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**FULFILLING THE PROMISE OF *GIDEON* IN  
MASSACHUSETTS: PROVIDING A POST-CONVICTION  
RIGHT TO COUNSEL FOR PRISONERS ASSERTING  
INNOCENCE**

SAMUEL D. JOCKEL\*

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I. INTRODUCTION

The celebrated 1963 Supreme Court decision, *Gideon v. Wainwright*, established that the Sixth Amendment’s guarantee of counsel is a fundamental right, essential to a fair trial for indigent defendants in state courts.<sup>1</sup> *Gideon* was part of the Warren Court’s revolution in criminal procedure, which extended an unprecedented array of rights to state and federal criminal defendants.<sup>2</sup> Justice Hugo Black’s opin-

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

<sup>2</sup> See *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968) (holding that the frisk of a suspect detained

ion for the court declared that, "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. This seems to us to be an obvious truth."<sup>3</sup>

Within a year of the *Gideon* decision, Boston College Law School students Brian J. Moran and Lewis Rosenberg published an article in the *Massachusetts Law Quarterly* analyzing how Massachusetts could implement *Gideon*'s newly announced requirements of assignment of counsel.<sup>4</sup> In *The Indigent Defendant in Massachusetts and Gideon v. Wainwright*, Moran and Rosenberg noted that *Gideon* left open two questions: first, the time in the proceedings when counsel must be appointed and; second, which criminal charges trigger the right.<sup>5</sup> Believing that fairness in the administration of justice demanded that the accused be afforded the means of presenting his best defense, the authors advocated for automatic appointment of counsel for a certain category of serious offenses (felonies and serious misdemeanors, punishable by a minimum of one year of incarceration) in the District and Superior trial courts.<sup>6</sup> They urged that the Supreme Judicial Court of Massachusetts ("SJC") could accomplish this result via its own rulemaking authority.<sup>7</sup>

Moran and Rosenberg chose a worthy state as the focus for their proposals, a state with deep historical ties in protecting the right to counsel for the accused. Beginning in 1641, Article 26 of the Massachusetts settlement code (*Body of Liberties*) authorized unpaid attorneys to provide counsel<sup>8</sup> to "every man that findeth himself unfit to plead his own cause in any Court."<sup>9</sup> Over a century later, John Adams appeared in the Superior Court of Judicature (predecessor to the SJC), and de-

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for investigation is a Fourth Amendment "search" that, absent probable cause, can only be justified in the limited context of attempting to discover weapons); *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that law enforcements use of electronic surveillance of private communications without probable cause, even in the absence of a physical trespass, violates the Fourth Amendment); *Miranda v. Arizona*, 384 U.S. 436, 472 (1966) (holding that the Fifth Amendment requires that all suspects are "clearly informed of their rights" preceding any custodial interrogation); *Massiah v. United States*, 377 U.S. 201, 205 (1964) (holding that the Sixth Amendment precludes the use of incriminating statements deliberately elicited by law enforcement agents after a defendant's indictment in the absence of counsel); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the Fourth Amendment exclusionary rule to the States).

<sup>3</sup> *Gideon*, 372 U.S. at 344.

<sup>4</sup> Brian J. Moran & Lewis Rosenberg, *The Indigent Defendant in Massachusetts and Gideon v. Wainwright*, 48 MASS. L. Q. 417, 417 (1963).

<sup>5</sup> *Id.* at 425.

<sup>6</sup> *Id.* at 431.

<sup>7</sup> *Id.* at 432 (recommending an amendment to then Supreme Judicial Court Rule 10 that would extent the rule to "allow for the appointment of counsel in certain misdemeanor cases where the punishment involved is a minimum of one year of incarceration.").

<sup>8</sup> EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620-1692, 95 (1993).

<sup>9</sup> THOMAS LECHFORD WITH J. HAMMOND TUMBULL, PLAIN DEALING OR NEWS FROM NEW ENGLAND, 68 (George Brinley ed., 1867).

fended British soldiers against criminal charges arising out of their involvement in what is commonly known as the Boston Massacre.<sup>10</sup> Adams chose to defend the soldiers in the interest of ensuring a fair and even-handed trial.<sup>11</sup> On June 15, 1780, the right to counsel in the state was constitutionalized by the ratification of the Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts,<sup>12</sup> a precursor to the rights established in the U.S. Constitution's Bill of Rights. By the early nineteenth century, even before the practice was required by the state legislature, the SJC was assigning counsel for indigent defendants charged with murder.<sup>13</sup>

The SJC's jurisprudence under Article XII of the Massachusetts Declaration of Rights has since reflected the state's longstanding history of protecting the rights of the accused.<sup>14</sup> Following the Warren Court era, where the Supreme Court retreated from decisions protecting indigent defendants, the SJC emerged as a leader in the new federalism by setting an example for other states for how they could protect their citizens' rights, independent of the Supreme Court.<sup>15</sup> By 1986, the SJC Standing Advisory Committee on Rules of Criminal Procedure adopted the proposals set out in the 1963 article by Moran and Rosenberg. Specifically, Massachusetts Rule of Criminal Procedure 8 provides assignment of counsel for those sentenced to imprisonment or committed to the custody of the Department of Youth Services.<sup>16</sup>

While the SJC has done well to comply with *Gideon's* promise at trial and on direct appeal<sup>17</sup>, Massachusetts' highest court has failed to guarantee indigent prisoners the right to counsel in post-conviction proceedings.<sup>18</sup> Post-conviction proceedings provide convicted persons the right to petition the trial court, and challenge the legality of their judgment or sentence. In the federal system, this is a statutory right referred to in the Constitution and federal code as a writ of *habeas corpus*.<sup>19</sup> In Massachusetts, the SJC promulgated Massachusetts Rules of Criminal Procedure Rule 30, which give convicted persons the right to file a motion for a new trial.<sup>20</sup> The Massachusetts legislature has since enacted a law allowing convicted persons

<sup>10</sup> Morris L. Ernst & Alan U. Schwartz, *The Right to Counsel and the "Unpopular Cause"*, 20 U. PITT. L. REV. 727, 728 (1959).

<sup>11</sup> See *id.*

<sup>12</sup> See MASS. CONST. pt. 1, art. XII.

<sup>13</sup> See 7 Nathan Dane, A *GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS*, 210-18 (1824) (citing several murder cases as early as 1790 in which the SJC appointed counsel to a capital defendant).

<sup>14</sup> See *infra* Part III.B.

<sup>15</sup> See *infra* Part III.B.

<sup>16</sup> MASS. R. CRIM. P. 8.

<sup>17</sup> See *Commonwealth v. Frank*, 680 N.E.2d 67, 69 (Mass. 1997) (finding a right to the assistance of counsel in an appeal).

<sup>18</sup> See *Murray v. Giarratano*, 492 U.S. 1, 7 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987); *Commonwealth v. Conceicao*, 446 N.E.2d 383, 385 (Mass. 1983).

<sup>19</sup> U.S. CONST. art. I § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Congress has further defined this as a federal statutory right in 28 U.S.C. § 2254 (2016).

