (Mass. 2010).

150. Article 12's right to counsel provision provides that: "every subject shall have a right to . . . be fully heard in his defence by himself, or his council [sic], at his election." MASS. CONST. pt. 1, art. XII. The Sixth Amendment in pertinent part provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

151. U.S. CONST. amend. VI; MASS. CONST. pt. 1, art. XII.

152. MASS. CONST. pt. 1, art XII.

153. U.S. CONST. amend. VI.

154. *See* Leavens, *supra* note 20, at 97 (stating that "[t]here may be principled reasons for a state court to find different, more protective meaning for a common norm and to impose its version of that norm within its state, but it is *almost never* because the state and federal provisions have significantly different text") (emphasis added).

155. Commonwealth v. Murphy, 862 N.E.2d 30, 41 (Mass. 2007).

12 coupled with prior interpretations by the SJC compel the conclusion that the SJC should afford Massachusetts citizens greater protection than provided by *Montejo*.

A. *Safeguarding the Attorney-Client Relationship*

If Massachusetts were to follow the *Montejo* rule it would undermine the safeguards the SJC has long recognized as important to the protection of the attorney-client relationship. Through the adoption of court rules[156] and case law, the Massachusetts judiciary has taken a stance on ensuring defendants have the benefit of legal representation and have not tolerated tactics by the police aimed at circumventing Article 12.

One of the SJC's efforts to ensure that a criminal defendant's right to rely on the assistance of counsel is not circumvented by the government appears in *Commonwealth v. Manning*.[157] In *Manning*, the SJC preserved the attorney-client relationship by finding that efforts by drug enforcement agents "to induce the defendant to become an inform[ant]," without notice to the defendant's attorney, violated the defendant's right to counsel.[158] In so holding, the court stated that "[i]t is clear that [inducing] conduct amounted to unwarranted interference with the relationship between the defendant and his attorney. There is no justification for the Government to attempt to deal with the defendant behind the back of his counsel."[159] Finding the conduct by the government agents to be so egregious, the court contemplated adopting "a per se rule which would mandate the dismissal of an indictment in cases in which gov-

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156. *See supra* Part I.C.

157. Commonwealth v. Manning, 367 N.E.2d 635, 636, 638 (Mass. 1977).

158. *Id.* at 636. In addition to urging the defendant to become an informant, the drug enforcement agent also "[d]uring the course of the conversation, . . . 'made several disparaging remarks about [Manning's] counsel and the manner in which he was conducting the defense of the . . . case' and 'indicated that the tactics of defense counsel would not insure the defendant being kept out of jail.'" *Id.* at 636.

159. *Id.* at 637. The Commonwealth argued that the defendant was required to "show that he was actually prejudiced by the agents' conduct" and because the defendant could not show that, "any error was harmless." *Id.* at 638. The court rejected the Commonwealth's argument and held that it

> need not invoke a presumption of prejudice, as implicit in the motion judge's finding that there have been no "serious" impairment of the attorney-client relationship is a finding that the defendant had in fact been prejudiced to some extent. "The right to have the assistance of counsel *is too fundamental and absolute* to allow courts to indulge in nice calculations of prejudice arising from its denial."

Id. (emphasis added) (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)).

ernment agents intentionally attempt to subvert the attorney-client relationship."[160] The court decided against the per se rule but cautioned that "we wish to leave no doubt that such conduct will not be tolerated in our criminal justice system."[161] This warning by the court makes the SJC's protective view of the attorney-client relationship undoubtedly apparent.

Another instance in which the SJC has taken affirmative steps to safeguard the attorney-client relationship can be found in *Commonwealth v. Mavredakis*.[162] In *Mavredakis*, the SJC's holding that police officers had a duty to inform a suspect of an attorney's efforts to render assistance[163] was grounded in protecting the attorney-client relationship.[164] In deciding not to defer to the Supreme Court's holding that police had such a duty, the SJC said that the federal rule "would lend tacit approval to affirmative police interference with the attorney-client relationship"[165]—something the court was unwilling to do.[166] In *Mavredakis*, the court stated that when an accused accepts an attorney's assistance during interrogation, "the police must suspend questioning until the suspect is afforded the opportunity to consult with the attorney."[167] Analogously, if *Montejo* were followed in Massachusetts, it would allow police to question a defendant who has already accepted an attorney's assistance, and has not yet had the opportunity to speak with his attorney.

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160. *Id.* at 639.

161. *Id.*

162. Commonwealth v. Mavredakis, 725 N.E.2d 169, 179 (Mass. 2000).

163. *Id.* (holding that "the duty we announce concerns solely the obligation 'to apprise the defendant of a specific communication from his attorney that bore directly on *the right to counsel*'") (emphasis added) (quoting State v. Stoddard, 537 A.2d 446, 453 (Conn. 1988)).

164. *See* Commonwealth v. Murphy, 862 N.E.2d 30, 42 (Mass. 2007) (discussing the efforts the SJC has taken in safeguarding the attorney-client relationship).

