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# IN THE NAME OF EFFICIENCY: HOW THE MASSACHUSETTS DISTRICT COURTS ARE LOBBYING AWAY THE CONSTITUTIONAL RIGHTS OF INDIGENT DEFENDANTS

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**Abstract:** This Note explores the current practice of lobby conferences in Massachusetts district courts. At these proceedings, attorneys meet with the judge in chambers, without the defendant and off the record. The attorneys and the judge make one last attempt to settle the case before proceeding to trial. Court officials rely on the lack of record in lobby conferences to foster the type of candid discussion between the attorneys and the judge they believe to be necessary for efficient disposition of cases. As this Note examines the reasons why lobby conferences have a unique role in district courts, it also highlights how the lack of record makes it nearly impossible for indigent criminal defendants to hold their attorneys accountable for anything that happens at these proceedings. This Note argues that mandating recording of lobby conferences will be circumvented by the courts. Instead, appellate courts must recognize the inherent conflict of interest and change how they treat ineffective assistance of counsel claims that arise in the context of lobby conferences.

## INTRODUCTION

*Because criminal law governs the most serious sanctions that a society can impose on its members, inequity in its administration has especially corrosive consequences. Perceptions of race and class disparities in the criminal justice system are at the core of the race and class division in our society. . . . [and have been exploited] to make the hard choices of the criminal justice system easier.*<sup>1</sup>

As incarceration rates rapidly stretch the criminal justice system to capacity, the state of indigent defense in Massachusetts has reached a

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\* Comment Editor, BOSTON COLLEGE THIRD WORLD JOURNAL (2008–2009).

<sup>1</sup> DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 11–12 (1999).

crisis point.<sup>2</sup> The state-funded Committee for Public Counsel Services (CPCS) coordinates representation of indigent defendants in Massachusetts.<sup>3</sup> However, CPCS's staff of 110 full-time attorneys has been far from sufficient to meet the needs of indigent defendants across the state.<sup>4</sup> Court appointed private counsel make up more than ninety percent of criminal and civil representation in Massachusetts.<sup>5</sup> Nevertheless, Massachusetts has been consistently reluctant to fund indigent defense to its full capacity.<sup>6</sup>

In the summer of 2004, indigent defense gained state-wide attention when lawyers refused to take additional cases in a protest over inadequate pay, and the Massachusetts Supreme Judicial Court ordered the release of prisoners who were held without counsel.<sup>7</sup> The crisis of

<sup>2</sup> See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008); Jason M. Scally, *All Quiet on the Western Front?*, MASS. LAW. WKLY., Aug. 22, 2005, at 24. According to the Pew Report, the American prison population has tripled over the last twenty years, and today it is higher than any other country in the world. See PEW CTR. ON THE STATES, *supra*, at 5.

For the first time in history more than one in every 100 adults in America are in jail or prison. . . .

. . . .

A close examination of the most recent U.S. Department of Justice data (2006) found that while one in 30 men between the ages of 20 and 34 is behind bars, the figure is one in nine for black males in that age group.

Press Release, Pew Ctr. on the States, *Pew Report Finds More than One in 100 Adults Are Behind Bars* (Feb. 28, 2008), available at [http://www.pewcenteronthestates.org/news\\_room\\_detail.aspx?id=35912](http://www.pewcenteronthestates.org/news_room_detail.aspx?id=35912). Massachusetts's prison population has grown by three percent in the last two years, making it the highest in the Northeast. See PEW CTR. ON THE STATES, *supra*, app. 29. For every dollar that Massachusetts spent on higher education, it spent ninety eight cents on corrections. See *id.* app. 31. This represents a huge burden not only on the courts' resources but also on the state. See *id.*

<sup>3</sup> SPANGENBERG GROUP, *INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM I* (2005).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See *Lavallee v. Justices in Hampden Super. Ct.*, 812 N.E.2d 895, 912 (Mass. 2004); Scally, *supra* note 2, at 24. On May 3 and 4, 2004, no private attorneys showed up in Hampden County District Court to take on new cases, and at least nineteen indigent defendants were arraigned without counsel. See *Lavallee*, 812 N.E.2d. at 901. On July 8, 2004, the situation did not get any better, when "fifty-eight indigent defendants with cases pending in Hampden County were without counsel to represent them; thirty-one were held in custody." See *id.* at 912 n.10. On appeal, the Supreme Judicial Court (SJC) held that the defendants were being deprived their right to counsel under Article 12 of the Massachusetts Declaration of Rights. See *id.* at 901. The SJC ordered the release of prisoners in Hampden County who were being held for more than seven days without counsel and a dismissal of all the charges if an attorney was not appointed within 45 days. See *id.* at 912. Hampden, however, was not the only county encountering problems recruiting attorneys to represent

representation of indigent defendants was due, in part, to Massachusetts's failure to increase the pay scale for appointed counsel since 1986.<sup>8</sup> In addition, some defense counsel faced a long lag time before payment.<sup>9</sup> For example, some waited eight months for services rendered in the previous fiscal year.<sup>10</sup> As the shortage of qualified attorneys to represent indigent defendants continues, the number of court filings has increased annually.<sup>11</sup> In the 2008 fiscal year, 828,637 cases were filed in Massachusetts District Court alone—an increase of 5.7% from the year before.<sup>12</sup> Each year CPCS assigns about 200,000 new criminal and civil cases for representation.<sup>13</sup>

The large caseload and shortage of counsel creates an incentive for the system to resolve cases as quickly as possible.<sup>14</sup> As a result, plea bargaining has become “a way of life.”<sup>15</sup> In Massachusetts's three largest counties, about eighty percent of criminal cases are settled without a trial.<sup>16</sup> Even though plea bargaining plays a dominant role in the disposition of criminal cases, it is “an area [of the law] with minimal court

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indigent defendants; both Superior and District Courts in Suffolk and Middlesex counties were having similar problems. *See* Kathleen Burge, *Public Defenders Protest Pay Lack: Vote to Refuse New Court Cases*, BOSTON GLOBE, Aug. 16, 2003, at B4; Scally, *supra* note 2, at 24.

<sup>8</sup> *See* SPANGENBERG GROUP, *supra* note 3, at 1. Even though the state legislature approved a \$7.50 pay increase just days after the Hampden incident, the pay for appointed counsel in Massachusetts still remains one of the lowest in the country. *See id.* at 5.

<sup>9</sup> Buffy Spencer, *Some Lawyers Awaiting State Pay*, THE REPUBLICAN (Springfield, Mass.), Aug. 4, 2007, at A01, available at 2007 WLNR 15200055.