<sup>20</sup> MASS. R. CRIM. P. 30.

the right to request access to DNA evidence as well as a statute compensating people whose convictions are vacated or reversed due to their innocence.<sup>21</sup>

Although both Massachusetts and federal law provide indigent defendants the right to petition for post-conviction relief, the SJC has parroted reasoning used by the Supreme Court to deny indigents the absolute right to appointed counsel in these proceedings. In the 1983 *Commonwealth v. Conceicao* decision, the SJC adopted the reasoning used by the Supreme Court in *Ross v. Moffitt*<sup>22</sup> to hold that Article XII of the Massachusetts Declaration of Rights does not guarantee an indigent prisoner an absolute right to appointed counsel in preparing or presenting his motion for a new trial.<sup>23</sup> While *Ross* didn't address the question as to what discretion courts have if they accept a limited right to counsel, the SJC placed the decision on the trial judge to determine whether to appoint counsel on a motion for a new trial.<sup>24</sup> Remarkably, in its decision, the SJC failed to consider whether the text of the Massachusetts Declaration of Rights, or its own precedent interpreting it, may require a different result.<sup>25</sup>

Thirty years after *Conceicao* and at the 50th anniversary of *Gideon*, the U.S. criminal justice system is undergoing another revolution: the Innocence Movement. Since the mid-1990s, post-conviction DNA testing and other advances in forensic science have exposed a large number of convictions of factually innocent people.<sup>26</sup> Over the past several decades, legal advocates and scholars, journalists, psychologists, scientists, activists, and prisoners' families have worked to free innocent prisoners by exposing and correcting wrongful convictions.<sup>27</sup> States legislatures and courts have begun to play a vital role in this movement, providing post-conviction relief in their courts for those claiming actual innocence.<sup>28</sup>

By failing to guarantee post-conviction counsel to indigent prisoners, *Conceicao* stands as an impediment to the Innocence Movement in Massachusetts. It is also a

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<sup>21</sup> MASS. GEN. LAWS ANN. ch. 278A, § 2 (West 2016); MASS. GEN. LAWS ANN. ch. 258D, § 1-9 (West 2016).

<sup>22</sup> 417 U.S. 600 (1974).

<sup>23</sup> *Conceicao*, 446 N.E.2d at 386 (1983).

<sup>24</sup> *Id.* at 387-88.

<sup>25</sup> *Id.* at 387 ("After reviewing both United States Supreme Court precedent and decisions of other courts, we conclude that an indigent defendant does not have an absolute right under any provision of the United States Constitution or the Massachusetts Declaration of Rights to appointed counsel in preparing or presenting his motion for a new trial.").

<sup>26</sup> As of May 2017, there have been 349 post-conviction DNA exonerations in United States history. See *The Cases*, INNOCENCE PROJECT (last visited May. 9, 2017), <https://www.innocenceproject.org/all-cases/#exonerated-by-dna>.

<sup>27</sup> See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L.REV. 1465, 1468 (2011).

<sup>28</sup> Today, every state allows for an imprisoned person to apply for an order to obtain post-conviction DNA evidence, more than half of states have laws that require the preservation of evidence in particular cases, and thirty states, the District of Columbia, and the federal government provide some form of compensation for the wrongfully convicted. See *Policy Reform*, INNOCENCE PROJECT (last visited Sept. 17, 2016), <http://www.innocenceproject.org/policy>

barrier to fulfilling *Gideon*'s promise of ensuring that the accused in state courts are given the means of presenting their best defense. Now, over fifty years since *Gideon* was decided, is an appropriate occasion to reconsider *Conceicao* and to recognize a right to counsel for persons asserting actual innocence in post-conviction proceedings.

Part II of this Article begins by establishing that the SJC's decision in *Conceicao* relied on Supreme Court decisions interpreting the federal Constitution. Part III argues the SJC's reliance on federal precedent was a break from its tradition of interpreting the Massachusetts Declaration of Rights to provide greater safeguards than in the federal Constitution. Part IV argues that the plain language of Article XII, unlike the text of the Sixth Amendment, is not limited to trial proceedings and should be interpreted to apply to post-conviction claims of innocence. Part V argues that denying prisoners a right to counsel will make their statutory rights meaningless since counsel is needed to navigate any statutory remedy, and Part VI urges the SJC to read *Conceicao* narrowly and interpret Article XII to guarantee an absolute state constitutional right to counsel for prisoners asserting actual innocence in post-conviction proceedings.

## II. FOLLOWING THE FEDS: HOW *CONCEICAO* DENIED THE RIGHT TO COUNSEL IN POST-CONVICTION PROCEEDINGS

The SJC's 1983 decision in *Commonwealth v. Conceicao* held that a convicted person is not guaranteed a right to counsel in state post-conviction proceedings.<sup>29</sup> Paul Conceicao was convicted of unarmed robbery and sentenced to 7-15 years in prison.<sup>30</sup> After his conviction was upheld on appeal, Conceicao filed a motion for a new trial pro se, under Massachusetts Rule of Criminal Procedure 30, and moved for appointment of counsel on grounds of his indigency.<sup>31</sup> In his motion, Conceicao challenged the trial judge's jury instructions and claimed ineffective assistance of counsel.<sup>32</sup> The trial judge denied the motion for a new trial without a hearing and declined to take any action on Conceicao's motion for appointment of counsel.<sup>33</sup> On appeal to the SJC, Conceicao argued, in part, that under both the U.S. Constitution and the Massachusetts Declaration of Rights he was entitled to appointed counsel before presenting his motion for a new trial<sup>34</sup>

Chief Justice Hennessey's opinion for the SJC relied heavily on "analogous cases" decided by the Supreme Court and the decisions of other state courts that denied the absolute right to counsel in post-conviction proceedings.<sup>35</sup> The SJC cited

<sup>29</sup> *Conceicao*, 446 N.E.2d at 387.

<sup>30</sup> *Id.* at 384.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 385.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 387 (citing *Ross v. Moffitt*, 417 U.S. 600, 618 (1974); *Graham v. State*, 372 So. 2d 1363, 1365-66 (Fla. 1979); *Honore v. Washington State Bd. of Prison Terms*, 466 P.2d 485, 496 (Wash. 1970)).

the portions of *Ross* declaring that neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment requires any state to provide an indigent defendant appointed counsel on a discretionary appeal to a state supreme court.<sup>36</sup> The SJC quoted *Ross* and stated that although an indigent defendant may be benefited by an appointment of counsel on a discretionary appeal,

The duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.<sup>37</sup>

Just as the Supreme Court found that that opportunity was provided to the defendant in *Ross*, the SJC found that it was also provided to Conceicao.<sup>38</sup> The SJC cited reasoning used in other state court decisions to find that, "a motion for a new trial is consistently placed in a different category than the original trial or an appeal from a conviction."<sup>39</sup> The SJC ultimately held that "an indigent defendant does not have an absolute right under any provision of the United States Constitution or the Massachusetts Declaration of Rights to appointed counsel in preparing or presenting his motion for a new trial."<sup>40</sup>

While the SJC parroted the Supreme Court's (and other state courts') interpretation of the federal Constitution, it failed to consider whether the Massachusetts Declaration of Rights, or its own precedent interpreting it, required a different result. More importantly, since Conceicao did not assert innocence, the SJC did not consider whether Article XII requires a different result in post-conviction proceedings based on actual innocence.

### III. FEDERALISM: THE SJC'S EXPANSIVE INTERPRETATION OF THE MASSACHUSETTS DECLARATION OF RIGHTS

As a basic principle of federalism, "[t]he federal Bill of Rights did not supersede those of the states."<sup>41</sup> Drafters of the Bill of Rights drew upon corresponding provisions in various state constitutions, constitutions that granted their own protections of individual rights.<sup>42</sup> The Massachusetts Declaration of Rights was ratified in 1780, predating the Bill of Rights by eleven years, and it was subsequently used as a model for that federal counterpart: "the state constitutions—particularly that of Massachusetts—were the greatest single influence on the Federal Constitu-

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<sup>36</sup> *Id.* at 386.

<sup>37</sup> *Id.* at 386 (quoting *Ross v. Moffit*, 417 U.S. 600, 616 (1974)).

<sup>38</sup> *Id.* at 388.

<sup>39</sup> *Id.* at 387 (quoting *United States v. Banks*, 369 F.Supp. 951, 954 (M.D.Pa. 1974)). This reasoning was also used by the Supreme Court to deny the right to counsel in post-conviction proceedings. See *infra* Part V.A.

<sup>40</sup> *Conceicao*, 446 N.E.2d at 387.