165. *Mavredakis*, 725 N.E.2d at 179. To that point, the court further went on to adopt recognitions by other jurisdictions that

> there is an important difference between the abstract right to speak with an attorney . . . and a concrete opportunity to meet "with an identified attorney actually able to provide at least initial assistance and advice." "Faced with a concrete offer of assistance . . . a suspect may well decide to reclaim his or her continuing right to legal assistance."

Id. at 178-79 (alteration in original) (citations omitted) (quoting State v. Haynes, 602 P.2d 272, 278 (Or. 1979) and State v. Stoddard, 537 A.2d 446, 453 (Conn. 1998)).

166. *Id.* at 176 (recognizing that under *Moran* "police had no duty to inform a suspect of an attorney's efforts to render legal services when the suspect had not personally requested such legal representation") (citing Moran v. Burbine, 475 U.S. 412, 422, 432 (1986)).

167. *Id.* at 180.

Allowing the police to question a defendant who has already accepted an attorney's assistance would have numerous negative consequences. Notably, putting the *Montejo* rule into practice would render being represented in a custodial interrogation more burdensome than being unrepresented. For example, under *Mavredakis* when a suspect accepts an attorney's offer of assistance during a custodial interrogation the police must halt questioning and cannot resume until the suspect speaks with the attorney.[168] Under a *Montejo* fact pattern, at the time the interrogation takes place, defendants have already accepted and invoked their right to counsel at arraignment, but have yet to speak with their counsel. Before the police have a duty to halt the interrogation under *Montejo*, the defendant has to *re-invoke* his right to counsel during the interrogation.[169] Thus a represented defendant has a higher burden than an unrepresented suspect, which requires the represented defendant to invoke the right to counsel twice: once at arraignment and again during the interrogation.

Adherence to the *Montejo* rule would encourage police conduct aimed at circumventing Article 12, namely, interrogating defendants who have just been arraigned, but have yet to have the opportunity to speak with their attorney. When an accused is first brought into a custodial interrogation, pre-arraignment, the police have the opportunity to question him. In *Montejo*, the defendant was questioned all afternoon, evening, and then into the next morning.[170] After the accused becomes a charged defendant, and has secured an attorney, the only foreseeable benefit of allowing the police to interrogate him is to give the police another chance at obtaining a confession. However, in the post-arraignment context, this confession comes at the hands of the police circumventing the defendant's "right to rely on counsel as a 'medium' between him and the State."[171]

In attempting to obtain a post-arraignment confession the police are interfering with the relationship between the defendant and

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168. *Id.*

169. Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009). "[A] defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited." *Id.* While this is true, thinking that they have already invoked their right to counsel at arraignment, most defendants will not be learned enough to know that they must *again* invoke it at the interrogation for their right to counsel to be respected and upheld.

170. *Id.* at 2082.

171. Maine v. Moulton, 474 U.S. 159, 176 (1985).

his attorney, thereby degrading the safeguards the Massachusetts judiciary has put in place to protect that relationship. Such a result would be a digression for the Massachusetts judiciary and, therefore, post-arraignment police-initiated interrogations should continue to be prohibited.

Admittedly, there may come a time when an "emergency" situation arises in which time is crucial, and a defendant's attorney cannot be contacted prior to the questioning. However, those situations should be rare, and if an emergency situation arises a defendant should be notified, *prior to questioning*, that his attorney was not contacted before the defendant is asked to sign a *Miranda* waiver. Additionally, the defendant's attorney should be contacted at the first opportunity. Aside from that exception, once a defendant's Article 12 right to counsel attaches, there should be a blanket prohibition on police-initiated interrogations of represented defendants, thus advancing the SJC's efforts to protect the attorney-client relationship.

B. *Circumvention of Article 12*

The SJC has not only taken steps to safeguard the attorney-client relationship, but also to ensure that law enforcement does "not . . . act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[172] In *Hilton* and *Howard*, the SJC expanded upon the Supreme Court's efforts to stop law enforcement from confronting defendants without their counsel's knowledge.[173] There, the court classified both social workers[174] and court officers as "government agents"[175] in an effort to protect a defendant's right to rely on the assistance of counsel when communicating with the government.

Relying on *Hilton*, a Massachusetts Superior Court in *Commonwealth v. Blagojevic* reaffirmed the "broad prohibition" against efforts by law enforcement targeted at eliciting inculpatory statements from represented defendants.[176] Notably, the court's holding that after the time of arraignment, the police were "obligated to

172. Commonwealth v. Hilton, 823 N.E.2d 383, 398 (Mass. 2005) (quoting Maine v. Moulton, 474 U.S. 159, 171 (1985)).

173. Commonwealth v. Howard, 845 N.E.2d 368, 372 (Mass. 2006); *Hilton*, 823 N.E.2d at 400-01; *see supra* Part I.D.

174. *Howard*, 845 N.E.2d at 372-73.

175. *Hilton*, 823 N.E.2d at 400.