<sup>10</sup> *See id.*

<sup>11</sup> Mass. Dist. Court Dep't, Summary of Filings—Fiscal Years 1997 through 2008, available at <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/allstats2008.pdf> (compiling the number of Massachusetts District Court filings from fiscal year 1996 through 2006). The number of filings does not necessarily correlate to the number of indigent defendants passing through the system. *See id.* However, it does indicate the increasing stress on the court's resources. *See id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See* SPANGENBERG GROUP, *supra* note 3, at 1.

<sup>14</sup> *See* Earnest B. Murphy, Letter to the Editor, *Judge: Plan for Lobby Conferences Should Be Debated*, MASS. LAW. WKLY., May 28, 2007, at 54.

<sup>15</sup> *See* Gary V. Murray, *Plea Deals Keep Courts Functioning*, WORCESTER TELEGRAM & GAZETTE, Feb. 25, 2001, at A1, available at 2001 WLNR 11481277. Plea bargaining is a process by which “[t]he defendant voluntarily admits responsibility for the crime by entering a guilty plea, and, in turn, the prosecution agrees to [recommend to the judge] to reduce the number or severity of criminal charges pursued against the defendant or, alternatively, recommends that the judge impose a less-than-maximum sentence.” Christopher E. Smith, *Plea Bargaining*, in THE U.S. LEGAL SYSTEM 514, 515 (Timothy L. Hall ed., 2004). By entering a guilty plea, the defendant admits responsibility for the crime and knowingly and voluntarily waives his Sixth Amendment right to a jury trial. *See id.*

<sup>16</sup> *See* Murray, *supra* note 15.

supervision or legal protection.”<sup>17</sup> This is especially true at the district court level, where “the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”<sup>18</sup>

This Note focuses specifically on the current practice in Massachusetts of plea bargaining in lobby conferences.<sup>19</sup> These plea discussions usually take place with a judge behind closed doors, outside of a defendant’s presence, and off the record.<sup>20</sup> Court officials believe the informal atmosphere facilitates settlement.<sup>21</sup> It is the criminal defendant, however, who pays the price for this efficiency.<sup>22</sup> Specifically, the lack of

<sup>17</sup> William Robinson, *Plea Bargaining and Guilty Pleas*, in MASSACHUSETTS CRIMINAL DEFENSE § 37.1 (Eric D. Blumenson et al. eds., 1990).

<sup>18</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972). For example,

[t]he great majority of plea hearings in the Massachusetts district courts consist simply of a hurried recitation of a police report. On occasion, a defendant, usually represented by counsel, will agree with the prosecutor to waive the reading of the report and admit to the face of the Complaint, but a judge is not bound by this agreement and can insist on hearing evidence.

Francis D. Doucette, *Non-Appointment of Counsel in Indigent Criminal Cases: A Case Study*, 31 NEW ENG. L. REV. 495, 506 (1997).

<sup>19</sup> Even though this Note specifically focuses on plea bargaining in lobby conferences, a number of other articles have been written over the years critiquing the practice of plea bargaining as a way to relieve court congestion. See, e.g., Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1179 (1975) [hereinafter Alschuler, *Defense Attorney’s Role*]. In particular, Professor Alschuler points out that plea bargaining makes the outcome of the case depend not on whether the defendant is actually responsible for the crime, but on “tactical decision[s] irrelevant to any proper objective of criminal proceeding.” See Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983) [hereinafter Alschuler, *Alternatives to Plea Bargaining*]. Alschuler also discusses the effect plea bargaining has on the attorneys involved. See *id.* at 933. He argues that:

Plea bargaining leads lawyers to view themselves as judges and administrators rather than advocates; it subjects them to serious financial and other temptations to disregard their clients’ interests; and it diminishes the confidence in attorney-client relationships that can give dignity and purpose to the legal profession and that is essential to the defendant’s sense of fair treatment.

See *id.*

<sup>20</sup> See *Commonwealth v. Gaumond*, No. 98–2813–14–15, 2002 WL 732152, at \*4 n.2 (Mass. Super. Ct. Apr. 19, 2002).

<sup>21</sup> See, e.g., Murphy, *supra* note 14, at 54.

<sup>22</sup> See *Commonwealth v. Fossa*, 666 N.E.2d 158, 161 (Mass. App. Ct. 1996). Justice Laurence of the Massachusetts Appeals Court has acknowledged that lobby conferences come at a price: “We take judicial notice of the judges’ legitimate concern over the court calendar and the need to move cases along. However, ‘concern for the avoidance of a congested [court] calendar must not come at the expense of justice.’” *Id.* (alteration in original) (quoting *Monahan v. Washburn*, 507 N.E.2d 1045, 1047 (Mass. 1987)).

a record makes it nearly impossible for indigent defendants to successfully litigate a claim for ineffective assistance of counsel, a procedural safeguard guaranteed to them under the Sixth Amendment.<sup>23</sup>

Indigent defendants make up the majority of the cases that plead out.<sup>24</sup> The defendants' lack of economic resources renders them dependent on appointed counsel for representation and more vulnerable to incompetence.<sup>25</sup> At the same time, the large caseloads, low pay, and lack of record create financial incentives for attorneys to resolve cases as quickly as possible and gives little incentive for other system participants to hold them accountable.<sup>26</sup> This lack of accountability, combined with a justice system that relies on self-interested parties "lobbying" cases in secrecy, eviscerates indigent defendants' right to counsel under the Sixth Amendment.<sup>27</sup> In effect, the current practice of plea bargaining in lobby conferences sacrifices the interest of indigent defendants in the name of efficiency.<sup>28</sup>

This Note does not advocate doing away with lobby conferences. It acknowledges the entrenched practice of lobby conferences in district courts and instead argues that the current test for ineffective assistance of counsel should reflect the increased burden the current practice places on indigent defendants. Part I of this Note will explore the roots of lobby conferences in the United States and, more specifically, in

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<sup>23</sup> See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1088–89 (2006).

<sup>24</sup> See *id.* at 1034 ("Poor people account for more than 80% of individuals prosecuted. These criminal defendants plead guilty approximately 90% of the time.")

<sup>25</sup> See COLE, *supra* note 1, at 76; Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1203–04. Justice Marshall, in his dissenting opinion in *Strickland*, noted that:

It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case.

*Strickland v. Washington*, 466 U.S. 668, 708 (1984) (Marshall, J., dissenting).

<sup>26</sup> See *infra* notes 59–63, 82–87 and accompanying text (discussing how the current system of plea bargaining creates financial incentives for attorneys and administrative incentives for judges to plea cases as quickly as possible).

