Constitutional Law—Massachusetts Supreme Judicial Court Distinguishes *Thompkins*'s Unambiguous Invocation Requirement of Right to Remain Silent—*Commonwealth v. Clarke*, 960 N.E.2d 306 (Mass. 2012)

The United States Supreme Court famously held in *Miranda v. Arizona* that the Fifth Amendment privilege against self-incrimination granted a series of required safeguards, and outlined a way a suspect can invoke his rights.[1] In 2010, the Court revisited this issue in *Berghuis v. Thompkins*, holding that a suspect simply remaining silent was not enough, but he must "unambiguously" announce his intention to invoke the right to remain silent.[2] In *Commonwealth v. Clarke*,[3] the Supreme Judicial Court of Massachusetts (SJC) considered *Thompkins* in determining whether a suspect's head shaking constituted an unambiguous invocation of the right to remain silent.[4] The SJC held that the defendant's shaking of his head met the heightened *Thompkins* standard and also distinguished *Thompkins* because article XII of the Massachusetts Declaration of Rights did not require "utmost clarity" to invoke the right to remain silent.[5]

On October 10, 2008, two detectives from the Massachusetts Bay Transportation Authority (MBTA) Transit Police Department, Christopher Ahlborg and Audrina Lyles, arrested the defendant, Brandon Clarke, for indecent assault and battery and placed him in an interrogation room at MBTA headquarters.[6] After informing him that the interrogation would be videotaped, Detective Ahlborg gave Clarke a waiver form describing his *Miranda* rights.[7]

1. *See* 384 U.S. 436, 444 (1966) (holding suspect must receive warning of right to remain silent prior to questioning); *see also* U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."). The Court required these safeguards, "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it." Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court had previously extended the Fifth Amendment privilege against compulsory self-incrimination to the states through the Fourteenth Amendment. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding Fourteenth Amendment protects Fifth Amendment right against compulsory self-incrimination from abridgement by states).

2. *See* 130 S. Ct. 2250, 2259-60 (2010) (quoting Davis v. United States, 512 U.S. 452, 459 (1994)) (applying unambiguous requirement from invocation of right to counsel to right to remain silent).

3. 960 N.E.2d 306 (Mass. 2012).

4. *See id.* at 310-11 (setting issue before court).

5. *See id.* at 311 (holding suspect's action met heightened federal standard, but Massachusetts Constitution only required lower standard); *see also* MASS. CONST. pt. I, art. XII (outlining Massachusetts privilege against self-incrimination).

6. *See* 960 N.E.2d at 311.

7. *See id.* The court noted that the form provided to the defendant complied with *Miranda*, informed the suspect that he could stop the questioning at any time, and asked him if he understood these rights. *See id.* at 311 n.2. Immediately above the signature line, the form asked: "Having these rights in mind, do you wish to speak with me now?" *Id.*; *see* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring law enforcement to

When Clarke immediately began to sign the waiver, Detective Ahlborg stopped him because the detective wanted to discuss Clarke's rights with him verbally before obtaining the written waiver.[8] After Detective Ahlborg completed this review, an exchange took place between Clarke and Detective Ahlborg in which Clarke asked what would happen if he did not speak, to which Detective Ahlborg replied, "Nothing."[9] Following this answer, Clarke indicated that he wanted to go home, and when asked if he wanted to speak, Clarke "shook his head back and forth in a negative fashion."[10] Detective Lyles then interjected to correct what she perceived as a misperception—that by saying nothing Clarke would be free to leave—and informed Clarke that even if he said nothing, he would still be charged and held unless bailed.[11]

The conversation between the three continued during which Clarke indicated his confusion and anxiety about the interrogation; however, Clarke ultimately decided he wanted to talk to the detectives, signed the "Miranda waiver form," and admitted that he had repeatedly brushed his hand against a man on the subway.[12] At trial, Clarke moved to suppress his incriminating statements

warn suspects of right to remain silent prior to any questioning).

8. *See* 960 N.E.2d at 311.

9. *Id.*

10. *Id.* at 311-12 (citing motion judge's finding). The entire conversation went as follows:

> THE DEFENDANT: "[Inaudible] speak with you, or?"
> AHLBORG: "Nope, you don't have to speak with me at all if you don't want to. It's completely up to you."
> THE DEFENDANT: "What happens if I don't speak with you?"
> AHLBORG: "Nothing."
> THE DEFENDANT: "I just want to go home."
> AHLBORG: "You just want to go home? So you don't want to speak?"