176. Commonwealth v. Blagojevic, No. 06-302, 2007 WL 969079, at *1 (Mass. Super. Ct. Feb. 28, 2007).

refrain from any effort to question [the defendant] . . . in the absence of his counsel" was not rooted in the *Jackson* rule, but rather Massachusetts precedent and *Maine v. Moulton*.[177]

Logically, holdings not based on *Jackson* should not be affected by the *Montejo* rule. However, the *Blagojevic* holding, prohibiting post-arraignment police interrogations in Massachusetts, is in danger of being overruled if *Montejo* were to be followed. *Montejo* permits what *Blagojevic* explicitly prohibits: the questioning of defendants after arraignment without their counsel's knowledge.[178] In requesting counsel, or securing private counsel, the defendant should be interpreted as saying, "I only want to communicate through my attorney." By expressly choosing to have the assistance of counsel, a defendant invokes his right to rely on the assistance of counsel for the duration of litigation. Allowing the police to initiate interrogations of defendants after their Article 12 invocation negates their express choice. Thus, adherence to *Montejo* would undermine the rules the Massachusetts judiciary has put in place to preserve a defendant's choice to have counsel.

C. Miranda *Warnings—Grossly Inadequate*

The Supreme Court in *Miranda v. Arizona* held that the Fifth Amendment's privilege against self-incrimination carries with it certain procedural safeguards.[179] Under *Miranda*, an individual in custody has the right to consult with an attorney and have an attorney present during interrogation.[180] Thus, with *Miranda*, the Supreme Court created "what may be best described as the '*Miranda* right to counsel,'" independent from the right to counsel guaranteed by the Sixth Amendment and Article 12.[181] While the Court created this *Miranda* right to counsel, its only real purpose was to protect a suspect's right to remain silent, and therefore "is [significantly] narrower than the full-blooded Sixth Amendment" and Article 12 right to counsel.[182] The *Miranda* right to counsel is nothing

177. *Id.* at *2.

178. Montejo v. Louisiana, 129 S. Ct. 2079, 2083, 2091 (2009) (discussing the *Jackson* rule, and *Jackson's* overruling now means that *Montejo* allows post-arraignment police-initiated interrogations).

179. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

180. *Id.*

181. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 1: INVESTIGATION 417 (4th ed. 2006).

182. *Id.* Recognizing that due to *Miranda's* narrower application, "[i]t is necessary to treat the *Miranda* and Sixth Amendment versions of the right to counsel sepa-

more than a prophylactic safeguard,[183] while the right to counsel in both Article 12[184] and the Sixth Amendment is a "fundamental" constitutional right.[185]

The holding in *Montejo* rests on the belief that *Miranda* warnings adequately apprise defendants of the Sixth Amendment rights they are giving up,[186] even though *Miranda* was designed to protect defendants' Fifth Amendment right against self-incrimination.[187] Thus, the *Montejo* Court concluded that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver."[188] Justice Stevens, in his dissenting opinion in *Montejo*, adamantly argued that *Miranda* warnings were inadequate to ensure "that a defendant possess 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'"[189]

Article 12 guarantees criminal defendants the right to have counsel for their defense.[190] It gives a defendant the right to choose between two options: (1) to proceed with an attorney *or* (2) to elect to proceed without an attorney and represent himself.[191] Article 12 is enforced through SJC Rule 3:10, which requires the judge to ad-

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rately. They attach at different times, under different circumstances, for different reasons, and with different effects." *Id.*

183. *Id.* at 416.

184. Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 903 (Mass. 2004).

185. Jennifer Diana, *Apples and Oranges and Olives? Oh My!* Fellers*, the Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine*, 71 BROOK. L. REV. 985, 1007 (2005) (discussing the differences between the Fifth and Sixth Amendments).

186. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009) (reasoning that because *Miranda* warnings "suffice[ ] to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence' before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached") (citation omitted) (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)).

187. *Id.* Interestingly, the Court acknowledged the fact that *Miranda* was designed to protect an accused's Fifth Amendment right, but dismisses this glaring distinction as "irrelevant." *Id.*

188. *Id.* at 2089-90 (referring to Miranda v. Arizona, 384 U.S. 436, 474 (1966); Edwards v. Arizona, 451 U.S. 477, 484 (1981); Minnick v. Mississippi, 498 U.S. 146, 153 (1990)).

189. *Id.* at 2101 (Stevens, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). Stevens believed that because the *Miranda* warnings were insufficient to ensure Montejo *understood* the right he was giving up, "the record in this case provide[d] no basis for concluding that Montejo validly waived his right to counsel, even in the absence of *Jackson*'s enhanced protections." *Id.*

190. MASS. CONST. pt. 1, art. XII.

191. *See id.*

vise a defendant of his constitutional right to have an attorney available to him "at public expense if necessary."[192]

For a defendant to effectuate a waiver of the right to counsel at an arraignment or similar proceeding, "the waiver must 'be voluntary' and must involve 'an informed and intentional relinquishment of a known right.'"[193] When a defendant elects to proceed *pro se*, the judge must ensure that the defendant has "a sense of the magnitude of the undertaking and the disadvantages of self-representation."[194] Moreover, a defendant must be fully apprised of "the seriousness of the charge and of the penalties he may be exposed to before deciding to take a chance on his own skill."[195] Inherent in the right of a defendant to proceed *pro se* is the judicial recognition that average defendants are not capable of representing themselves.[196]