<sup>27</sup> See *Gaumont*, 2002 WL 732152, at \*4 n.2; Backus & Marcus, *supra* note 23, at 1088–89. The term "lobbying cases" comes from the *Gaumont* decision and refers to plea bargaining in lobby conferences. See *id.*

<sup>28</sup> See Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 163 (2001); Murphy, *supra* note 14, at 54. Levinson argues that although the *Strickland* test "may cheat defendants out of procedural fairness, it can be viewed as a necessary evil in the name of judicial economy." Levinson, *supra*, at 163.

Massachusetts. Part II will discuss the current use of lobby conferences to facilitate plea bargaining to the exclusion of the criminal defendant. Part III will trace the rise of the Sixth Amendment “right to counsel revolution” and its recent application to plea bargaining. Part IV will analyze how the current use of lobby conferences in Massachusetts violates the Sixth Amendment right to counsel by undermining a criminal defendant’s ability to hold appointed counsel accountable. Finally, Part V will propose a revised approach to ineffective assistance of counsel claims. The proposal seeks to address the increased burden placed on indigent defendants by the practice of plea bargaining in unrecorded lobby conferences.

### I. LOBBYING CASES

The practice of holding unrecorded lobby conferences to relieve congestion in the courts is long-standing. Lobby conferences date back to the fixed session terms of nineteenth century English courts.<sup>29</sup> As court case loads increased, English judges began hearing “subsidiary or collateral” issues of procedure in their chambers when court was not in session to expedite the resolution of cases.<sup>30</sup> As a result, the terms “chamber conference” and “lobby conference” signified any place where the judge heard motions and issued orders when court was not in session.<sup>31</sup> Historically, courts held these lobby conferences off the record.<sup>32</sup> By facilitating candid exchanges between attorneys and judges, court officials viewed the informal nature of off the record lobby conferences as necessary to facilitate plea bargains to help settle cases more quickly and efficiently.<sup>33</sup> Today the practice is institutionalized in the Massachusetts criminal justice system.<sup>34</sup>

Even though the debate over recording lobby conferences began over thirty years ago, district courts in Massachusetts currently do not have a court rule mandating that lobby conferences be recorded.<sup>35</sup> As

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<sup>29</sup> See *Von Schmidt v. Widber*, 34 P. 109, 110 (Cal. 1893). The English courts had a fixed term of ninety-one days when the court could be in session. See *id.*

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

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *Murphy*, *supra* note 14, at 54.

<sup>34</sup> See *id.*

<sup>35</sup> See MASS. DIST. CT. SPEC. R. 211(A)(1); JEROME S. BERG, *ROUGH JUSTICE TO DUE PROCESS: THE DISTRICT COURTS OF MASSACHUSETTS 1869–2004*, at 60 (2004) (noting that in 1974 Chief Justice Flaschner of the Massachusetts Trial Courts advised judges to record lobby conferences). Federal law requires that all proceedings in open court in criminal cases be recorded. See 28 U.S.C. § 753(b)(1) (2000). Similarly, the Special Rules of the District Courts

early as 1974, Chief Justice Flaschner advised judges against holding lobby conferences off the record.<sup>36</sup> More recent cases have also reiterated the stance of the Massachusetts appellate courts, recommending that lobby conferences be put on the record.<sup>37</sup> Nevertheless, in Massachusetts district courts, the issue of whether lobby conferences should be held on the record is left solely to the discretion of the individual judges.<sup>38</sup> Furthermore, individual attorneys are responsible for supplementing the record after an unrecorded lobby conference.<sup>39</sup> Thus, even if an issue is raised during a lobby conference, a defendant is prevented from raising the issue on appeal unless the defense attorney raised it on the record.<sup>40</sup>

In recent years, however, Massachusetts Superior Court judges began holding lobby conferences on the record or in open court.<sup>41</sup> This shift was partly due to a highly publicized lawsuit involving a Massachu-

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of Massachusetts 211(A)(1) state that "all courtroom proceedings . . . shall be recorded electronically." MASS. DIST. CT. SPEC. R. 211(A)(1). Rule 9 of the District Court Supplemental Rules of Criminal Procedure extends Rule 211 to criminal cases in the District Court. MASS. DIST. SUPP. R. CRIM. P. 9. Given that recording in Massachusetts district courts is only mandated in the courtroom, there is no rule that explicitly guides the recording of out of court criminal proceedings, such as lobby conferences.

<sup>36</sup> See BERG, *supra* note 35, at 60. Judge Flaschner was also critical of bench conferences that were held off the record, calling them the "older rough justice model of a District Court" that "deteriorated from legal impropriety to making a mockery out of the judicial process." *Id.* at 54–55.

<sup>37</sup> See *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 758 n.15 (Mass. 2007) ("If there was ever a case that demonstrates the need for lobby conferences, where cases or other court matters are discussed, to be recorded, this is the case. This litigation, with all its unfortunate consequences for those involved, might not have occurred if the critical lobby conference . . . had been transcribed."); *Commonwealth v. Fanelli*, 590 N.E.2d 186, 189 (Mass. 1992) ("[I]f a lobby conference is held, the better practice is to record it, and provide a copy of the recording to the defendant on request, so that the defendant may know what was said."); *Commonwealth v. Rosenfield*, 478 N.E.2d 165, 167 n.1 (Mass. App. Ct. 1985) ("We fail to see what purpose an unrecorded bench conference could have served in a criminal case without a jury.").

<sup>38</sup> See *Murphy*, 865 N.E.2d at 758 n.15 (leaving whether to record lobby conferences to the discretion of individual judges).

<sup>39</sup> See AM. BAR ASS'N., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 92 (rev. ed. 2003).

<sup>40</sup> See, e.g., *Zedros v. Kenneth Hudson, Inc.*, 418 N.E.2d 1279, 1280–81 (Mass. App. Ct. 1981) (refusing to consider error in an unrecorded closing argument because counsel did not request that a record be made). This may raise other plausible arguments against holding lobby conferences off the record, including the right to fair trial and meaningful appellate review. However, this Note will only address the Sixth Amendment right to counsel during the plea bargaining process.