Id. at 311. At the motion to suppress hearing, Detective Ahlborg testified that he interpreted the headshake to mean the defendant did not want to speak, while Detective Lyles testified she did not recognize any meaning in the headshake. *See id.* at 312. The Commonwealth contended that the shaking of the head was not interpreted at the time to mean "no," but was instead an "ambiguous action" that could just as reasonably be interpreted to have a variety of other meanings such as confusion, regret, disbelief of the situation in which the suspect finds himself, expression of a range of emotions, or having no meaning at all, but just an involuntary motion. *See* Brief and Appendix for the Commonwealth on Direct Entry from an Order of the Single Justice of the Supreme Judicial Court at 14-15, Commonwealth v. Clarke, 960 N.E.2d 306 (Mass. 2012) (No. SJC-10816), 2011 WL 3572301, at *14-15 [hereinafter Brief for the Commonwealth] (explaining head movement's range of possible meanings). Detective Lyles clarified Detective Ahlborg's answer of "nothing" because it may have been confusing and misleading, seeming to suggest that if Clarke remained silent, he would be free to go. *See id.* at 15 (discussing reasons why Detective Lyles interjected). Detective Lyles explained what "nothing" meant, resulting in the continued exchange and subsequent decision by Clarke to waive his rights. *See id.* at 15-17 (describing sequence of events following Detective Lyles's clarification).

11. *See* 960 N.E.2d at 312 ("But that 'nothing' does not exclude you still being charged and us detaining you here. . . . So it doesn't mean you'll get to walk up out of here and go home right now.").

12. *See id.* The officers did not videotape Clarke's incriminating statements because after signing the waiver form, Clarke did not grant permission for the remainder of the interrogation to be recorded. *See id.* The Commonwealth of Massachusetts charged Clarke with one count of assault and battery and two counts of indecent assault and battery on a person fourteen or over. *See id.*

"arguing that he had invoked his right to remain silent by shaking his head in a negative fashion . . . ."[13] The trial judge allowed the motion to suppress because he found Clarke's head shaking—in light of the totality of the circumstances—to be an unambiguous invocation of the right to remain silent.[14] The Commonwealth applied to the SJC for leave to appeal from the allowance of the motion to suppress; a single justice granted this application and reported the case to the full court.[15] The SJC upheld the trial judge's decision to suppress because Clarke's unambiguous invocation of his right to remain silent was not "scrupulously honor[ed]" when the officers continued the questioning and elicited the incriminating statements.[16] The court then determined that even if Clarke's action could be interpreted as not meeting *Thompkins*, the Massachusetts Constitution did not require a suspect to invoke his right to remain silent with the "utmost clarity" as required by federal law.[17]

In *Miranda v. Arizona*, the Supreme Court ruled that the Fifth Amendment privilege against self-incrimination required "procedural safeguards" to ensure law enforcement "scrupulously honored" a suspect's Fifth Amendment rights.[18] The Court held that before law enforcement officials may interrogate a person in custody, they must inform him of a series of rights including the right to remain silent and the right to both consult with a lawyer and have one present during questioning.[19] A suspect may waive these rights, but if waived, the prosecution must demonstrate that the suspect waived these rights "voluntarily, knowingly and intelligently."[20] Furthermore, if the suspect indicates "in any

13. *Id.*

14. *See id.* Clarke's status as a first-time arrestee and his overall reluctance to answer questions weighed heavily in the trial judge's "totality of the circumstances" analysis. *See id.* at 313. The Commonwealth argued in its brief to the SJC that the determination of whether Clarke invoked his right to remain silent should be fact specific and made in the totality of the circumstances, "including examining circumstances both immediately prior and subsequent to defendant's claim to have invoked his right to remain silent." Brief for the Commonwealth, *supra* note 10, at 12.

15. *See* 960 N.E.2d at 310-11; *see also* MASS. R. APP. P. 15(c) (conferring authority of single justice to review motions and refer to appellate court); Pemberton v. Pemberton, 411 N.E.2d 1303, 1304-05 (Mass. App. Ct. 1980) (describing authority to decide appeal rests in appellate court not in single justice).