1. Post-Arraignment Waiver

The decision to waive one's Article 12 right to counsel in a post-arraignment custodial interrogation context is also a monumental decision. While the defendant is not completely waiving his right to counsel for the remainder of the criminal prosecution, he is waiving counsel at a stage deemed to be "critical."[197] Similar to when a defendant waives his right to counsel at an arraignment and elects to proceed *pro se*, in a custodial interrogation the defendant must waive his right to counsel on an informed and intentional basis, with the knowledge of the right he is giving up.[198]

Waiving the right to counsel at a police-initiated custodial interrogation is a decision that can shape the rest of the criminal proceedings. More importantly, it is a decision that could dictate the outcome of the accused's trial: "[g]iven the realities of modern criminal prosecution, the critical proceedings at which counsel's as-

192. Rules of the Court, 416 Mass. 1301, 1309 (1993) (successor of original rule).

193. Commonwealth v. Means, 907 N.E.2d 646, 656 (Mass. 2009) (quoting Commonwealth v. Torres, 813 N.E.2d 1216, 1276 (2004)).

194. Commonwealth v. Lee, 475 N.E.2d 363, 368 (Mass. 1985) (quoting Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976) (internal quotations omitted)).

195. *Id.*

196. Commonwealth v. Martin, 683 N.E.2d 280, 283 (Mass. 1997) (recognizing "the obvious truth that the average defendant lacks the skill necessary to protect oneself in a criminal proceeding").

197. Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009).

198. Commonwealth v. Anderson, 862 N.E.2d 749, 756 (Mass. 2007) ("'To be valid, [a] waiver must be voluntary, and there must be an informed and intentional relinquishment of a known right.'") (quoting Commonwealth v. Torres, 813 N.E.2d 1261, 1276 (2004)).

sistance is required more and more often *occur outside the courtroom* in pretrial proceedings 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'"[199] In *Montejo*, after the defendant gave the *Miranda* waiver, he wrote a letter of confession that was admitted against him at trial and ultimately led to his conviction and subsequent death sentence.[200]

Due to the consequences that waiving the right to counsel can have, post-arraignment waivers of the right to counsel are scrutinized closely in Massachusetts. In *Commonwealth v. Anderson*, the SJC was faced with a defendant who had been assigned counsel, but had not yet met his counsel when he initiated contact with the police.[201] During the custodial interrogation, Anderson signed a *Miranda* waiver after being apprised of the fact that he had been assigned counsel.[202] Ultimately, the court upheld the waiver, finding it conclusive that the defendant was the one who initiated the contact.[203] In reaching that conclusion the court stated that a post-arraignment waiver of the defendant's Article 12 right to counsel in a custodial interrogation "without the benefit of counsel's presence or advice is particularly suspect."[204] Notably, even when the defendant initiates contact with the police, every reasonable presumption

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199. *Montejo*, 129 S. Ct. at 2099 (Stevens, J., dissenting) (emphasis added) (quoting United States v. Wade, 388 U.S. 218, 224 (1967)). Justice Stevens analogizes the Court's decision in *Wade*, which held a post-indictment lineup was a critical stage of criminal proceedings based on the belief that counsel's presence was imperative, to the post-arraignment custodial interrogations. *Id.* Further, in *Moulton*, the Court recognized that "to deprive a person of counsel during the period prior to trial may be *more damaging* than denial of counsel during the trial itself." Maine v. Moulton, 474 U.S. 159, 170 (1985) (emphasis added).

200. *Montejo*, 129 S. Ct. at 2082.

201. *Anderson*, 862 N.E.2d at 756-57.

202. *Id.* at 757. The police were aware of the fact that the defendant's attorney had requested that they not interview the defendant because the attorney had sent the police a letter that stated: "'no attempt should be made to interrogate Mr. Anderson or to obtain any physical or documentary evidence from him without my knowledge and express approval.'" *Id.* at 754. Further, the SJC stated that the case would have been decided differently under Article 12 if the defendant had not been informed of his counsel's entry into the case or that his counsel requested that he not be interviewed. *Id.* at 757. If that had been the case, "[a] waiver obtained in such circumstances would not be knowing and intelligent within the meaning of art. 12." *Id.*

203. *Id.* at 756-57.

> Anderson initiated contact with [the police] after learning of his indictment; was advised fully of his Miranda rights, including his right to consult with counsel and to have counsel present . . . [i]n these circumstances, the judge's conclusion that Anderson intentionally, knowingly, and voluntarily waived his Fifth and Sixth Amendment rights to counsel . . . was constitutionally sound.

Id.

204. *Id.* at 758.

against waiver is given.[205] Nevertheless, in that case, the *Miranda* waiver was upheld due to the defendant initiating contact with the police.

In factual situations similar to *Montejo* and *Jackson*, where the defendants do not initiate contact with the police and have not yet met their respective attorneys, *Miranda* warnings are grossly inadequate to ensure that defendants are knowledgeable about the Article 12 right they are giving up. In a pre-arraignment custodial interrogation in which the right to counsel has not yet attached,[206] *Miranda* warnings adequately apprise a suspect of the right he is giving up by speaking to the police, that is, the right against self-incrimination. But, in the post-arraignment context, when Article 12 has attached[207] and the accused is represented by counsel, the accused is now a charged defendant, and the *Miranda* warnings which were sufficient pre-arraignment become inadequate to fully inform a defendant of the Article 12 right he is surrendering.