<sup>41</sup> See *Gaumont*, 2002 WL 732152, at \*4 n.2; Peter W. Agnes, Jr., *Some Observations and Suggestions Regarding the Settlement Activities of Massachusetts Trial Judges*, 31 SUFFOLK U. L. REV. 263, 306–07 (1997).

setts Superior Court Judge and statements he allegedly made during an off the record lobby conference.<sup>42</sup> Many judges feared that the lack of record left them vulnerable if an attorney misconstrued their words and alleged misconduct, such as coercion to take a plea.<sup>43</sup>

Nevertheless, unrecorded lobby conferences maintain a stronghold in Massachusetts district courts as an essential tool to facilitate expeditious settlement.<sup>44</sup> District courts occupy a unique position in the Commonwealth as the “major point of access,” handling “the lion’s share of legal business.”<sup>45</sup> Even though Massachusetts district courts have long been courts of record, it was not until the 1970s that the court began to preserve testimony on the record.<sup>46</sup> The congestion and informality that define district courts are commonly stated reasons for

<sup>42</sup> See *Murphy*, 865 N.E.2d at 749–51. Massachusetts Superior Court Judge Murphy sued the Boston Herald for defamation after an exchange that occurred during an off the record lobby conference. *Id.* The Boston Herald published a series of articles claiming that Judge Murphy was lenient on crime, “letting four accused rapists return to the streets in the past week, [having] a pro-defendant stance and [having] heartlessly demeaned victims.” *Id.* 749–50. The reporter then quoted statements allegedly made by Judge Murphy during an unrecorded lobby conference when prosecutors confronted the judge about lenient sentencing. *See id.* at 750. The lack of record allowed the reporter to take the Judge’s words out of context and, as the jury found, materially change the meaning conveyed by the statements. *See id.* at 754–58.

<sup>43</sup> *See id.* at 749–50.

<sup>44</sup> *Murphy*, *supra* note 14, at 54. *Gaumont* is an example of one judge’s comparison of lobby conferences to a process akin to an assembly line:

A lobby conference is often requested in many criminal cases . . . where the parties disagree as to what sentence should be imposed in the event the defendant pleads guilty. The purpose of such a lobby conference then is to determine what sentence the judge will give upon a plea. . . . Resorting to the oft used analogy of making sausage, the process of plea negotiation in a lobby conference may be messy and even unappealing, but the defendant is eager to engage in the process because he seeks to know the flavor of the end result. In short, the defendant is seeking as much information as possible fore [sic] making an important decision.

*Gaumont*, 2002 WL 732152, at \*2.

<sup>45</sup> Susan S. Silbey, *Making Sense of the Lower Courts*, 6 JUST. SYS. J. 13, 13 (1981). The 1920s brought reform to Massachusetts district courts, which relieved some of the congestion experienced by the Superior Court. *See BERG*, *supra* note 35, at 26–28. The reform included increasing the jurisdictional limit for civil cases and granting sole jurisdiction over all motor vehicle tort cases to the district courts. *See id.*

<sup>46</sup> *See Commonwealth v. Leach*, 141 N.E. 301, 304 (Mass. 1923) (“The district courts of this commonwealth are courts of record and of superior and general jurisdiction with reference to all matters within their jurisdiction. In this particular, judges of district courts stand on the same footing as judges of the superior court.”); *BERG*, *supra* note 35, at 58–59. Up until the 1970s, the Superior Court reviewed criminal and juvenile appeals on a de novo basis. *See BERG*, *supra* note 35, at 64. The courts rationalized that there was no need to preserve testimony because it was not being used in re-trials. *See id.*

maintaining lobby conferences off the record.<sup>47</sup> The most relied upon policy arguments in favor of the current practice are from the perspective of court administration.<sup>48</sup> The voices of criminal defendants, on the other hand, have been missing from this debate.<sup>49</sup>

## II. BACK-ROOM DEALING AND THE INDIGENT DEFENDANT

To echo language used in *Commonwealth v. Gaumond*, a plea agreement negotiated in a lobby conference between the judge and the lawyers may be regarded by the public, the defendant, and the victim as a “back room deal.”<sup>50</sup> The potential for abuse stems from the self-interest of the parties involved and the lack of accountability in these secret proceedings.<sup>51</sup>

The criminal justice system presumes that the defendant’s rights are represented merely because he has counsel.<sup>52</sup> Even when a criminal defendant is acting *pro se*, the Massachusetts courts have found no prejudice when the defendant was excluded from the proceeding because he was deemed to be represented by standby counsel.<sup>53</sup> The

<sup>47</sup> See Murphy, *supra* note 14, at 54.

<sup>48</sup> See *id.*

<sup>49</sup> See, e.g., Agnes, *supra* note 41, at 308 (discussing the policy behind lobby conferences solely from judge’s perspective).

<sup>50</sup> See 2002 WL 732152, at \*4 n.2. Even though *Gaumond* involved a sidebar discussion between the judge and the parties on the record, the judge goes on to state that lobby conferences

are in essence “back room deals” that do not involve the defendant, the victim, or the public. No matter how fair a judge is in the lobby conference . . . it is usually only the judge and the lawyers participating. Any plea agreement negotiated in such a private setting is likely to be misunderstood by the public, the defendant, or the victim.

*Id.*

<sup>51</sup> See *id.*

<sup>52</sup> Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1228 (2006) (“Courts often conclude that defendant’s absence does not violate the defendant’s right because they assume that counsel will protect the defendant’s interests in the hearing. But the defendant depends on counsel to raise the issue of the defendant’s absence as well as all other issues important to the defense.”).

<sup>53</sup> See *United States v. Bullard*, 37 F.3d 765, 767 (1st Cir. 1994). Defendant, acting *pro se*, was allegedly excluded from a lobby conference regarding the disqualification of a juror. See *id.* The defendant was also excluded from the subsequent questioning of the juror. See *id.* Instead the judge permitted standby counsel to represent defendant’s interests at these proceedings. See *id.* The reviewing court found no prejudice because standby counsel was present. See *id.* The court also refused to find error because the record was incomplete and did not clearly indicate that the defendant was absent. See *id.* Thus, in denying the defendant’s appeal, the reviewing court presumed that the defendant’s interests were being represented by the presence of counsel. See *id.*

court's presumption in favor of defense counsel does not account for any of the incentives the attorney may have to act in self-interest.<sup>54</sup> As a result, the current practice of relying on the defense attorney to supplement the record after the fact is entirely inadequate to safeguard the rights of the criminal defendant.<sup>55</sup>

### A. *The Judge*

Judges are under administrative pressures "to move cases along and discourage trials."<sup>56</sup> The Administrative Office of the Trial Courts (AOTC) imposes time standards on every case.<sup>57</sup> The performance of each judge is measured against these standards.<sup>58</sup> Therefore, a district court judge must try to move his or her docket along expidiously.<sup>59</sup> There is tremendous incentive for the judge to appoint counsel that will help to dispose of cases quickly.<sup>60</sup> The practice of unrecorded lobby conferences allows the judge to negotiate the disposition of cases with only the attorneys present.<sup>61</sup> In Massachusetts, the current practice was best articulated in a recent letter to the editor from current Superior Court Judge Murphy:

[T]here are hundreds of real lobby conferences conducted by judges of all departments of the Trial Court every single day. . . .