16. 960 N.E.2d at 316.

17. *See id.* at 320 (holding article XII provides greater protections even if headshake failed to meet federal standard).

18. 384 U.S. 436, 478-79 (1966); *see* Michael L. Vander Giessen, Comment, Berghuis v. Thompkins*: The Continued Erosion of* Miranda*'s Protections*, 46 GONZ. L. REV. 189, 193 (2011) (describing effects of *Miranda* on requirements of law enforcement officials). The Court required prosecutors to demonstrate that certain procedural safeguards had been followed in order to use a suspect's statements—made during custodial interrogation—in a criminal proceeding. *See* George M. Dery III, *Do You Believe in* Miranda*? The Supreme Court Reveals Its Doubts in* Berghuis v. Thompkins *by Paradoxically Ruling That Suspects Can Only Invoke Their Right to Remain Silent by Speaking*, 21 GEO. MASON U. C.R. L.J. 407, 408 (2011) (describing ruling in *Miranda*).

19. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

20. *See* Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (describing conditions for effective waiver);

manner" before or during the interrogation that he does not want to be interrogated, law enforcement officials may not question him even if the suspect has already answered questions or volunteered statements.[21]

Although *Miranda* created a heavy burden on the government to prove effective waiver of these rights, lower courts developed separate interpretations about what actually constituted a proper invocation of the right to counsel.[22] In *Davis v. United States*, where the suspect had waived his rights and then made an ambiguous request for counsel, the Court held that a suspect must "unambiguously request counsel" such that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[23] In *Berghuis v. Thompkins*, the Court applied the "unambiguous" standard to the right to remain silent, holding there was "no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent . . . ."[24] Not only did the Court apply this

960 N.E.2d at 314 (recognizing *Miranda* requires government to prove "voluntary, knowing, and intelligent waiver" of rights); *see also The Supreme Court, 1965 Term—Constitutional Law*, 80 HARV. L. REV. 201, 202 (1966) (demonstrating burden of proof for effective waiver lies with prosecution). The Court created a prophylactic rule to aid courts in reviewing custodial interrogations under the assumption that when adequate warnings are not provided, the confession is considered "tainted." *See* Harvey Gee, *In Order to Be Silent, You Must First Speak: The Supreme Court Extends* Davis*'s Clarity Requirement to the Right to Remain Silent in* Berghuis v. Thompkins, 44 J. MARSHALL L. REV. 423, 427 (2011) (noting Court's decision provides greater confidence that law enforcement obtained confessions voluntarily). The Court was attempting to undermine psychological police interrogation techniques used primarily against the poor and uneducated to gain confessions. *See id.* at 427-28.

21. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

22. *See* Richard L. Budden, Comment, *All in All,* Miranda *Loses Another Brick From Its Wall: The U.S. Supreme Court Swings Its Hammer in* Berghuis v. Thompkins*, Dealing a Crushing Blow to the Right to Remain Silent*, 50 WASHBURN L.J. 483, 493 (2011) (asserting courts around country had developed different approaches to invocation of right to counsel). These approaches broke into three categories:

> (1) [A]ny mention of counsel is sufficient to invoke the right; (2) the mentioning of counsel must meet a threshold-of-clarity standard for law enforcement to understand it as an invocation; or (3) all questioning about the crime must cease when counsel is mentioned, but officers are allowed to ask clarifying questions about the mention of counsel.

Id.

23. 512 U.S. 452, 459 (1994). The ambiguous request occurred when the suspect stated: "Maybe I should talk to a laywer." *Id.* at 455. It is important to note that the Court issued this ruling in a postwaiver context where the suspect had already waived his right to counsel and then ambiguously requested counsel. *See* Budden, *supra* note 22, at 495 (describing context in which Court made decision). The Court did not address the standard for invocation of the right to remain silent in the prewaiver context, nor did the Court hold that prewaiver requests for counsel also must be made unambiguously. *See id.* In fact, the unambiguous request may only be required after there has been an initial waiver. *See* Martin H. Sitler, *The Armor: Recent Developments in Self-Incrimination Law*, ARMY LAW., May 2000, at 47, 53 (2000) ("Having a valid initial waiver is a prerequisite to the ambiguous request for counsel rule. Without it, the rule does not apply.").