The facts of both *Montejo* and *Jackson* bring to light the inadequacies of *Miranda* warnings in a post-arraignment context. In *Montejo* and *Jackson* neither defendant had the opportunity to meet, let alone speak to, his attorney before the police sought him out for interrogation, knowing the defendant had been appointed counsel.[208] At the time, Montejo, Jackson, and Bladel signed their respective *Miranda* waivers they surely were not fully aware of the seriousness of their charges and the legal ramifications of speaking with the police outside of the presence of each of their attorneys. If waivers are viewed as "particularly suspect"[209] by the SJC even when the defendant initiates contact with the government,[210] they should be wholly invalid when the police initiate contact, especially in cases in which the defendant has not even had the opportunity to receive any legal advice whatsoever.

The most efficient and adequate way to ensure that represented defendants who do not initiate contact with the police are adequately protected is to continue to prohibit police-initiated interrogations of represented defendants. By adhering to this prohi-

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205. *Id.*

206. In a pre-arraignment custodial interrogation, Article 12 has not yet been triggered due to the fact that "judicial proceedings [have not] commenced." *Id.* at 756.

207. In the post-arraignment context the "judicial proceedings" have commenced and therefore the Article 12 right to counsel has attached. *See id.*

208. Montejo v. Louisiana, 129 S. Ct. 2079, 2082 (2009); Michigan v. Jackson, 475 U.S. 625, 627-28 (1986), *overruled by Montejo*, 129 S. Ct. at 2091.

209. *Anderson*, 862 N.E.2d at 758.

210. *See supra* note 205 and accompanying text.

bition, the courts would not have to indulge in the game of deciding when a waiver of the right to counsel is or is not valid in a post-arraignment custodial interrogation. Consequently, all waivers of counsel in such a setting would be automatically invalid and therefore inadmissible in court.

2. Changing *Miranda*

An alternative to a blanket prohibition would be to modify the *Miranda* warnings for post-arraignment waivers. In *Commonwealth v. Anderson*, the police advised Anderson during the interrogation of "his right to consult with counsel and to have counsel present" and the fact that an attorney from the Committee for Public Counsel Services had been appointed to represent him.[211] Finding the warnings to be sufficient, the court went on to place emphasis on the police explicitly telling Anderson of his attorney's entry into the case.[212] *Anderson* is distinguishable from cases such as *Montejo* because Anderson was unaware that he had been assigned an attorney until the time of the interview. However, the more extended warnings from *Anderson* can be used as a starting point to alter the *Miranda* rule.[213]

Anderson warnings would inform defendants that: (1) they have already been appointed counsel; (2) they have the right to consult with their counsel; (3) they have the right to have counsel present before speaking with the police; (4) their counsel is not aware of the current interrogation; and (5) by signing the *Miranda* waiver, they are saying that they want to talk to the police without notifying their attorney.[214] The *Anderson* court believed that such

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211. *Anderson*, 862 N.E.2d at 757.

212. *Id.* Importantly, at the time Anderson's attorney had been assigned to the case, Anderson had not requested counsel and therefore did not know prior to the interview of his attorney's entry. *Id.* at 745.

213. *Id.*

214. The proposed "*Anderson* warnings" are modified to fit cases with facts similar to *Montejo*. Unlike in *Anderson*, the defendant in *Montejo* was aware that an attorney was going to be appointed for him. Montejo v. Louisiana, 129 S. Ct. 2079, 2082 (2009). In *Anderson*, the police were aware that Anderson's attorney did not want Anderson interrogated outside of his presence, and the police advised Anderson of that, but in a factual setting such as *Montejo*, a defendant's attorney is not aware of the interrogation so the police would not need to advise the defendant of the attorney's supposed view of the interrogation. *Anderson*, 862 N.E.2d at 757. However, for the warnings to be effective the police would need to notify defendants like Montejo, that their attorneys are unaware of the interrogation, and the legal ramifications of talking to the police.

a warning would effectively ensure that a defendant was aware of the Article 12 right he was waiving.[215]

IV. When Wishing Fails: The Broad Implications of *Montejo*

The previous section established that the Massachusetts judiciary's broad interpretation of Article 12 was aimed at protecting the attorney-client relationship. Part IV brings to light the broad implications that post-arraignment police-initiated interrogations would have on the citizens of Massachusetts.

In *Commonwealth v. Lavallee*, the SJC stated that "[t]he duty to provide counsel to indigent criminal defendants belongs to the State, and the State is in the best position to enforce that duty."[216] Furthermore, since the State is in the best position to enforce the duty to provide counsel, the State should also be in the best position to oversee that the protections that come with it are upheld. If a rule by the Supreme Court inadequately protects the right to counsel, Massachusetts courts should continue to afford their citizens greater protection under Article 12. This section will examine 1) the impact that following *Montejo*'s lead would have on susceptible defendants and 2) the loophole that *Montejo* has created for the police, arguing that due to both of these factors, the *Montejo* rule inadequately protects a defendant's Article 12 right to counsel.