<sup>41</sup> Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

<sup>42</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

tion. . . .”<sup>43</sup> John Adams, a framer of both the Massachusetts Constitution and the U.S. Constitution, once said, “I made a Constitution for Massachusetts, which finally made the Constitution of the United States.”<sup>44</sup>

Given this history and the sovereignty of the Massachusetts Declaration of Rights, the SJC’s obligation has been “to make an independent determination of rights, liberties, and obligations [for the citizens of Massachusetts].”<sup>45</sup> The SJC has fulfilled that obligation by interpreting the language of its own constitution in many cases to, “[p]rovide greater safeguards than the Bill of Rights of the United States Constitution.”<sup>46</sup> As former SJC Chief Justice Herbert P. Wilkins commented, “[w]e need not move lock-step with Washington on every point. I think of the Supreme Court as describing a common base from which we can go up... We are... entitled to our own views, indeed constitutionally required to have them.”<sup>47</sup>

Specific to the argument advanced by this Article, the Supreme Court has given states the discretion to provide their own rights and protections for post-conviction proceedings.<sup>48</sup> In light of the Supreme Court’s encouragement of state action on the right to post-conviction counsel, this section argues that in *Conceicao* the SJC was unfaithful to its history of independent interpretation of the Massachusetts Declaration of Rights. This section will analyze the history of the SJC’s interpretation of Article XII, which has provided greater protections to defendants than those afforded by the Supreme Court.

#### A. Supreme Court’s Deference

The Sixth Amendment to the U.S. Constitution provides the accused with “Assistance of Counsel for his defense” in all criminal prosecutions.<sup>49</sup> Embodying the judicial power associated with the Warren Court, *Gideon v. Wainwright* extended this constitutional mandate to state courts for indigent defendants in all criminal prosecutions.<sup>50</sup> The *Gideon* decision rested on notions of basic fairness and equality:

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<sup>43</sup> ELISHA P. DOUGLASS, *REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION* 32 (1955).

<sup>44</sup> RONALD M. PETERS, JR., *THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT* 14 (1978) (quoting Letter from John Adams to Mercy Warren (July 28, 1807), in *THE ADAMS-WARREN LETTERS*, Collections of the Massachusetts Historical Society 73 (1925)).

<sup>45</sup> Charles G. Douglas, *State Judicial Activism — The New Role for State Bills of Rights*, 12 *SUFFOLK U. L. REV.* 1123, 1145 (1978) (quoting in part from *Project Report: Toward an Activist Role for State Bills of Rights*, 8 *HARV. C.R.-C.L. L. REV.* 271, 275 (1973)).

<sup>46</sup> *Commonwealth v. Hodge*, 434 N.E.2d 1246, 1249 (Mass. 1982).

<sup>47</sup> Herbert P. Wilkins, Remarks of Chief Justice Herbert P. Wilkins to Students at New England School of Law (March 27, 1997), in 31 *NEW ENG. L. REV.* 1205, 1213 (1997).

<sup>48</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) (“States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post conviction review.”).

<sup>49</sup> U.S. CONST. amend. VI.

<sup>50</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>51</sup>

In *Douglas v. California*, the Supreme Court further increased *Gideon's* reach, extending the guarantee of counsel to state appeals of right through the Fourteenth Amendment.<sup>52</sup> Importantly, the Court reasoned that a fundamental inequality existed when counsel was denied. The "rich man. . . enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, where the indigent. . . is forced to shift for himself. The indigent. . . has only the right to a meaningless ritual, while the rich man has a meaningful appeal."<sup>53</sup>

Unlike the guarantees of counsel at the trial and direct appellate levels, the Supreme Court has not mandated counsel for those petitioning in "discretionary" state proceedings in *Murray v. Giarratano*, *Pennsylvania v. Finley*.<sup>54</sup> The Court in *Ross* characterized post-conviction motions, where the petitioner seeks to press his claims after a loss of appeal, as "discretionary" in nature and thus not deserving of constitutionally guaranteed counsel.<sup>55</sup> In holding that the federal Constitution does not require appointment of post-conviction counsel, the Supreme Court in *Ross* stated that states are in a better position to decide what (if any) access to post-conviction counsel they are willing to provide.<sup>56</sup> The Court clarified, "[w]e do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review."<sup>57</sup> The Court in *Finley* also carved out a role for individual states, declaring that states have a great deal of discretion to both develop and implement programs to aid prisoners that wish to secure post-conviction review.<sup>58</sup>

### B. History of SJC Interpretation of Article XII of the Declaration of Rights

With its storied history of independent interpretation, the SJC was a good candidate to go beyond the Supreme Court's rulings in *Ross*, *Finley*, and *Murray* to provide access to counsel in post-conviction proceedings for indigent Massachusetts prisoners. In 1957, six years prior to the *Gideon* decision, the SJC recognized a right to counsel for a man deemed to have an intellectual inferiority.<sup>59</sup> In *Pugliese*

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<sup>51</sup> *Id.* at 344.

<sup>52</sup> *Douglas v. People of State of Cal.*, 372 U.S. 353, 357-58 (1963).

<sup>53</sup> *Id.* at 357-58.

<sup>54</sup> See *Murray v. Giarratano*, 492 U.S. 1, 9 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1990).

<sup>55</sup> See *Murray*, 492 U.S. at 8; *Finley*, 481 U.S. at 555.

<sup>56</sup> *Ross v. Moffitt*, 417 U.S. 600, 618-19 (1974).

<sup>57</sup> *Id.* at 618.

<sup>58</sup> *Finley*, 481 U.S. at 559.

<sup>59</sup> See *Pugliese v. Commonwealth*, 140 N.E.2d 476 (1957).

*v. Commonwealth*, an indigent defendant suffering from mental incapacity, was convicted of a non-capital felony offense without the aid of an attorney.<sup>60</sup> Pugliese challenged his conviction under Article XII of the Declaration of Rights and under the Fourteenth Amendment to the U.S. Constitution.<sup>61</sup> Reversing the conviction, the SJC incorporated the protections under the Due Process clause of the Fourteenth Amendment, “[t]he Declaration of Rights that the Constitution of the Commonwealth contains safeguards ‘at least as strong as those of the Fourteenth Amendment to the United States Constitution.’”<sup>62</sup> The SJC cited a previous decision in *Allen v. Commonwealth*, where it considered the Fourteenth Amendment:

That law, as we understand it, requires assignment of counsel in noncapital cases only when the defendant, by reason of youth, inexperience, or incapacity of some kind, or by reason of some unfair conduct by the public authorities, or of complication of issues, or of some special prejudice or disadvantage, stands in need of counsel in order to secure the fundamentals of a fair trial.<sup>63</sup>

The SJC found that the right to a fair trial was violated under Article XII, as Pugliese was found to have an “incapacity of some kind.”<sup>64</sup> The *Pugliese* holding became the first occasion in which the SJC reversed a conviction in a trial court for failure to furnish counsel in a non-capital case.<sup>65</sup>

That same year, the SJC decided *Brown v. Commonwealth*, extending its interpretation of Article XII to grant a right to counsel to protect against prejudicial judicial misconduct.<sup>66</sup> *Brown* was convicted of armed robbery and assault and battery with a dangerous weapon, without the aid of counsel.<sup>67</sup> During the trial, the judge engaged in several instances of misconduct, including criticizing a jurymen for inquiring whether the defendant had an opportunity to secure counsel, and charging the jury ambiguously on the question of the defendant’s failure to take a stand.<sup>68</sup> The Court in *Brown* adopted *Pugliese*’s statement of the applicable rule under Article XII:

There is a requirement of ‘assignment of counsel in noncapital cases only when the defendant, by reason of youth, inexperience or incapacity of some kind, or by reason of some unfair conduct by the public authorities, or of complication of issues, or of some special prejudice or disadvantage, stands in need of counsel in order to secure the fundamentals of a fair trial.’<sup>69</sup>

Adopting this holding, the SJC found that the judge’s conduct was prejudicial, and “that the petitioner, whether guilty or not, was handicapped by a series of oc-

<sup>60</sup> *Id.* at 477-78.

<sup>61</sup> *Id.* at 477.

<sup>62</sup> *Id.* at 479 (quoting *Pizer v. Hunt*, 148 N.E. 801, 804 (1925)).

<sup>63</sup> *Id.* at 479.