24. 130 S. Ct. 2250, 2260 (2010). Prior to the Court's decision in *Thompkins*, seven circuit courts and thirteen state supreme courts had applied the *Davis* standard to the invocation of the right to remain silent including several that applied *Davis* in the prewaiver context. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1579-80 (2008) (describing application of *Davis* to right to remain silent).

standard in the prewaiver context, but the Court seems to have departed from *Miranda*'s "in any manner" language by requiring a suspect to actually announce in order to invoke his right to remain silent.[25]

The SJC may distinguish itself from Supreme Court holdings with regard to certain constitutional rights because the rights guaranteed under article XII of the Massachusetts Constitution, which are similar in scope to rights guaranteed by the Fifth Amendment, are "more expansive than those [rights] guaranteed by the Federal Constitution."[26] With regard to the right to counsel, the SJC had consistently applied an affirmative and unambiguous standard for proper invocation and did not distinguish from the *Davis* standard on state-law grounds under article XII.[27] In a case similar to *Thompkins*, the SJC applied the *Davis* standard to the right to remain silent but did not adopt the rule because the court only overturns a trial court's finding of fact on a "clearly erroneous" standard and saw no reason to "disturb the judge's findings."[28] In

25. *See* Vander Giessen, *supra* note 18, at 198-99 (asserting majority in *Thompkins* ignored *Miranda*'s "in any manner" language); *see also* Budden, *supra* note 22, at 499-500 (discussing Court's rejection of Thompkins's argument that unambiguous standard only applies in postwaiver context). The Court reasoned that extension of this rule to the right to remain silent provided "an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (quoting Davis v. United States, 512 U.S. 452, 458-59 (1994)). Not extending this rule to the right to remain silent would require police "to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.'" *Id.* (quoting Davis v. United States, 512 U.S. 452, 461 (1994)). The effect of the Court's decision is to create the somewhat paradoxical rule of requiring a suspect to speak when told he has an express right to remain silent. *See* Scott C. Stansbury, Article, Berghuis v. Thompkins *and* Miranda *Rights: Speaking Up to Stay Silent*, 38 S.U. L. REV. 317, 339 (2011) ("[*Thompkins*] represents the first decision that deals with a suspect having to clearly invoke his right to remain silent by speaking.").

26. *See* Commonwealth v. Cryer, 689 N.E.2d 808, 812-13 (Mass. 1998) (holding court may interpret Massachusetts Constitution as more expansive than United States Constitution); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."); 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, 921 (1980) (advocating for state's constitutional standards as higher than federal "lowest common denominator" standard).

27. *See, e.g.*, Commonwealth v. Dubois, 883 N.E.2d 276, 281-82 (Mass. 2008) (holding "Maybe I better get a lawyer" not sufficient to clearly invoke right to counsel); Commonwealth v. Obershaw, 762 N.E.2d 276, 284 (Mass. 2002) ("[E]quivocal statements and musings concerning the need for an attorney do not constitute such an affirmative request."); Commonwealth v. Contos, 754 N.E.2d 647, 657 (Mass. 2001) (holding "I think I'm going to get a lawyer" met unambiguous standard). The Supreme Court's decision in *Davis* did not change the law in Massachusetts as the SJC had previously required: "For the rule of *Miranda* regarding the termination of questioning to apply, there must be either an expressed unwillingness to continue or an affirmative request for an attorney." *See* Commonwealth v. Pennellatore, 467 N.E.2d 820, 823 (Mass. 1984) (holding "I guess I'll have to have a lawyer for this" not invocation of right).

28. *See* Commonwealth v. Sicari, 752 N.E.2d 684, 695-96 & n.13 (Mass. 2001) (holding long period of silence did not invoke right to remain silent). In *Thompkins*, the Court determined that a suspect remaining largely silent during a two-hour-and-forty-five-minute interrogation, but without saying that he wanted to remain silent or did not want to talk with police, was insufficient to invoke the right to remain silent. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2259-60 (2010). In *Sicari*, the SJC recognized that, in the aftermath

Commonwealth v. Mavredakis, the SJC outlined the factors the court would consider when determining if the article XII privilege against self-incrimination grants greater protection than the Constitution by "look[ing] to the text, history, and . . . jurisprudence existing in the Commonwealth" prior to the Supreme Court decision.[29]