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<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 542 (2007).

<sup>57</sup> See BERG, *supra* note 35, at 115. In 1980, the District Court Committee on Caseflow Management issued *Standards of Judicial Practice, Caseflow Management*, which assigned trial dates for disposition of cases, caseload limits, and limited the number of continuances for each case. *Id.* The AOTC is responsible for administration of all the Trial Courts in Massachusetts. The Administrative Office of the Trial Court, <http://www.mass.gov/courts/admin/aotc.html> (last visited Apr. 9, 2009).

<sup>58</sup> See Margaret H. Marshall, *Justice "Promptly, and Without Delay": Court Reform and Judicial Independence*, 117 YALE L.J. POCKET PART 172 (2008), <http://yalelawjournal.org/2008/03/18/Marshall.html>.

<sup>59</sup> See *id.*

<sup>60</sup> See COLE, *supra* note 1, at 89. Cole argues that an experienced attorney can make a judge's life difficult by "expend[ing] considerable time and resources" filing motions, developing evidence, and challenging errors. *See id.* This provides incentive to the judge to appoint a less qualified attorney to an indigent defendant in the interest of expediting the case. *See id.*

<sup>61</sup> Murphy, *supra* note 14, at 54.

[T]he lobby gives the interested parties the ability to cut to the chase and discuss the real strengths and weaknesses of the case, as well as the considerations involved in an appropriate sentencing.

....

[T]here are many times when a judge, in the course of a relaxed brainstorming session with counsel, will conjure up a settlement modality that has not even been considered by the parties, and which will settle a three-week case in one morning.

There are times when, although a global settlement may not be possible, the court may persuade counsel to waive some legal theory in the interests of efficiency.<sup>62</sup>

Even though Judge Murphy was recently involved in a lawsuit that arose during an unrecorded lobby conference, he maintains a steadfast commitment to the practice.<sup>63</sup> But it is clear from Judge Murphy's own words that, to the exclusion of the defendant, the judge and the attorney strike deals "in the interests of efficiency."<sup>64</sup>

### B. *The Attorney*

In addition to building a rapport with the judge, defense attorneys—appointed counsel in particular—may have financial incentive to cut a deal.<sup>65</sup> Professor Alschuler outlines two ways for private defense counsel to reach financial success.<sup>66</sup> In the first option, the attorney's reputation as a great trial lawyer brings in wealthy clients to whom he is able to devote a lot of his time.<sup>67</sup> However, building up one's practice can take a matter of years and can be difficult.<sup>68</sup> The second option, which seems more realistic for a greater number of attorneys, is to take on more cases for less pay.<sup>69</sup> The concern with this second approach is that it creates financial incentive for an attorney to plea bargain for a

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<sup>62</sup> *Id.*

<sup>63</sup> See *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 749–51 (Mass. 2007); *Murphy*, *supra* note 14, at 54.

<sup>64</sup> See *Murphy*, *supra* note 14, at 54.

<sup>65</sup> See Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1182.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

“quick buck.”<sup>70</sup> Professor Alschuler points out that the second option has become so common that it has earned some lawyers a negative label by members of their own criminal bar as “wholesalers” or “cop out lawyers.”<sup>71</sup> Furthermore, if an attorney is able to collect a fixed fee in advance from a client, he has even more incentive to dispose of the case as quickly as possible.<sup>72</sup>

In Massachusetts, the low pay for appointed counsel can create similar financial incentives for attorneys to plea bargain.<sup>73</sup> Massachusetts representation of indigent defendants depends on a hybrid system of 110 full-time CPCS attorneys and 2400 private court appointed attorneys.<sup>74</sup> Even though the full-time CPCS attorneys are salaried, the majority of the cases are handled by private counsel on an hourly basis.<sup>75</sup> The hourly rate is set by the CPCS and approved by the Massachusetts legislature.<sup>76</sup> Even with the recent pay increase, commentators routinely criticize Massachusetts public officials for maintaining some of the lowest paid appointed counsel in the country.<sup>77</sup> As a result, as Professor Alschuler points out, the low pay provides defense counsel with an incentive to take on more cases than they can try on the assumption that most of them will settle during plea negotiations.<sup>78</sup>

In light of the current shortage of appointed counsel in Massachusetts, attorneys that represent indigent defendants often take on large caseloads.<sup>79</sup> If an attorney is forced to sacrifice time or resources because of their large caseload, the sacrifice often comes at the expense of the indigent defendant, not a paying client.<sup>80</sup> As a result, a defense attorney has an extraordinary amount of incentive to foster the rapid turnover of cases through plea bargaining, while at the same time pre-

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<sup>70</sup> See Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1182. This is not to say that most defense attorneys only care about profit. See *id.* Rather, this Note argues that the current system is designed in a way that encourages this type of abuse. Lobby conferences, in particular, foster this type of abuse because they take place in front of the judge, without the defendant and off the record.

<sup>71</sup> See *id.* at 1182–84.

<sup>72</sup> See *id.* at 1200.

<sup>73</sup> See SPANGENBERG GROUP, *supra* note 3, at 2; Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1182.

<sup>74</sup> See SPANGENBERG GROUP, *supra* note 3, at 1.

<sup>75</sup> See *id.* at 1, 2.

<sup>76</sup> See *id.* at 2.

<sup>77</sup> Editorial, *An Open Letter to the Candidates*, MASS. LAW. WKLY., Sept. 25, 2006, at 62.

<sup>78</sup> See Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1182.

<sup>79</sup> See SPANGENBERG GROUP, *supra* note 3, at 1; Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1182.

<sup>80</sup> See Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1182, 1203.

serving personal relationships with other system participants.<sup>81</sup> In addition, given that lobby conferences happen behind closed doors without any record of the proceeding, the defense attorney “is not subject to review by the people who pay for it or by anyone else.”<sup>82</sup> This current practice of plea bargaining gives little incentive for any system participant, other than the defendant, to hold appointed counsel accountable.<sup>83</sup> As the only one with an incentive to hold defense counsel accountable, an indigent defendant becomes the only one with the burden.<sup>84</sup>

### C. *The Absent Defendant*

In the current framework, the potential for abuse in lobby conferences is exacerbated by the fact that the law considers the defendant’s role in the process subservient to his attorney’s primary role and so the defendant is often left out of the proceeding.<sup>85</sup> In *Jones v. Barnes*, the Court held that the defendant has the “ultimate authority to make certain fundamental decisions regarding the case.”<sup>86</sup> This includes whether to plead guilty and whether to accept a plea agreement.<sup>87</sup> However in reality, “over 90 percent of criminal defendants plead guilty, generally without any significant time expended on their case. In recent studies, between half and four-fifths of counsel entered pleas without interviewing any prosecution witnesses, and four-fifths did so without filing any defense motions.”<sup>88</sup> Another study in a survey of about 700 public defenders found that 46.7% somewhat agreed or strongly agreed that they should secure their client’s consent before seeking plea agreements from the prosecutor; the remainder somewhat disagreed or strongly disagreed.<sup>89</sup>

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<sup>81</sup> See *id.* at 1198.