<sup>64</sup> *Id.*

<sup>65</sup> See *Moran & Rosenberg*, *supra* note 4, at 423.

<sup>66</sup> *Brown v. Commonwealth*, 140 N.E.2d 461, 465 (Mass. 1957).

<sup>67</sup> *Id.* at 462.

<sup>68</sup> See *id.* at 464-65.

<sup>69</sup> *Id.* at 463.

currences which hardly could have come to pass had he been represented by counsel.”<sup>70</sup>

In 1958, five years before *Gideon*, the SJC codified the law set forth in *Brown* and *Pugliese* in Rule 10 of the General Rules, requiring appointment of counsel in all noncapital felony cases.<sup>71</sup> In 1964, the SJC expanded this rule to include indigent defendants charged with any crime punishable by imprisonment, including misdemeanors.<sup>72</sup> Eight years later, the Supreme Court followed suit in *Argersinger v. Hamlin*, holding that indigent criminal defendants cannot be imprisoned unless provided with counsel.<sup>73</sup>

In several instances, the SJC has also been more protective of defendants in its interpretation of Article XII than the Supreme Court when interpreting similar provisions in the Constitution. For example, while the Supreme Court has read the Sixth Amendment to require defendants alleging ineffective assistance of counsel based on counsel’s conflict of interest to prove the conflict adversely affected counsel’s performance,<sup>74</sup> in *Commonwealth v. Hodge* the SJC held that under Article XII, a defendant making an ineffective assistance of counsel claim based on a conflict of interest had *only* to show the existence of a conflict.<sup>75</sup> The SJC reasoned that Article XII independently guarantees the right to effective assistance of counsel and, “such a fundamental right should not depend upon a defendant’s ability to meet such an impossible burden.”<sup>76</sup>

In *Commonwealth v. Mavredakis*, the SJC held that the self-incrimination provision of Article XII provides a broader protection against self-incrimination than the Fifth Amendment.<sup>77</sup> The SJC diverged from the Supreme Court’s holding in *Moran v. Burbine*, which found that the Fifth and Sixth Amendments do not require police officers to inform a suspect of an attorney’s efforts to render legal services prior to formal arraignment when the suspect had not personally requested such representation.<sup>78</sup> In contrast, in *Mavredakis*, the SJC believed the “abstract right to

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<sup>70</sup> *Id.* at 465.

<sup>71</sup> Raquel E. Babeu, Note, *Right to Counsel/Criminal Law – Wishing for Rights: Interpreting the Article 12 Right to Counsel in Massachusetts in the Aftermath of Montejo v. Louisiana*, 34 W. NEW ENG. L. REV. 163, 170 n.49 (2012) (“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...”).

<sup>72</sup> *Id.* at 171 n.52 (citing *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1227 (Mass. 1997)) (the amended text 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.”).

<sup>73</sup> 407 U.S. 25, 37 (1972) (holding that absent a knowing and intelligent waiver, “no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”).

<sup>74</sup> *Cuyler v. Sullivan*, 446 U.S. 333, 348 (1980).

<sup>75</sup> *Commonwealth v. Hodges*, 434 N.E.2d 1246, 1249 (Mass. 1982).

<sup>76</sup> *Id.* at 1249.

<sup>77</sup> 725 N.E.2d 169, 178-79 (Mass. 2000).

<sup>78</sup> See *Moran v. Burbine*, 475 U.S. 412, 468 (1986).

speak with an attorney mentioned in the Miranda warnings” would give officers an incentive to interfere with the attorney-client relationship.<sup>79</sup> The court reasoned that Article XII “requires a higher standard of protection” than that provided for in the *Moran* decision, holding that Mavredakis’ statements made during a custodial interrogation must be suppressed because he had not been informed that counsel had been retained on his behalf.<sup>80</sup>

In 2004, the Supreme Court in *United States v. Patane* refused to apply the “fruit of the poisonous tree” doctrine to suppress a gun police found as a result of an un-Mirandized interrogation.<sup>81</sup> Justice Thomas’ plurality decision reasoned that, “[t]he Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn.”<sup>82</sup> In contrast, in *Commonwealth v. Martin* the SJC held that, under Article XII, physical evidence derived from an unwarned statement must be excluded at trial.<sup>83</sup> Moreover, the SJC’s expansive interpretation of the Declaration of Rights is further demonstrated when compared to the Supreme Court’s interpretation of the Fourth Amendment, as well as in cases pertaining to civil rights.<sup>84</sup>

<sup>79</sup> *Mavredakis*, 725 N.E.2d at 178-79.

<sup>80</sup> *Id.* at 178, 181.

<sup>81</sup> 542 U.S. 630, 634-35, 642 (2004).

<sup>82</sup> *Id.* at 637.

<sup>83</sup> 827 N.E.2d 198, 200 (Mass. 2005) (“[T]he Supreme Court’s construction of the Miranda rule, which was intended to secure the privilege against compelled incrimination in the context of inherently coercive custodial interrogations, is no longer adequate to safeguard the parallel but broader protections afforded Massachusetts citizens by art. 12 . . .”).

<sup>84</sup> The SJC has interpreted Article XIV of the Massachusetts Constitution to provide greater protections than the Fourth Amendment search and seizure protections. Compare *United States v. White*, 401 U.S. 745, 751 (1971) (holding that a statutorily authorized electronic recording of a conversation in one’s home, only consented to and known by a government informant, is beyond the reach of Fourth Amendment protections as such situations do “not invade the defendant’s constitutionally justifiable expectations of privacy”), with *Commonwealth v. Blood*, 507 N.E.2d 1029, 1033 (Mass. 1987) (interpreting Article XIV to hold that residents of a home have a reasonable expectation of privacy, thus, it is not reasonable to expect that communications in a private home are electronically intercepted and recorded), and *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (promulgating the totality of circumstances probable cause standard for the issuance of a search warrant under the Fourth Amendment), with *Commonwealth v. Upton*, 458 N.E.2d 717, 720-21 (Mass. 1983) (rejecting the totality of circumstances test despite clear guidance from the Supreme Court, and instead relying exclusively on Article XIV to retain the Aguilar-Spinelli two-pronged test).

The SJC has also been at the forefront of protecting individuals with regard to their civil rights. Compare *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 3 (1973) (declining to read a right to adequate education into the U.S. Constitution), with *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 527 (Mass. 1993) (recognizing a state constitutional right to an adequate education). In 2003, the SJC became the first state supreme court to recognize that marriage rights are to be extended to same sex couples, holding that “[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.” *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003). It wasn’t until 2015 when the Supreme Court

What accounts for this individualist streak, this perennial departure from constitutional norms? As stated by former SJC Chief Justice Herbert Wilkins, the reason lies in the attitude that has been traditionally instilled in the Court, rather than the textual differences its Constitution has with the federal document.<sup>85</sup> Ultimately, Wilkins asserts that the underlying force behind this pattern of nonconformity has been the “tradition of independence and leadership in Massachusetts that people identify with and respect . . . .”<sup>86</sup> Through this tradition of bold judging, the SJC has bucked the constitutional trends of the Supreme Court on several fronts, carving out its own criminal procedure protections for the accused in Massachusetts.

#### IV. CONSTITUTIONAL TEXT

Unlike its tradition of independent jurisprudence visible through many other interpretations of the Massachusetts Declaration of Rights, the SJC in *Conceicao* simply adopted Supreme Court reasoning characterizing post-conviction settings as discretionary in nature and thus not deserving of Sixth or Fourteenth Amendment protection.<sup>87</sup> The SJC in *Conceicao* failed to even analyze the text of Article XII,<sup>88</sup> which presents significant differences from that of the Sixth Amendment, and those differences offer a basis for extending right to counsel protections beyond trial situations.<sup>89</sup> As a principle of federalism, the SJC can rely on the constitutional language of Article XII to extend the right to counsel for state indigents in post-conviction proceedings.<sup>90</sup> In the past, the SJC has relied on textual differences between Article XII and the parallel federal constitutional provisions to explain its broader interpretation of the Massachusetts Declaration of Rights.<sup>91</sup>

Section A of this Part first articulates the Court’s position that the Sixth and Fourteenth Amendment protections do not bind states to provide counsel in discretionary post-conviction proceedings. Section B of this Part then argues that given significant textual differences between Article XII and the Sixth Amendment, the SJC does not have to limit the text of Article XII’s right to counsel provision to tri-

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held that the fundamental right to marry is guaranteed to same-sex couples by the Equal Protection and Due Process clauses of the Constitution. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Similarly, additional civil rights, such as a prisoner’s right to vote, have been extended under the Massachusetts Constitution, ahead of the protections given by the Supreme Court. See Herbert Wilkins, Note, *The Massachusetts Constitution-The Last Thirty Years*, 44 SUFFOLK U. L. REV. 331, 346 (2011).