In *Clarke*, the SJC analyzed the Fifth Amendment in light of *Thompkins* and article XII to determine if Brandon Clarke's actions were sufficient to invoke the right to remain silent.[30] In the Fifth Amendment analysis, the court first discussed the Supreme Court's ruling in *Miranda* and recognized that the Court had set a low bar for invoking the right to remain silent by allowing invocation "in any manner."[31] The SJC then discussed the heightened bar the Court had instituted in *Thompkins* by requiring suspects to "'unambiguously' announce their desire to be silent."[32] Applying *Thompkins* to the facts of the case at bar, the SJC upheld the trial judge's determination that Clarke "engaged in affirmative conduct indicating his desire to end police questioning."[33] The SJC rejected the Commonwealth's argument that *Thompkins* required verbal conduct in order to unambiguously invoke the right to remain silent because of *Miranda*'s "in any manner" language and because of previous recognitions that nonverbal conduct can clearly communicate.[34] The SJC held that under the *Thompkins* standard, Clarke unambiguously invoked his right to remain silent

of *Davis*, most circuit courts and state supreme courts had adopted the "clear articulation rule" for the right to remain silent, and discussed that this case would not meet that standard but declined to explicitly adopt the rule because the silence did not require police to cease questioning. Commonwealth v. Sicari, 752 N.E.2d 684, 696 & n.13 (Mass. 2001).

29. *See* 725 N.E.2d 169, 177 (Mass. 2000) (discussing factors used to determine if state constitution has more expansive protections than federal Constitution). Article XII is more expansive than the Fifth Amendment and the SJC has more broadly interpreted article XII than the Fifth Amendment. *See id.* at 178. In *Mavredakis*, even though there would not have been a Fifth Amendment violation under *Miranda*, the SJC held that the police department's policy of preventing contact between third parties and suspects in custody violated article XII. *See id.* at 180 (holding policy unconstitutional as far as application to attorney's contact with suspects). This case was in line with a number of cases over the past thirty years in which the SJC has found greater protections under the state constitution than those provided under the U.S. Constitution. *See* 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, 406 (2004) (describing how *Mavredakis* comports with previous SJC distinctions from federal Constitution through Massachusetts Constitution).

30. *See* 960 N.E.2d at 311. Even though the SJC will defer to the trial judge and accept subsidiary findings of fact, where the judge determined facts based on documentary video evidence, the SJC will put itself in the position of the trial judge in viewing the videotape. *See id.* at 313. In such a scenario, the court will review and analyze the evidence independently to determine "its significance without deference." *Id.* After reviewing the evidence, the SJC will substantially defer to the trial judge, provided his findings are warranted by the evidence. *See id.* (describing circumstances when SJC will review documentary evidence).

31. *See id.* at 314 (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)).

32. *Id.* (quoting Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010)). The court then stated that this is the objective test adopted from *Davis*. *See id.*

33. *Id.* at 315.

34. *See* 960 N.E.2d at 315 (citing Commonwealth v. Gonzalez, 824 N.E.2d 843, 848 (Mass. 2005)) (holding *Thompkins* does not necessarily require verbal communication to unambiguously invoke).

by engaging in conduct "that a reasonable police officer in the circumstances would understand."[35]

After determining that Clarke had met the *Thompkins* standard, the court opted to determine whether article XII also requires this standard if Clarke's "conduct were to be construed as not meeting the heightened Federal standard, articulated in *Thompkins* . . . ."[36] After reasoning that a state's constitution may provide greater protections to its citizens than the U.S. Constitution, the court turned to the *Mavredakis* factors to determine whether article XII's privilege against self-incrimination confers more protection than the Fifth Amendment.[37] Recognizing that the heightened standard in *Thompkins* had come from *Davis*, the court discussed its right-to-remain-silent jurisprudence in the post-*Davis* (and pre-*Thompkins*) era and discerned a fundamental difference between the prewaiver and postwaiver contexts.[38] The court reasoned that it would be appropriate to apply *Thompkins* in the postwaiver context because a suspect changed course mid-interrogation whereas, in the prewaiver context, the suspect would not have made the choice whether to answer questions, and applying *Thompkins* would provide insufficient protections under article XII.[39] The SJC declined to adopt the *Thompkins* rule because it places "too great a burden on the exercise of a fundamental constitutional right" and held that even if Clarke's conduct had been insufficient under *Thompkins*, it was sufficient under article XII.[40]