A. *Susceptible Defendants*

The *Montejo* opinion relies on the assumption that defendants are adequately capable of facing the government on their own: "[a]ny criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with the police on his own."[217] However, that as-

215. *Anderson*, 862 N.E.2d at 757. While changing the *Miranda* warnings is an alternative, it would be impractical and burdensome to create another set of warnings that apply solely to post-arraignment police-initiated interrogations. Continued adherence to the rule prohibiting post-arraignment police-initiated interrogations would take no effort at all, and would continue to provide a bright-line easy-to-apply rule for law enforcement. The magnitude of the decision to waive the assistance of counsel, as well as the repercussions of effectuating such a waiver brings to light the reality that a *Miranda* waiver does not fully apprise a defendant of the Article 12 right he is surrendering, thus requiring the conclusion that Massachusetts should continue to adhere to the rule prohibiting such interrogations.

216. Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 907 (Mass. 2004).

217. *Montejo*, 129 S. Ct. at 2089.

sumption is flawed in two respects. First, it negates the belief that "[t]he simple fact that [the] defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly."[218] Second, it does not take into account that *Miranda* warnings are confusing to not only the average defendant, but also "vulnerable defendants"[219] in the context of post-arraignment custodial interrogations.

The Supreme Court has a long-standing belief that the legal system is complex to even the most educated and sophisticated defendants.[220] If the intelligent and educated defendants are ill equipped to face the legal system on their own, "how much more true is it of the ignorant and illiterate, or those of feeble intellect?"[221] Recently in 2010, the American Psychology-Law Society

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218. Michigan v. Jackson, 475 U.S. 625, 633 n.7 (1986), *overruled by Montejo*, 129 S. Ct. at 2091 (2009) (quoting People v. Bladel, 365 N.W.2d 56, 67 (Mich. 1984)). Additionally, the Court adopted the belief that, "[w]hen an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel." *Id.* (quoting *Bladel*, 365 N.W.2d at 67).

219. Brief for National Association of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Petitioner, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1007119, *3. Reference to "vulnerable defendants" comes from the amici brief filed in support of Petitioner, Montejo:

> The *Jackson* rule ensures that the right to assistance of counsel does not become a meaningless abstraction, easily lost when police confront the defendant outside the presence of counsel. . . . [C]oncerns undergirding the *Jackson* rule are magnified for particularly *vulnerable* defendants, including the mentally and developmentally disabled, juveniles, those lacking education, those with substance addiction, and the indigent. These defendants are especially vulnerable to police suggestion that counsel is unnecessary, many such defendants lack the capacity to appreciate the importance of counsel . . . .

Id. at *2-3 (emphasis added); *see also* Dearborn, *supra* note 57, at 373 (finding that "[t]he great weight of evidence indicates most suspects do not understand their *Miranda* rights and are therefore unable to waive them validly without first speaking to counsel").

220. Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (recognizing that, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . [h]e requires the guiding hand of counsel at *every step* in the proceedings against him") (emphasis added).

221. *Id.*; *see also* Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) (holding that "[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman, may appear intricate, complex and mysterious").

published an Article dealing with police-induced confessions and *Miranda* warnings,[222] finding that

> studies have repeatedly shown that a substantial proportion of adults with mental disabilities, and "average" adolescents below age 16 have impaired understanding of *Miranda* warnings when they are exposed to them. Even adults and youth who understand them sometimes do not grasp their basic implications.[223]

Due to their inability to understand the warnings, vulnerable defendants were found to be more susceptible to waiving their rights.[224]

Given the reality that even average defendants are perplexed by *Miranda* warnings, in the post-arraignment setting when a defendant has already secured a lawyer it is "confusing and counterintuitive" for defendants to be told that they have the right to have an attorney appointed.[225] Not only is it confusing, but coupled with the fact that vulnerable defendants already have an "impaired understanding of *Miranda* warnings"[226] it is imperative that such de-

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222. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3 (2010) (discussing the issue of false confessions *i.e.*, innocent people who had falsely confessed and were then convicted at trial). The Article noted that

> some studies have found that poor comprehension of *Miranda* warnings is itself predictive of a propensity to give false confessions. Sometimes this stems from a desire to comply; at other times it appears to be related to a naïve belief that one's actual innocence will eventually prevail—a belief that is not confined to adolescents or persons with disabilities.

Id. at 19 (citations omitted). Given the correlation between an impaired understanding of *Miranda* warnings and false confessions, what value does a false confession add to the "truth seeking process?" Ensuring that in the post-arraignment context defendants have the benefits of their legal counsel during a police-initiated interrogation would cut down on the likelihood of false confessions attributed to an impaired understanding of *Miranda* warnings. A defendant's counsel would be able to fully explain to a defendant all of the negative consequences that waiving *Miranda* rights could have, and therefore would lead to a better comprehension of *Miranda* warnings.

223. *Id.* at 14-15.