<sup>85</sup> See Wilkins, *supra* note 84, at 356-57.

<sup>86</sup> See *id.* at 357.

<sup>87</sup> See *supra* Part II.

<sup>88</sup> “After reviewing both United States Supreme Court precedent and decisions of other courts, we conclude that an indigent defendant does not have an absolute right under any provision of the United States Constitution or the Massachusetts Declaration of Rights to appointed counsel in preparing or presenting his motion for a new trial.” *Commonwealth v. Conceicao*, 446 N.E.2d 383, 387 (1983).

<sup>89</sup> See *infra* Part IV.B.

<sup>90</sup> See *supra* Part III.B.

<sup>91</sup> See *supra* Part III.B.

al situations and can use Article XII to grant the right to counsel for Massachusetts prisoners in post-conviction proceedings.

A. *Supreme Court: Gideon's Sixth Amendment (and Fourteenth) Protections Aren't Binding on States in "Discretionary" Post-Conviction Proceedings*

The Sixth Amendment to the U.S. Constitution reads in part, "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."<sup>92</sup> *Gideon v. Wainwright* held that the Sixth Amendment assistance of counsel provision is a fundamental right under the Constitution, and made obligatory upon the states by the Fourteenth Amendment in a state trial proceeding.<sup>93</sup> The Court in *Douglas v. The People of the State of California* granted the right to counsel for state appeals as a right, in light of the Fourteenth Amendment.<sup>94</sup> The Court has since made clear that "the Sixth Amendment does not apply to appellate proceedings."<sup>95</sup> Similarly, the Court has not seen fit to extend the application of the Sixth Amendment to state post-conviction proceedings.<sup>96</sup>

In denying the right to appointed counsel for indigents on discretionary appeals in North Carolina state courts, the Court in *Ross* distinguished discretionary proceedings from trial proceedings, where the accused must be provided counsel to assure a fair trial.<sup>97</sup> In a trial, the state triggers the judicial system in an effort, "to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt."<sup>98</sup> On the other hand, in discretionary appellate proceedings, "it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below."<sup>99</sup> The Court found this difference significant: clearly, the State may not dispense of the trial proceedings without a criminal defendant's consent, but the State is under no obligation to provide an appeal.<sup>100</sup> Thus, the Sixth Amendment protections of *Gideon* are no longer applicable.<sup>101</sup>

The Court continued this categorization in *Finley*, stating "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself . . . , [i]t is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct

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<sup>92</sup> U.S. CONST. amend. VI.

<sup>93</sup> 372 U.S. 335, 343-44 (1963).

<sup>94</sup> 372 U.S. 353, 357-58 (1963).

<sup>95</sup> *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 153 (2000).

<sup>96</sup> *See Murray v. Giarratano*, 492 U.S. 1, 8, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 558 (1987).

<sup>97</sup> *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 611.

<sup>101</sup> *See id.* at 610.

review of his conviction."<sup>102</sup> Not only is it the petitioner's choice whether to commence an "attack", but also these proceedings are so far removed from the criminal trial itself that it is justifiable to characterize post-conviction relief as a collateral civil remedy.<sup>103</sup>

As a civil remedy removed from the trial, the Court has analyzed the right to counsel in post-conviction proceedings under Fourteenth Amendment Due Process and Equal Protection.<sup>104</sup> Due process guarantees basic "fairness between the State and the individual."<sup>105</sup> In *Ross*, the Court denied the right to appointed counsel under the Fourteenth Amendment's Due Process Clause for indigents on discretionary appeals in North Carolina state courts.<sup>106</sup> The Court recognized that the state need not provide an appeal at all, and so if an appeal is provided, the State does not "act[] unfairly by refusing to provide counsel to indigent defendants at every stage of the way."<sup>107</sup>

In *Finley*, the Supreme Court denied the right to counsel in post-conviction habeas corpus motions on the basis of the Fourteenth Amendment's Due Process clause.<sup>108</sup> The Court reversed the Pennsylvania Superior Court's finding that the defendant's counsel violated her constitutional rights by withdrawing representation in the defendant's post-conviction proceedings.<sup>109</sup> The Court reasoned that appointed counsel in the defendant's post-conviction motion was not needed to satisfy due process because it was already afforded to her at the trial and in the direct review of her conviction.<sup>110</sup> Because defendants are technically operating outside of the trial proceeding, "[s]tates have no obligation to provide [post-conviction] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well."<sup>111</sup>

The plurality opinion in *Murray* declined to find a Fourteenth Amendment Due Process right to appointed counsel for a Virginia inmate preparing a habeas petition challenging his capital conviction.<sup>112</sup> Even the finality of the death penalty was not enough to persuade the plurality to extend a guarantee of counsel, reasoning that "[the] rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases."<sup>113</sup> The Court noted that "[t]he additional safeguards im-

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<sup>102</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987); see also *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (holding that, "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.").

<sup>103</sup> See *Finley*, 481 U.S. at 555-56.

<sup>104</sup> *Ross*, 417 U.S. at 608-09.

<sup>105</sup> *Id.* at 609.

<sup>106</sup> *Id.* at 610.

<sup>107</sup> *Id.* at 611.

<sup>108</sup> See *Finley*, 481 U.S. at 556.

<sup>109</sup> *Id.* at 551.

<sup>110</sup> See *id.* at 554.

<sup>111</sup> *Id.* at 557 (citation omitted).

<sup>112</sup> *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

<sup>113</sup> *Id.*

posed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed."<sup>114</sup>

The Supreme Court has also declined to extend the Fourteenth Amendment's Equal Protection guarantees to the appointment of counsel in post-conviction proceedings. Equal protection analysis governs a State's disparate treatment of similarly situated classes of individuals.<sup>115</sup> Hence, in stark contrast to concern about the disparity in treatment between the rich and the poor shown in *Gideon* and *Douglas*, the *Ross* Court reasoned that the Fourteenth Amendment does not require absolute equal treatment, but allows for analysis by degrees.<sup>116</sup> The majority in *Ross* conceded that "a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review," would likely help the defendant's case, but just because appointing an attorney would be beneficial does not make it constitutionally required.<sup>117</sup> Moreover, the Court employed a similar equal protection analysis in *Finley*, where it explained that, like the defendant in *Ross*, the "defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review."<sup>118</sup> Thus, not only is recognition that counsel may be "helpful" or "beneficial" not enough to constitutionally require post-conviction representation,<sup>119</sup> but such counsel is also not necessary because the petitioner is already granted access to the trial record and appellate briefs.<sup>120</sup>

*B. Using Article XII Language as a Tool to Grant a Right to Counsel in Post-Conviction Proceedings*

Instead of considering the question of a prisoner's right to post-conviction counsel under the Sixth and Fourteenth Amendments, the SJC can give separate attention to Massachusetts' own Article XII provision for right to counsel.<sup>121</sup> Unlike the Sixth Amendment, which was not extended beyond *Gideon* to protect defendants in post-conviction proceedings, the broad provisions of Article XII can provide the

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<sup>114</sup> *Id.*

<sup>115</sup> *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

<sup>116</sup> *Id.* at 612.

<sup>117</sup> *Id.* at 616.

<sup>118</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).

<sup>119</sup> *Ross*, 417 U.S. at 609.