In the Fifth Amendment analysis, the SJC determined the meaning of Clarke's headshake (and invocation of the right to remain silent) as unambiguous under *Thompkins*, despite reasonable alternative explanations that could have made the meaning of the headshake at least ambiguous.[41] Instead of

35. *Id.* (quoting Davis v. United States, 512 U.S. 452, 459 (1994)). The court reasoned that because of the right in question, it would be "sensible to recognize that a suspect may well communicate through conduct other than speech." *Id.* The court found justification for this reasoning in Justice Sotomayor's dissent in *Thompkins*. *See id.* ("Advising a suspect that he has a 'right to remain silent' is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected." (quoting Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting))).

36. *Id.* at 316.

37. *See id.* at 317; *see also* Commonwealth v. Mavredakis, 725 N.E.2d 169, 177 (Mass. 2000) ("[W]e look to the text, history, and our prior interpretations of art. 12, as well as the jurisprudence existing in the Commonwealth . . . .").

38. *See* 960 N.E.2d at 318-19 (analyzing period between *Davis* and *Thompkins* with respect to prewaiver and postwaiver differences).

39. *Id.* at 319. The court discussed a number of reasons why a suspect might fail to unambiguously invoke in the prewaiver context, such as unfamiliarity with the English language, intimidation by the interrogation process, or an overwhelmed feeling because of the circumstances. *See id.* (citing Davis v. United States, 512 U.S. 452, 469-70 (1994) (Souter, J., concurring)). The court discussed a scenario where a suspect finds his initial ambiguous invocation ignored and, as a result, forgoes a later invocation of his right to remain silent—precisely the scenario *Miranda* intended to address. *See id.* at 320.

40. *See id.* at 320.

41. *See id.* at 315 (holding defendant's headshake met heightened standard under Thompkins). *But see* Brief for the Commonwealth, *supra* note 10, at 14-15 (indicating other reasonable interpretations of

examining the context of the headshake in the totality of the circumstances inside the interrogation room, the court interpreted Detective Ahlborg's question—"So you don't want to speak?"—as a direct question and the headshake as a direct, negative response.[42] The court favored *Miranda*'s "in any manner" language to invoke the right to remain silent over the more explicit (and more recent) *Thompkins* requirement that a suspect "unambiguously announce" because of previous recognitions that nonverbal conduct can convey mixed messages.[43] In finding Clarke's headshake meets the heightened *Davis* test under the Fifth Amendment—that a reasonable police officer would understand it as invoking the right to remain silent—the SJC somewhat narrowly construed the Supreme Court's invocation requirements.[44]

By applying article XII to the invocation of the right to remain silent—even though Clarke's headshake met the *Thompkins* unambiguous standard—the SJC effectively deterred further appellate review by the U.S Supreme Court.[45] By focusing on the *Mavredakis* factors in its analysis of whether article XII grants broader protections, the court avoided criticisms that it "protected certain constitutional rights by fiat, rather than by well-grounded reasoning."[46] The

defendant's headshake).

42. *See* 960 N.E.2d at 315 (describing questioning and response). The court further justified this interpretation because Detective Ahlborg understood the headshake to mean that Clarke did not want to speak. *See id.* But this type of volitional action runs counter to the court's jurisprudence with respect to invoking the right to counsel and the court's application of *Davis* (in *Sicari*) with respect to invoking the right to remain silent. *See supra* notes 27-28 (describing court's earlier jurisprudence applying *Davis* to right to remain silent in Massachusetts). The court upheld the trial judge's totality-of-the-circumstances analysis based on Clarke's youth and lack of prior arrests. 960 N.E.2d at 313. But the court had previously required the totality-of-the-circumstances analysis to include examining the circumstances in the context of the interrogation and not the defendant's prior lack of criminal history. *See* Brief for the Commonwealth, *supra* note 10 (describing previous contextual analysis of statements by defendants to determine right-to-remain-silent invocation).

43. *See* 960 N.E.2d at 315 (deciding *Thompkins* does not require speech because of language in *Miranda*). This line of reasoning appears to run contrary to *Thompkins* because even Justice Sotomayor's dissenting opinion, as quoted by the court, discussed the apparent confusion that may result from requiring a suspect to speak after he has been advised he has the right to remain silent. *See id.* (quoting Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting)) (noting Justice Sotomayor's observation in *Thompkins* of contradiction in compelling advised suspect to verbalize preference).