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

<sup>83</sup> See *id.*

<sup>84</sup> See *id.*

<sup>85</sup> See Poulin, *supra* note 52, at 1228; Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 7 & n.22 (1998).

<sup>86</sup> 463 U.S. 745, 751 (1983).

<sup>87</sup> *Id.*

<sup>88</sup> DEBORAH L. RHODE, ACCESS TO JUSTICE 124 (2004).

<sup>89</sup> See Uphoff & Wood, *supra* note 85, at 32, 41. Although the survey focused on defense attorneys in the public defender’s office, the study is relevant to this discussion because it reflects the quality of representation indigent defendants receive in this country. *Id.*

Likewise, the current practice of lobby conferences fosters this lawyer-centered model where the lawyer—as a detached expert—is perceived to be in a better position to make strategic decisions.<sup>90</sup> Under this model, the defendant is perceived to be a hindrance to the candid exchange between skilled professionals and is thus excluded from the lobby conference.<sup>91</sup> This model is even more problematic with indigent defendants who do not choose their lawyers and have no guarantee of a “meaningful” relationship with appointed counsel.<sup>92</sup> As a result, the current framework compromises the voice of the indigent defendant in the name of efficiency.<sup>93</sup>

### III. THE RISE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

*[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.*<sup>94</sup>

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.”<sup>95</sup> The Sixth Amendment right to counsel attaches at the time judicial proceedings are initiated and extends to subsequent plea negotiations.<sup>96</sup> The Supreme Court in later cases expanded the constitutional right to state courts, as well as to felony and misdemeanor offenses.<sup>97</sup> In 1963 the Supreme Court in *Gideon v. Wain-*

<sup>90</sup> See *id.* at 7 & n.22.

<sup>91</sup> See *id.*

<sup>92</sup> See *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (rejected the notion that Sixth Amendment guarantees a defendant a meaningful attorney-client relationship). However, this does not preclude counsel from having “an obligation to *seek* to develop a relationship of trust with [a] client.” Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 375.

<sup>93</sup> See *Uphoff & Wood*, *supra* note 85, at 7; *Murphy*, *supra* note 14, at 54.

<sup>94</sup> *Griffin v. Illinois*, 351 U.S. 12, 19, 21 (1956) (holding that an indigent defendant is entitled to a copy of the transcript regardless of his ability to pay).

<sup>95</sup> U.S. CONST. amend. VI.

<sup>96</sup> *State v. Donald*, 10 P.3d 1193, 1200 (Ariz. Ct. App. 2000). Even though a criminal defendant does not have a constitutional guarantee to a plea bargain, once the state initiates plea negotiations the defendant has a Sixth Amendment right to be “adequately informed of consequences before deciding whether to accept or reject the offer.” See *id.*; also *United States v. Gordon*, 156 F.3d 376, 379–80 (2nd Cir. 1998) (concluding that a defendant has a right to counsel during plea negotiations).

<sup>97</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Gideon v. Wainright*, 372 U.S. 335, 344 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938); *Powell v. Alabama*, 287 U.S. 45, 71 (1932). In *Powell v. Alabama* the Supreme Court for the first time recognized the right to counsel for indigent defendants, but the Court limited the right to state capital cases. See 287

right expanded the right to counsel beyond capital cases to all indigent criminal defendants and recognized that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided.”<sup>98</sup>

In 1970, the Supreme Court clarified in *McMann v. Richardson* that the right to counsel is a right to “effective assistance of competent counsel.”<sup>99</sup> The Court held that an attorney must meet minimum standards of competence to ensure effective assistance of counsel.<sup>100</sup> *Strickland v. Washington* set up a two-prong test that a criminal defendant must meet to hold his lawyer accountable for ineffective assistance of counsel.<sup>101</sup> Under the two-prong test the defendant must show: (1) his attorney’s deficient representation, and (2) that the deficiency prejudiced his defense.<sup>102</sup> In reviewing counsel’s performance the court takes the totality of circumstances into consideration but with a “strong presumption” that the attorney’s conduct was adequate.<sup>103</sup> The court in *Strickland* went on to point out that the test was in no way meant to “improve the quality of legal representation,” but was meant to provide a procedural safeguard for the Sixth Amendment by ensuring that the procedure the court followed is fair and just.<sup>104</sup>

In 1985, the Supreme Court for the first time applied the *Strickland* test to challenges of guilty pleas based on ineffective assistance of coun-

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U.S. at 71 (“[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.”). Six years later, the Sixth Amendment guarantee was upheld in all federal criminal prosecutions. See *Johnson*, 304 U.S. at 463. Later it was extended to all criminal felony prosecutions, including state felonies. See *Gideon*, 372 U.S. at 341–44. In 1972, the Supreme Court applied the Sixth Amendment to misdemeanors as well as felonies. See *Argersinger*, 407 U.S. at 37.

<sup>98</sup> See 372 U.S. at 344. Even though the Supreme Court first recognized an indigent defendant’s right to appointed counsel in *Powell v. Alabama*, it was not until *Gideon v. Wainwright* that the right was expanded beyond capital cases to all criminal defendants. See *Gideon*, 372 U.S. at 344; *Powell*, 287 U.S. at 71. The Court in *Gideon* went on to proclaim that “lawyers in criminal courts are necessities, not luxuries.” 372 U.S. at 344.

<sup>99</sup> 397 U.S. 759, 771 (1970).

<sup>100</sup> See *id.*

<sup>101</sup> See 466 U.S. 668, 687 (1984).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.* at 690 (“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”). The reasonableness of the lawyer’s conduct must be assessed in light of the facts as they were known to the attorney at the time. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Furthermore, as long as the lawyer’s conduct may be attributed to “sound trial strategy” the court will avoid second guessing it. See *Darden v. Wainwright*, 477 U.S. 168, 186 (1986).