224. *Id.* at 19 (finding that vulnerable defendants "often lack the capacity to weigh the consequences of rights waiver, and are more greatly susceptible to waiving their rights as a matter of mere compliance with authority").

225. *See* Emily Bretz, Note, *Don't Answer the Door:* Montejo v. Louisiana *Relaxes Police Restrictions for Questioning Non-Custodial Defendants*, 109 MICH. L. REV. 221, 244-45 (2010) (arguing that "[t]he fact that, post-*Montejo*, represented defendants have to repeatedly reassert their desire to have an attorney present during interrogation is confusing and counterintuitive, not only for the average defendant, but especially for those who are more vulnerable").

226. Kassin et al., *supra* note 222, at 14-15; *see also* Dearborn, *supra* note 57, at 362-63 (advocating for "the Sixth Amendment right to counsel to attach the moment *Miranda* warnings are required" due to suspects' impaired understanding of *Miranda*).

fendants have an opportunity to consult with their attorney prior to any police-initiated custodial interrogation. Interpreting Article 12 to allow post-arraignment police-initiated interrogations in the absence of a defendant's attorney would inadequately protect represented defendants. Further, it would negate the defendant's choice to proceed with the help of an attorney, a choice that is protected by Article 12 and that is in place to protect a defendant at critical confrontations with the government.[227]

B. *The* Montejo *Loophole: Non-Custodial Interrogations*

By overruling *Jackson*, the *Montejo* Court left the door open for police to interrogate represented defendants, not only in a custodial setting, but also in a non-custodial setting, where a defendant has no *Miranda* protections.[228] Part of the rationale for overruling *Jackson* was the Court's belief that it was superfluous, because *Miranda* and its progeny sufficiently protected a defendant's right to counsel.[229] However, *Miranda*, *Edwards*, and *Minnick*: "appl[y] only in the context of custodial interrogation"[230] making the *Jack-*

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227. Commonwealth v. Anderson, 862 N.E.2d 749, 755-56 (Mass. 2007) (recognizing that "art. 12 confer[s] the right to the assistance and advice of counsel in order to protect the unaided layman at critical confrontations with the government after being charged with a specific crime").

228. *See* Todd C. Berg, *U.S. Supreme Court Expands Police, 'Interrogation' Power, Overruling 23-Year-Old Decision*, MICH. LAWYERS WEEKLY, June 1, 2009 ("*Montejo's* biggest impact will be felt by those defendants who aren't in jail . . . . Because the 'protections of *Miranda* and *Edwards* expire when a defendant is released from custody,' . . . Jackson used to pick up the slack by deterring the police from trying to interrogate defendants. Now, under *Montejo* . . . those same defendants are 'fair game.'").

229. Montejo v. Louisiana, 129 S. Ct. 2079, 2089-90 (2009).

230. *Id.* The Court in *Montejo* found it irrelevant that *Miranda* and its progeny were, "designed to protect Fifth Amendment, not Sixth Amendment, rights" because "[w]hat matters is that these cases, like *Jackson*, protect the right to have counsel during *custodial interrogation*." *Id.* at 2090 (emphasis added). However, if a defendant is not in custody, then *Miranda* does not apply:

> *Montejo* also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups).

Id.; *see also* Richard W. Bishop, *Constitutional Defenses—Confessions*, 17B MASS. PRAC., PRIMA FACIE CASE § 53.136 (5th ed., 2010) ("Miranda warnings are required only when interrogation is custodial in nature. A person in custody is not entitled to Miranda warnings unless he is subjected to interrogation or its functional equivalent."); Bretz, *supra* note 225 at 237 (discussing that "[b]ecause *Miranda* referred specifically to custodial interrogations, only defendants *in police custody* are entitled to its protections, and to the related rights guaranteed by *Edwards v. Arizona*").

son rule in a non-custodial interrogation not only necessary, but imperative to preserve a defendant's Article 12 right to counsel.

The phrase "custodial interrogation" refers to "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'"[231] In *Commonwealth v. Bryant*, the SJC found that a confession obtained by the police that "took place during a friendly chat in the defendant's home" was non-custodial in nature,[232] and consequently, the *Miranda* requirement was not triggered.[233] Notably, at the time the non-custodial interrogation took place the defendant's Article 12 right to counsel had not attached. If it had, the *Jackson* rule would have prohibited the police from interrogating the defendant, regardless of whether it was a non-custodial interrogation.

If Massachusetts were to follow *Montejo*, no constitutional safeguards would protect represented defendants in a non-custodial interrogation from the police coming to their door and interrogating them. The *Montejo* Court was of the belief that these types of non-custodial interrogations "are the *least* likely to pose a risk of coerced waivers."[234] However, recent studies have found "that

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231. Commonwealth v. Bryant, 459 N.E.2d 792, 797 (Mass. 1984) (recognizing that "police are not required to give [*Miranda*] warnings every time they interview a witness, but only when the witness is in 'custody'"). In determining whether "the interrogation has taken place in custodial circumstances" the SJC has stated,

> [t]he difficulties inherent in determining whether a given confrontation between suspect and police is appropriately characterized as custodial derive from the necessity of answering what is essentially a subjective inquiry-whether, from the point of view of the person being questioned, the interrogation took place in a coercive environment-by reference to objective indicia.