44. *See id.* (holding *Thompkins* does not require speech but nonverbal expression sufficiently meets standard). *But see* Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) ("Had [Thompkins] made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'" (quoting Michigan v. Mosley, 423 U.S. 96, 103 (1975) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)))). Although the Court did not specifically require a statement, commentators have interpreted this ruling as "requir[ing] defendants to expressly state that they are exercising their right to silence." *See* Gee, *supra* note 20, at 424 (discussing effective meaning of *Thompkins* ruling); *see also* Dery, *supra* note 18, at 407 ("If you wish to ensure your Fifth Amendment right to remain silent, you had better speak up."); Stansbury, *supra* note 25, at 339 (discussing why Court's decision requires suspects to speak in order to invoke right).

45. *See* 960 N.E.2d at 320 ("We therefore hold that, even if the defendant's conduct was insufficient to meet the Federal *Thompkins* standard, the defendant acted with sufficient clarity to invoke his art. 12 right to remain silent."). To justify this course of action, the court began with a discussion of its practice of interpreting "'the rights of our citizens under art. 12 to be more expansive than those guaranteed by the Federal Constitution.'" *See id.* at 316-17 (quoting Commonwealth v. Cryer, 689 N.E.2d 808, 812-13 (Mass. 1998)).

46. *See* Ireland, *supra* note 29, at 408-09 (describing cases where SJC determined broader protections

court maintained that invocation by unambiguous nonverbal conduct was consistent with prior jurisprudence despite advocating an utmost-clarity standard for law enforcement: When there is a question as to the invocation of the right to remain silent, the court recommended that police cut off questioning and "ask the suspect to make his choice clear."[47]

Even though the court rejected the *Thompkins* standard under article XII, its primary complaint rested on the problem of requiring unambiguous invocation in the prewaiver context where "the suspect has yet to exercise the choice between speech and silence."[48] The court continued by somewhat ironically stating that a failure to invoke unambiguously may have a number of causes despite rejecting the Commonwealth's argument that, in context, Clarke's head movement could reasonably have a number of other meanings.[49] Further, the court stated that ambiguous invocations should not be treated as if the suspect had said nothing, yet it did not endorse the actions of Detective Lyles when she interpreted the headshake as an ambiguous action and clarified for Clarke what "nothing" meant in context.[50] Clear nonverbal expression may just as sufficiently invoke the right to remain silent; however, Clarke's actions were ambiguous enough that reasonable police officers could differ on the intent of the headshake.[51]

The Supreme Judicial Court of Massachusetts had to determine whether nonverbal expression can invoke the right to remain silent in the post-*Thompkins* era. Even though nonverbal expression can just as clearly communicate intent, and a headshake may precisely mean a desire not to be questioned, Clarke's actions did not express this desire as clearly as the SJC determined. The court decided that Clarke's conduct met the Supreme Court's heightened *Thompkins* standard, but then rejected it under article XII of the Massachusetts Constitution. The court preferred to rely on its previous decisions with respect to the right to remain silent and not adopt the more recently imposed federal standard.

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without reasoned interpretation); *see also* 960 N.E.2d at 317 (invoking *Mavredakis* factors to determine application of article XII privilege against self-incrimination).

47. *See* 960 N.E.2d at 321 (advocating, but not mandating, that police obtain clear invocation from suspect whenever otherwise ambiguous).

48. *See id.* at 319 ("To require a suspect, before a waiver, to invoke his or her right to remain silent with the utmost clarity, as called for by *Thompkins*, would . . . provide insufficient protection for residents of the Commonwealth under art. 12.").

49. *Compare id.* (describing range of other reasons why suspect may fail to clearly invoke right to remain silent), *with* Brief for the Commonwealth, *supra* note 10, at 15 (explaining range of possible meanings head movement could have in present case).

50. *Compare* 960 N.E.2d at 316 (finding insufficient actions taken by Detective Lyles to clarify because questioning continued), *with id.* at 320 (discussing relevance of ambiguous invocations).

51. *See* Brief for the Commonwealth, *supra* note 10, at 15 (describing other possible meanings of head movement).