<sup>120</sup> *See Finley*, 481 U.S. at 557.

<sup>121</sup> 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, 928 (1980) ("On numerous occasions, the Massachusetts court has given separate attention to the provisions of the Declaration of Rights and from time to time has recognized significant rights not available through the fourteenth amendment [sic], or otherwise under the United States Constitution. In recent times, there have been strong indications that attention appropriately should be given to the constitutional rights of criminal defendants under the Massachusetts Constitution.").

basis to grant prisoners counsel in state post-conviction proceedings.<sup>122</sup> Accordingly, in *Mavredakis*, the SJC distinguished its holding from the Supreme Court's decision in *Moran v. Burbine* based on textual differences between Article XII and the Fifth Amendment:

The text of art. 12, as it relates to self-incrimination, is broader than the Fifth Amendment. The Fifth Amendment, in relevant part, states: '[N]or shall [any person] be compelled in any criminal case to be a witness against himself.' Article 12, however, commands that 'No subject shall ... be compelled to accuse, or furnish evidence against himself.' Based on the textual differences between art. 12 and the Fifth Amendment, we have 'consistently held that art. 12 requires a broader interpretation [of the right against self-incrimination] than that of the Fifth Amendment.'<sup>123</sup>

Similarly, significant textual differences exist between the right to counsel language of Article XII and the Sixth Amendment.<sup>124</sup> In 1780, Massachusetts guaranteed the right to counsel under Article XII of the Massachusetts Declaration of Rights, "every subject shall have a right . . . to be fully heard in his defence [sic] by himself, or his council at his election."<sup>125</sup> The Sixth Amendment to the U.S. Constitution reads, "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."<sup>126</sup> While the Sixth Amendment refers to "the accused," Article XII refers to "every subject."<sup>127</sup> "Every subject" suggests a more expansive class of individuals protected, broader than the limited class of criminal defendants protected in the Sixth Amendment.<sup>128</sup> Furthermore, that specific Sixth Amendment language denotes that protections are available "in all prosecutions," whereas Article XII does not have such limiting language.<sup>129</sup> Additionally, the Sixth Amendment refers to, "the right to a speedy and public trial," which modifies the right to counsel provision.<sup>130</sup> While Article XII states that, "every subject shall have a right to be fully heard . . . in his defense," Article XII is void of any language of trial proceedings.<sup>131</sup> This suggests that Article XII might be applicable in non-trial proceedings where the prisoner is a plaintiff, which is supported by the SJC's expansive protections in probation violation hearings and in child custody proceedings.<sup>132</sup>

<sup>122</sup> See MASS. CONST. pt. 1, art. XII (amended 2013).

<sup>123</sup> *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 178 (Mass. 2000) (quoting U.S. CONST. amend. V) (quoting MASS. CONST. pt. 1, art. 12) (quoting Opinion of the Justices, 591 N.E.2d 1073 (1992)).

<sup>124</sup> Compare MASS. CONST. pt. 1, art. XII (amended 2013), with U.S. CONST. amend. VI.

<sup>125</sup> MASS. CONST. pt. 1, art. XII (amended 2013).

<sup>126</sup> U.S. CONST. amend. XI.

<sup>127</sup> *Id.*; MASS. CONST. pt. 1, art. XII (amended 2013).

<sup>128</sup> Compare MASS. CONST. pt. 1, art. XII (amended 2013), with U.S. CONST. amend. VI.

<sup>129</sup> Compare MASS. CONST. pt. 1, art. XII (amended 2013), with U.S. CONST. amend. VI.

<sup>130</sup> U.S. CONST. amend. XI.

<sup>131</sup> Compare MASS. CONST. pt. 1, art. XII (amended 2013), with U.S. CONST. amend. VI.

<sup>132</sup> See discussion *supra* Part II.B (noting that unlike the Supreme Court, the SJC has also recognized a constitutional right to counsel for defendants in civil probation violation hear-

Just as the SJC found a defendant was entitled to access to counsel under circumstances where the Supreme Court failed to do so,<sup>133</sup> the SJC could also break from the Supreme Court to find that the right to counsel in Massachusetts attaches to post-conviction proceedings. At the outset, while the Sixth Amendment refers to a “public trial,” Article XII is void of any language concerning trial proceedings; that significant distinction could be used as a basis for arguing that the provisions of Article XII can apply to those wishing to challenge their conviction outside of the “trial.”<sup>134</sup> Furthermore, the Sixth Amendment applies only to the “accused,” and it was that limitation which formed the basis for the Supreme Court’s holding that the right to counsel does not apply until criminal proceedings begin.<sup>135</sup> In contrast, the SJC could read Article XII’s more expansive phrase, “every subject,” broadly to include not only those accused, but also those prisoners challenging their sentence post-conviction.<sup>136</sup> Ultimately, if the SJC could find in *Mavredakis* that Article XII applies before the Sixth Amendment does (before the defendant is formally charged),<sup>137</sup> then the SJC could also find that it applies after the Sixth Amendment right is exhausted, such as in motions for new trials.

#### V. STATE V. FEDERAL STATUTORY SCHEMES

Despite the shaky constitutional rationale applied in *Conceicao* and the SJC’s interpretation of Article XII since then, the *Conceicao* decision, which did not extend a guarantee of counsel to indigents in post-conviction proceedings, still stands as the law of the land in Massachusetts.<sup>138</sup> Afterwards, the state of Massachusetts enacted a statutory scheme that in certain circumstances may question the legitimacy of *Conceicao* as it applies to prisoners claiming actual innocence.<sup>139</sup> Under the statute, indigent prisoners are given the right to pursue their claims of innocence post-conviction, but without the right to obtain assistance of counsel to navigate that pursuit.<sup>140</sup> This section explores the paradox a prisoner in Massachusetts faces

ings and in judicial proceedings to terminate parental rights).

<sup>133</sup> See e.g., *Moran v. Burbine*, 475 U.S. 412, (1986).

<sup>134</sup> See U.S. CONST. amend. VI; MASS. CONST. pt. 1, art. XII (amended 2013).

<sup>135</sup> See *Rothgery v. Giles* County, 554 U.S. 191, 198 (2008) (“The Sixth Amendment right of the ‘accused’ to assistance of counsel in ‘all criminal prosecutions’ is limited by its terms: ‘it does not attach until a prosecution is commenced.’”) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)); *Commonwealth v. Anderson*, 862 N.E.2d 749, 755-56 (Mass. 2007) (holding both Sixth Amendment and Article XII “confer the right the assistance and advice of counsel in order to protect unaided layman at critical confrontations with the government after being charged”).

<sup>136</sup> See MASS. CONST. pt. 1, art. XII (amended 2013).

<sup>137</sup> See *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 178 (Mass. 2000).

<sup>138</sup> *Commonwealth v. Conceicao*, 446 N.E.2d 383, 386 (Mass. 1983).

<sup>139</sup> See MASS. GEN. LAWS ch. 278A, § 3 (2016) (allowing convicted persons the right to request access to DNA evidence); MASS. GEN. LAWS ch. 258D, § 1-9 (2016) (providing for the compensation of people whose convictions are vacated or reversed due to their innocence).

<sup>140</sup> See MASS. GEN. LAWS ch. 278A, § 3; MASS. GEN. LAWS ch. 258D, § 1-9; MASS. R.

when seeking to challenge his conviction given the without the constitutional right to assistance of counsel.