Id.

232. *Id.* at 798.

233. *Id.* The SJC spelled out four factors that are taken into account in determining whether an interrogation is custodial in nature:

> (1) the place of the interrogation; (2) whether the investigation has begun to focus on the suspect, including whether there is probable cause to arrest the suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the suspect; and (4) whether, at the time the incriminating statement was made, the suspect was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with the defendant's arrest.

Id. Applying those factors to the case the court found that: the interrogation took place in the defendant's home, "the interview itself was informal, and the questioning unaggressive" therefore leading the court to conclude that the interrogation was non-custodial in nature. *Id.*

234. *Montejo*, 129 S.Ct at 2090. To that point, the Court went on to qualify their belief, "[w]hen a defendant is not in custody, he is in control, and need only shut his

since *Miranda*, police have intentionally focused their efforts on securing inculpatory statements from defendants in non-custodial interrogations."[235] Adherence to *Montejo* would promote police conduct aimed at targeting represented defendants in a non-custodial setting, in hopes of obtaining a confession.

Moreover, continued adherence to *Jackson* provides an easy-to-apply bright-line rule. The SJC has recognized that "difficulties [are] inherent" in deciding whether an interrogation was custodial or non-custodial.[236] Adherence to *Jackson* would eliminate those difficulties by prohibiting police-initiated interrogations of represented defendants regardless of whether the interrogation was custodial or non-custodial in nature. Even the majority in *Montejo* conceded that "[a] bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial."[237]

C. *Right to Initiate Contact*

While this Note argues that Massachusetts should prohibit police-initiated interrogations of represented defendants, it does not foreclose the right of the defendant to initiate contact with the police. If a defendant contacts the police without notifying his counsel, he does so at his own risk. In *Commonwealth v. Anderson*, following the *Jackson* rule, the SJC noted that "'nothing . . . prevents a suspect charged with a crime and represented by counsel [from] . . . speak[ing] with police in the absence of an attorney.'"[238]

When the defendant initiated contact with the police he had the opportunity to consult with his counsel before doing so,[239] and therefore the concerns that are present when the police initiate contact are not as apparent. However, even though a defendant can initiate contact with the police, it is important to recognize that any waiver of counsel in that defendant-initiated interrogation is still

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door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the 'inherently compelling pressures,' that one might reasonably fear could lead to involuntary waivers." *Id.* (citations omitted).

235. Bretz, *supra* note 225, at 238.

236. *Bryant*, 459 N.E.2d at 797.

237. *Montejo*, 129 S. Ct. at 2089.

238. Commonwealth v. Anderson, 862 N.E.2d 749, 756 (Mass. 2007) (quoting Michigan v. Harvey, 494 U.S. 344, 352 (1990)).

239. *Id.* at 754-55.

"particularly suspect."[240] Implicit in this recognition is that regardless of whether the defendant initiates contact with the police, once the Article 12 right to counsel has attached and has been invoked by the defendant, the defendant is unlikely to waive that right knowingly.

CONCLUSION

The SJC has recognized, time and again, that the Massachusetts Declaration of Rights can afford its citizens greater protection than the Bill of Rights to the United States Constitution.[241] The history of the right to counsel in Massachusetts demonstrates the Commonwealth's longstanding record of being proactive in both affording indigent criminal defendants the right to counsel before the United States Supreme Court and expanding the right to counsel when the Supreme Court has limited it.

When faced with following the United States Supreme Court's holding in *Montejo*, a decision which this Note argues would degrade the right to counsel, Massachusetts courts should continue the prohibition that is in place which forbids police-initiated interrogations of represented defendants. Any other result would be inconsistent with the steps the SJC has taken to safeguard the attorney-client relationship and the right of a defendant to rely on the assistance of counsel at all "critical stages."[242] Certainly society does have a valid interest in convicting and punishing criminals, but that right is not absolute nor should it be allowed to trump the constitutional right to counsel afforded by Article 12.

Adherence to pre-*Montejo* law would continue to provide a bright-line, workable rule. The SJC has said that the purpose of an exclusionary rule is to: "compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it."[243] By continuing the prohibition on police-initiated interrogations of represented defendants and deeming any waivers of the right to counsel at those interrogations invalid, Massachusetts

240. *Id.* at 758 (discussing that, "[a]mong the important circumstances to be considered, of course, are whether the waiver was obtained in a custodial setting and whether it was obtained either in the absence of counsel's presence or in the absence of the defendant's having had the opportunity to consult with counsel").

241. *E.g.*, Commonwealth v. Hodge, 434 N.E.2d 1246, 1249 (Mass. 1982).

242. Lavalle v. Justices in Hampden Superior Court, 812 N.E.2d 895, 903 (Mass. 2004) (stating that "[t]he right to counsel extends to every 'critical stage' of the criminal process"); *see also supra* note 227 and accompanying text.

243. Commonwealth v. Lora, 886 N.E.2d 688, 698 (Mass. 2008) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

would ensure that the protections afforded by Article 12 do not become mere abstractions.

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