<sup>104</sup> *Strickland*, 466 U.S. at 689.

sel.<sup>105</sup> In the context of plea bargaining, the fairness of the trial becomes irrelevant; the fairness of the plea process is the sole focus of the test.<sup>106</sup> The Court held that a guilty plea must be “a voluntary and intelligent choice,” and it may be challenged for ineffective assistance of counsel if an attorney did not provide “reasonably competent advice.”<sup>107</sup> To meet the *Strickland* test, the defendant must overcome the presumption that the attorney’s conduct was proper.<sup>108</sup> In order to meet the first prong of the test the defendant must show that the attorney’s representation fell below an objective standard of reasonableness.<sup>109</sup> This merely amounts to the minimum standards of competence set out in *McMann*.<sup>110</sup> The second prong is deemed satisfied if “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”<sup>111</sup> Under *Strickland*, a “reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>112</sup> The defendant can also meet the prejudice prong of the test if he can show that “he would have accepted the plea but for counsel’s advice, and that had he done so he would have received a lesser sentence.”<sup>113</sup>

The defendant must not merely allege that he would have plead differently, but actually support it with objective facts on the record to allow the court to meaningfully assess the claim.<sup>114</sup> *Hill v. Lockhart* illustrates how difficult it is for a defendant to meet the prejudice prong without a complete record.<sup>115</sup> Even though the defendant was able to show that his attorney improperly advised him as to when he would be eligible for parole, the Court held that the defendant did not satisfy “the kind of prejudice necessary” because he did not allege any “special circumstances that might support the conclusion that he placed par-

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<sup>105</sup> See *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In *Lockhart* the defendant appealed his conviction, claiming the guilty plea was involuntary. See *id.* at 54. The defendant argued that he plead guilty in large part relying on his attorney’s erroneous advice about his parole eligibility. See *id.* at 55. The defendant was told by his attorney that he would be eligible for parole after serving one third of his prison sentence, even though state law mandated one half before being eligible for parole. See *id.*

<sup>106</sup> See *Wanatee v. Ault*, 259 F.3d 700, 703 (8th Cir. 2001).

<sup>107</sup> See *Lockhart*, 474 U.S. at 56; *McMann*, 397 U.S. at 770–71.

<sup>108</sup> See *Strickland*, 466 U.S. at 690.

<sup>109</sup> See *Lockhart*, 474 U.S. at 57.

<sup>110</sup> See *id.* at 58–59.

<sup>111</sup> *Id.* at 59; see also *Strickland*, 466 U.S. at 694.

<sup>112</sup> 466 U.S. at 694.

<sup>113</sup> See *Wanatee*, 259 F.3d at 704.

<sup>114</sup> See *Commonwealth v. Saferian*, 315 N.E.2d 878, 883–84 (Mass. 1974). Massachusetts courts base the decision on “specific circumstances of the given case.” See *id.* at 883.

<sup>115</sup> See 474 U.S. at 60.

ticular emphasis on his parole eligibility in deciding whether or not to plead guilty.<sup>116</sup> The Court reasoned that defendant's mistaken belief that he would be eligible for early parole did not alter his decision about whether or not to go to trial.<sup>117</sup>

In his concurring opinion, Justice White argued that failure to inform the defendant of relevant law pertaining to his case satisfied the first prong of the *Strickland* test.<sup>118</sup> Even though he criticized the majority opinion, Justice White still emphasized the importance of the lack of a complete court record to the *Strickland* analysis.<sup>119</sup> Justice White noted that had the record stated that the defense counsel was aware of the defendant's prior conviction, which would make him ineligible for early release, the defendant would have been entitled to a hearing for ineffective assistance of counsel.<sup>120</sup> Subsequently, the *Strickland* test has proven to be a tough hurdle for defendants to overcome even in egregious cases, with the prejudice prong posing the biggest challenge.<sup>121</sup> Despite this, the test remains a crucial tool for defendants to hold their attorneys accountable to ensure fairness in the plea bargaining process.<sup>122</sup> Given that the majority of criminal cases are resolved without

<sup>116</sup> See *id.* (internal quotations omitted).

<sup>117</sup> See *id.* The court reasoned:

Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

*Id.*

<sup>118</sup> See *id.* at 62 (White, J., concurring).

<sup>119</sup> See *id.* at 62–63 (concurring with the majority because the record failed to show that the attorney knew of defendant's prior conviction).

<sup>120</sup> See *Lockhart*, 474 U.S. at 63.

<sup>121</sup> Backus & Marcus, *supra* note 23, at 1088–89 & n.304; see, e.g., *People v. Garrison*, 765 P.2d 419, 440–41 (Cal. 1989) (holding that defendant was not denied effective assistance of counsel where defense counsel was arrested driving to court with 0.27 blood-alcohol content); *People v. Tippins*, 570 N.Y.S.2d 581, 582 (App. Div. 1991) (holding that defendant was not denied effective assistance of counsel where the defense attorney slept through a portion of the trial); *People v. Badia*, 552 N.Y.S.2d 439, 440 (App. Div. 1990) (holding that defendant was not denied effective assistance of counsel where the defense attorney admitted to using heroin and cocaine during trial); see also Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 245–249 (1991) (summarizing additional cases).

<sup>122</sup> See Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1179; cf., e.g., *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (holding that defendant received ineffective assistance of counsel where defense attorney “failed to investigate and to present substantial mitigating evidence” at sentencing).

trial, analyzing *Strickland* in the context of plea negotiations provides a more realistic understanding of how the test is used today.<sup>123</sup>

#### IV. ENFORCING THE INDIGENT DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL

In *Strickland v. Washington*, the Supreme Court held that the new standard was meant to safeguard criminal defendants' Sixth Amendment right to a fair trial.<sup>124</sup> Justice O'Connor articulated that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."<sup>125</sup> In 2000, the Supreme Court again reaffirmed that procedural rights are the underpinning of the constitutional protection in *Strickland*.<sup>126</sup>

The current practice in Massachusetts of plea bargaining in lobby conferences violates the policy of procedural fairness articulated by Justice O'Connor in *Strickland*.<sup>127</sup> In Massachusetts district courts, plea bargaining takes place behind closed doors in the judge's chambers, without the defendant and without any record of the proceeding.<sup>128</sup> There are no uniform standards for the plea bargaining process in order to accommodate the variety of cases and proceedings before the court.<sup>129</sup> This lack of standardization, when combined with the lack of record at lobby conferences, renders the standard under *Strickland* extraordinarily difficult for the defendant to meet.<sup>130</sup> If a criminal defendant wants to file a claim for ineffective assistance of counsel, the defendant must meet both prongs of the *Strickland* test.<sup>131</sup> Even though a defendant may be able to identify particular problems in the attorney's representation, the prejudice prong of the test is the biggest hurdle for

<sup>123</sup> Alschuler, *Defense Attorney's Role*, *supra* note 19, at 1179; Murray, *supra* note 15.

<sup>124</sup> See 466 U.S. 668, 689 (1984).

<sup>125</sup> *Id.* at 696.