The Suspension Clause of the U.S. Constitution states: “[t]he Privileges of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>141</sup> Although the federal Constitution does not specifically create the right to habeas corpus relief, the federal habeas statute allows a prisoner in state custody to file an application for a writ of habeas corpus on the ground that, the custody “is in violation Constitution or laws and treaties of the United States.”<sup>142</sup> To qualify for federal habeas review, in addition to being in custody when the petition is filed,<sup>143</sup> a prisoner must have exhausted all state remedies, including state appellate review.<sup>144</sup> Thus, state post-conviction proceedings are the starting point for any state or federal claim challenging the legality of a one’s judgment or sentence.<sup>145</sup>

During the past three decades, there has been a significant shift away from a federal habeas-dominated post-conviction review toward review that is more state focused.<sup>146</sup> The limitations placed on federal habeas review by the Antiterrorism and Effective Death Penalty Act of 1996 effectively placed state judiciaries on the front lines of vindicating federal constitutional rights in criminal proceedings.<sup>147</sup> After that statute was passed, state judiciaries assumed a more active role<sup>148</sup> since federal judges could only grant relief on the merits if the petitioner exhausted all claims in the courts of a state and the state court’s decision:

(1) . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.<sup>149</sup>

Today, every state and the District of Columbia has a modern post-conviction remedy system where claims alleging that the conviction was obtained in violation of state and federal constitutional rights are cognizable.<sup>150</sup>

CRIM. P. 30(b) (providing a right to file a motion for a new trial).

<sup>141</sup> U.S. CONST. art. 1, § 9, cl. 2.

<sup>142</sup> 28 U.S.C. § 2254 (2014).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> *See* Brief of Former State Supreme Court Justices as Amici Curiae in Support of Petitioner at 2, *Martinez v. Ryan*, 623 F. 3d 731 (2012) (No. 10-1001), 2011 WL 4427080 (“This trend has been driven by decision of this Court that modified and reduced the role of federal courts, and further by congressional amendments to the federal habeas corpus statute in the Antiterrorism and Effective Death Penalty Act of 1996 that increased the significance and importance of state post-conviction remedies.”).

<sup>147</sup> *See id.* at 19-21.

<sup>148</sup> *See id.*

<sup>149</sup> 28 U.S.C. § 2254(b)(1)(a), (d) (2014).

<sup>150</sup> 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK,

Through both statutes and court rules, Massachusetts now affords state indigent prisoners a vehicle for post-conviction protections. In 1982, the SJC recognized that the legislature adopted Massachusetts Rule of Criminal Procedure 30 “as the exclusive vehicle for post-conviction relief” in Massachusetts.<sup>151</sup> Rule 30 provides that, “[a]ny person who is imprisoned . . . may at any time, as a right, file a written motion requesting the trial judge to release him. . . .”<sup>152</sup> Rule 30 allows a trial judge, “in the exercise of discretion [to] assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under . . . this rule.”<sup>153</sup>

As a result of not mandating assignment of counsel, the Rule’s heightened pleading requirements make success difficult for prisoners preparing and presenting motions pro se. Any grounds for relief not raised in the initial motion are subsequently waived.<sup>154</sup> If the motion for a new trial is based on a claim of newly discovered evidence (a claim often accompanying a claim of actual innocence), the petitioner bears the burden of establishing: (1) that the evidence was unavailable at the time of the trial, or (2) that it could not have been made available by the exercise of due diligence.<sup>155</sup> Although *Conceicao* asserts that, “in many cases defendants present frivolous and repetitive motions,”<sup>156</sup> a motion for a new trial that asserts actual innocence should not be characterized as such and is an important piece in securing the rights that should be afforded to innocent prisoners in Massachusetts.

Largely in response to the Innocence Movement, where claims of actual innocence are being taken more seriously in state courts and legislatures,<sup>157</sup> the Massachusetts legislature has showed concern for the wrongfully convicted by passing legislation, which supplemented Rule 30, aiding innocent prisoners in post-conviction settings. In 2012, the General Court passed the Post Conviction Access to Forensic and Scientific Analysis Act.<sup>158</sup> This Act allows persons convicted of a crime to file a motion requesting forensic or scientific analysis of evidence in their

§ 1:3-4 (2016-2017 ed.).

<sup>151</sup> *Leaster v. Commonwealth*, 432 N.E.2d 708, 709 (1982).

<sup>152</sup> MASS. R. CRIM. P. 30.

<sup>153</sup> *Id.* at (c)(5).

<sup>154</sup> *Id.* at (c)(2) (“Any grounds not so raised are waived unless the judge, in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.”).

<sup>155</sup> *See Commonwealth v. Grace*, 491 N.E. 2d 246, 306 (Mass. 1986) (detailing a discussion of the factors to be considered by the trial judge in granting or denying a motion for a new trial on the basis of newly discovered evidence and of the issues to be considered upon an appeal from his decision).

<sup>156</sup> *Commonwealth v. Conceicao*, 446 N.E.2d 383, 386 (Mass. 1983).

<sup>157</sup> The Innocence Movement has also begun to influence the jurisprudence of the U.S. Supreme Court. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (“[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations.”).

<sup>158</sup> MASS. GEN. LAWS ANN. ch. 278A, § 2 (West 2016).

case when they are asserting a claim of factual innocence.<sup>159</sup> Like navigating Rule 30, the requirements of 278A are also burdensome for the pro se applicant, who is not guaranteed counsel to litigate these claims. In requesting post-conviction discovery, a petitioner must provide information demonstrating the admissibility of evidence in court.<sup>160</sup> Furthermore, information must also be presented related to the actual existence and location of that evidence.<sup>161</sup>

Moreover, in 2004, the legislature enacted a compensation statute, providing a right to bring a claim for compensation to a specified group of people who were wrongfully convicted.<sup>162</sup> The provision provides, in part, that when compensating a qualifying wrongfully convicted person, the judge may award the person a sum of up to \$500,000.<sup>163</sup> Additionally, the judge may consider compensation through physical and emotional services, a reduction in tuition cost for educational services at any state or community college, or expungement of the record of conviction.<sup>164</sup>

The impact of these statutory provisions cannot be understated. They provide the vehicle through which wrongfully convicted persons can challenge their convictions and obtain compensation if their conviction is overturned. However, these procedural rights have no meaning without first having the right to counsel on a Rule 30 Motion for New Trial.

Contrary to the court's assertion in *Conceicao* that "the issues presented by the defendant will not be of such complexity or difficulty that counsel is necessary,"<sup>165</sup> not only is preparing and presenting a Rule 30 motion both complex and difficult, but also the stakes are high. Failure to include a claim can result in procedural default,<sup>166</sup> and if a pro se petitioner is unsuccessful because counsel was not there to assist his preparation and presentation in the motion for a new trial, the avenues that the Post Conviction Access to Forensic and Scientific Analysis Act provides to access evidence and to be compensated for a wrongful conviction may never be realized.

Especially in cases where the petitioner is claiming innocence based on new evidence, counsel is necessary to advocate for the petitioner to gain access to that evidence. One of the major developments of the Innocence Movement is the recognition of the prevalence of false and faulty forensic evidence.<sup>167</sup> A pro se litigant simply does not have access to experts who can potentially lend support on a post-conviction claim. Furthermore, in *Conceicao* the SJC did not find counsel necessary in a motion for a new trial, relying partially on the fact that the judge ruling on

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at § 3(b)(2).

<sup>161</sup> *Id.* at § 3(b)(3).

<sup>162</sup> MASS. GEN. LAWS ANN. ch. 258D (West 2016).

<sup>163</sup> *Id.* at § 5(a).

<sup>164</sup> *Id.*

<sup>165</sup> *Commonwealth v. Conceicao*, 446 N.E.2d 383, 387 (Mass. 1983).

<sup>166</sup> MASS. R. CRIM. P. 30.

<sup>167</sup> See *Misapplication of Forensic Science*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/misapplication-forensic-science> (last visited May 9, 2017).

the motion would likely be the same judge who presided over the original trial.<sup>168</sup> The SJC reasoned that this judge would be familiar with the legal and factual issues involved and able to weed out frivolous and repetitive motions.<sup>169</sup> Although *Conceicao* did not involve a claim of actual innocence, in innocence cases, the trial judge is often part of the underlying problem. This makes counsel necessary to provide the indigent with the means of correcting any wrongs that went unnoticed at trial.

Despite the recently enacted statutory measures and regardless of innocence claims, the ruling in *Conceicao* still applies: there is no right to counsel for prisoners in Massachusetts asserting a post-conviction claim.<sup>170</sup> It is completely within a judge's discretion to assign counsel in a post-conviction matter.<sup>171</sup> In Massachusetts, post-conviction petitions are assigned counsel primarily through the coordination of the Committee for Public Counsel Services (CPCS) Private Counsel Division Criminal Appeals Unit,<sup>172</sup> a state funded agency, and the New England Innocence Project (NEIP),<sup>173</sup> a non-profit organization. While judges may be routinely assigning counsel from CPCS, NEIP, or otherwise, current practices can disappear in one budget cycle. A judge's discretion alone is therefore not enough to assure meaningful access to counsel.

While the SJC was at the forefront of granting counsel pre-*Gideon*, with regards to post-conviction counsel, Massachusetts has since fallen behind the twenty-nine other states that provide a right to counsel in post-conviction proceedings in non-capital cases.<sup>174</sup> Although it denied the right to post-conviction counsel, the Supreme Court in *Finley* noted, "in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review."<sup>175</sup> A better model exists than discretionary appointment in Massachusetts: a right that flows from the state to guarantee counsel in any case where the defendant asserts actual innocence. This right will effectuate the hard work that has been done to guarantee protections for the wrongfully convicted in Massachusetts.

<sup>168</sup> *Conceicao*, 446 N.E.2d. at 387.

<sup>169</sup> *Id.*

<sup>170</sup> *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 27 N.E.3d 349, 363 (Mass. 2015) (articulating continued adherence to the ruling in *Conceicao* and noting that "even where a defendant's right to a particular postconviction procedure is not constitutionally guaranteed, as is the case, for example, with motions for a new trial, this court has still required that indigent defendants nevertheless have meaningful access to whatever postconviction proceedings the State makes available").

<sup>171</sup> MASS. R. CRIM. P. 30 (2016).

<sup>172</sup> See *Private Counsel Division: Criminal Post Conviction and Appeals Unit*, COMMITTEE FOR PUBLIC COUNSEL SERVICES, <https://www.publiccounsel.net/pc/criminal-post-conviction-and-appeals-unit/> (last visited May 9, 2017).

<sup>173</sup> See *Who We Are*, NEW ENGLAND INNOCENCE PROJECT, <http://www.newenglandinnocence.org/who-we-are/> (last visited May 9, 2017).

<sup>174</sup> See WILKES, *supra* note 150, at § 1:5.

<sup>175</sup> *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987).

VI. STARE DECISIS: NARROWING *CONCEICAO* TO GRANT A CONSTITUTIONAL RIGHT TO COUNSEL IN POST-CONVICTION MOTIONS ASSERTING ACTUAL INNOCENCE

As a product of the Warren Court's rights revolution of the 1960s, *Gideon v. Wainwright*'s promise was clear: the accused in state courts must be given the means of presenting their best defense. By the time of the *Gideon* decision, Brian J. Moran and Lewis Rosenberg proclaimed that, "when compared with other states, Massachusetts stands in a more enlightened position," in its potential efforts to comply with *Gideon*.<sup>176</sup>

No state is better equipped to fulfill *Gideon*'s promise, and to make Moran and Rosenberg's proclamation a reality, than the Commonwealth of Massachusetts. Massachusetts was founded on the courage of John Adams' defense of British soldiers and the broad protections of the Massachusetts Declaration of Rights.<sup>177</sup> Massachusetts' highest court has since developed a record of independent and bold jurisprudence, interpreting the Massachusetts Declaration of Rights broadly to protect its citizens with state constitutional rights.<sup>178</sup>

In Massachusetts, the promise of *Gideon* was muted by the SJC's *Conceicao* decision, following in lockstep with the post-Warren Court decisions on post-conviction right to counsel.<sup>179</sup> Over fifty years after the *Gideon* decision, and thirty years after the *Conceicao* decision, the time is ripe for change in Massachusetts. The Innocence Movement has swept the country, reacting to the void in rights protections and acting as a catalyst for state courts and legislatures to implement procedures to assist the wrongfully convicted in state court proceedings. But, that movement can only be effectuated by the practical and symbolic function of a state-guaranteed right. With the last say on the Massachusetts Declaration of Rights and with the means of effecting change, the SJC has the opportunity to be the agent of change.<sup>180</sup>

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<sup>176</sup> Moran & Rosenberg, *supra* note 4, at 431.

<sup>177</sup> See *supra* Part III.

<sup>178</sup> See *supra* Part III.

<sup>179</sup> See *supra* Parts II, III.

<sup>180</sup> The Supreme Court has begun to treat post-conviction claims of innocent differently than claims not asserting innocence for purposes of federal habeas review, affording protections to those challenging their conviction on the grounds that they are factually innocent. See *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1928 (2013) (holding that "actual innocence, if proved, serves as a gateway [past the one-year] . . . statute of limitation" for claims of new innocence in a federal habeas petition provided in the Antiterrorism and Effective Death Penalty Act); see also *House v. Bell*, 547 U.S. 518, 537-38 (2006) (reiterating that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error); *Bousley v. United States*, 523 U.S. 614, 622 (1998) (finding that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review "where a defendant has procedurally defaulted [the] claim."); *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (recognizing that a prisoner "otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence."); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (stating "we think that in

As a starting point, the SJC could use its rule-making powers to provide a right to counsel in new trial motions that assert innocence; an amendment to the rule need not be decided on constitutional grounds.<sup>181</sup> The Massachusetts legislature has already granted procedural safeguards for challenging a conviction, so the adoption of a mandatory appointment of counsel under Rule 30 would give meaning to the already existing protections. It was the SJC that promulgated and adopted Rule 30 through its rulemaking powers in 1979, and therefore the SJC could choose to amend the rule to include language that grants the absolute right to appointed counsel for indigents that challenge their imprisonment based on a claim of actual innocence.

The SJC could also elect to reconsider *Conceicao*. Although the SJC is not bound to reconsider a case or question of law once decided when there has been no change of circumstances,<sup>182</sup> the SJC has at times reconsidered prior rulings and orders for the purposes of, “an efficient and fair means of advancing the administration of justice.”<sup>183</sup> Arguably, there has also been a change of circumstances since *Conceicao*. In that decision, the SJC was not loyal to its own expansive interpretation of Article XII and can do better in interpreting its own constitution.<sup>184</sup> Since *Conceicao*, the SJC has been bold and expansive in interpreting its own constitutional text, resulting in different outcomes than the Supreme Court on questions of constitutional interpretation.<sup>185</sup> Moreover, the Massachusetts legislature has provided multiple avenues for post-conviction relief to defendants, but *Conceicao* stands in the way of making those procedural rights more meaningful.<sup>186</sup> The SJC would not have to necessarily overrule *Conceicao* since that case did not involve a claim of actual innocence, it could merely narrow its ruling to grant the right to counsel for indigents claiming actual innocence. Now is the time to reconsider *Conceicao* to advance the administration of justice.

In 1963, Brian J. Moran and Lewis Rosenberg placed the responsibility on the judiciary to effect change and fulfill the promise of *Gideon* in Massachusetts, stating “[t]he movement . . . is toward a greater and earlier protection of the rights of the accused. The leadership for this movement, we submit, must come from the Judiciary.”<sup>187</sup> It is the judiciary, and in this case the Massachusetts SJC, which has the ability to show leadership once again, reading a post-conviction right to counsel for indigents claiming actual innocence into one of the state’s most revered founding documents, the Constitution of the Commonwealth of Massachusetts.

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an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.”)

<sup>181</sup> Wilkins, *supra* note 121, at 888-89 (stating that the SJC can establish requirements on non-constitutional grounds).

<sup>182</sup> Peterson v. Hopson, 29 N.E.2d 140, 142 (Mass. 1940).

<sup>183</sup> Commonwealth v. Cronk, 484 N.E.2d 1330, 1333 (Mass. 1985).

<sup>184</sup> See *supra* Part II, III, IV.

<sup>185</sup> See *supra* Part III, IV.

<sup>186</sup> See *supra* Part V.

<sup>187</sup> Moran & Rosenberg, *supra* note 4, at 434.