<sup>126</sup> See *Williams v. Taylor*, 529 U.S. 362, 390 (2000). In *Williams*, the trial court found that the attorney's failure to introduce defendant's violent childhood and psychological records at sentencing was not a tactical decision, but was due to attorney's erroneous belief that state law prohibited such evidence. See *id.* at 395. The Court concluded that the prejudice prong of the *Strickland* test was met because there was a reasonable probability that the sentencing proceeding would have had a different outcome had counsel explained the significance of all the evidence available at the time. See *id.* at 398-99. The Court, in finding ineffective assistance of counsel, relied solely on the post-conviction record. See *id.*

<sup>127</sup> See *Strickland*, 466 U.S. at 689; Backus & Marcus, *supra* note 23, at 1088-89.

<sup>128</sup> See, e.g., *Commonwealth v. Gaumond*, No. 98-2813-14-15, 2002 WL 732152, at \*4 n.2 (Mass. Super. Ct. Apr. 19, 2002).

<sup>129</sup> White, *supra* note 92, at 373.

<sup>130</sup> See COLE, *supra* note 1, at 78; Backus & Marcus, *supra* note 23, at 1088-89.

<sup>131</sup> See *Strickland*, 466 U.S. at 687.

defendants to overcome.<sup>132</sup> This is because the court largely relies on the record to determine whether the second prong of the test has been met.<sup>133</sup>

Justice Marshall, in his dissenting opinion in *Strickland*, specifically critiqued the Court's reliance on the record to prove the prejudice prong.<sup>134</sup> He noted "the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."<sup>135</sup> As a result, the burden of supplementing the record falls on the defendant.<sup>136</sup> By filing the ineffective assistance of counsel claim, the defendant is already put at a disadvantage because of the need to secure other counsel or risk proceeding without one.<sup>137</sup> The practical problems of supplementing the record after the fact may create gaps that will further hinder the defendant's ability to satisfy the prejudice prong.<sup>138</sup> The defendant may also be facing a real possibility that the parties present at the lobby conference may no longer be able to recall the proceeding in detail.<sup>139</sup> The defense attorney, along with other system players present at the lobby conference, may have incentive to refrain from revealing the misconduct in order to avoid being professionally disciplined, or to safeguard a rapport with the judge.<sup>140</sup> As a result, the defendant must rely on an incomplete record to satisfy what is already a demanding test.<sup>141</sup>

Lobby conferences violate the policy of procedural fairness articulated by Justice O'Connor in *Strickland* because they undermine the policy of equity that has shaped the Sixth Amendment right to counsel jurisprudence.<sup>142</sup> *Strickland* is part of a long line of cases that make up

<sup>132</sup> See Backus & Marcus, *supra* note 23, at 1089.

<sup>133</sup> See *id.*

<sup>134</sup> See *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

<sup>135</sup> *Id.*

<sup>136</sup> See Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 70 (1986).

<sup>137</sup> See *id.* at 70 n.309.

<sup>138</sup> See *Strickland*, 466 U.S. at 710 n.4 (Marshall J., dissenting) ("When defense counsel fails to take certain actions, not because he is 'compelled' to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.")

<sup>139</sup> See Berger, *supra* note 136, at 70 n.309.

<sup>140</sup> See *id.*; see also, e.g., *Evitts v. Lucey*, 469 U.S. 387, 390 n.3 (1985). The United States District Court for the District of Kentucky found ineffective assistance of counsel and referred the defendant's attorney to the Board of Governors of the Kentucky State Bar Association for disciplinary proceeding. See *Evitts*, 469 U.S. at 390 n.3.

<sup>141</sup> See *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

<sup>142</sup> See *id.* at 689; Jessa DeSimone, Comment, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1479 (2006).

the “right to counsel revolution.”<sup>143</sup> The right to counsel was included in the Bill of Rights to create a level playing field and protect against the power of the state.<sup>144</sup> It was also meant to “‘breathe life into the promise’ of the other Sixth Amendment guarantees,” such as the right to trial by jury, the right to a speedy and public trial, the right to confront and compel witnesses, and the right to notice of charges.<sup>145</sup>

Equity was the bedrock of the right to counsel revolution.<sup>146</sup> From the beginning, the Court saw the right to counsel as a necessity to ensure the fundamental fairness of the criminal process against the actions of the state.<sup>147</sup> In *Powell v. Alabama*, the Supreme Court upheld the right to counsel specifically to address the “tremendous advantage” of the prosecution over the lay person.<sup>148</sup> The Court recognized the imbalance of power between the prosecutor, who had the resources of the state, and a criminal defendant, who most often did not have the knowledge or the skills to negotiate the complexity of the legal system.<sup>149</sup> *Powell* held that the court has an obligation to safeguard these rights and appoint counsel for an indigent defendant, even when the defendant failed to request one.<sup>150</sup> Thus, according to *Powell*, the responsibility for ensuring the equitable balance of powers rests with the court, not the criminal defendant.<sup>151</sup>

The lack of record at lobby conferences means that the appellate court is no longer able to hold attorneys accountable, and the fate of the criminal defendant rests entirely on the integrity of his counsel.<sup>152</sup>

<sup>143</sup> See DeSimone, *supra* note 142, at 1479, 1482–83.

<sup>144</sup> See *Powell v. Alabama*, 287 U.S. 45, 66–68 (1932); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw. U. L. REV. 1635, 1640–41 (2003).

<sup>145</sup> See Metzger, *supra* note 144, at 1640 & n.25 (quoting AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 139 (1997)).

<sup>146</sup> See *id.* at 1640, 1642.

<sup>147</sup> See *id.* at 1642. The colonists, for example, instituted a comparable guarantee to the Sixth Amendment right to counsel. See *id.* at 1639–40. Many of the colonies rationalized the guarantee as a necessity to protect against prosecutorial privilege, governmental overreaching and to give “a fighting chance against the prosecution.” *Id.* at 1639. The guarantee meant to empower the ordinary citizen against what was seen as the “tremendous advantage” of the prosecution. *Id.* at 1640.

<sup>148</sup> See *id.* at 1642. *Powell* held that an indigent defendant’s right to counsel was violated when the court appointed counsel in a capital case on the morning of the trial. See 287 U.S. at 53–56. The court reasoned that the last minute appointment did not allow the attorney enough time to adequately prepare for the trial. See *id.* at 58–59.

<sup>149</sup> See Metzger, *supra* note 144, at 1642.

<sup>150</sup> 287 U.S. at 73.

<sup>151</sup> See *id.*; Metzger, *supra* note 144, at 1642–43.

<sup>152</sup> See Alschuler, *Defense Attorney’s Role*, *supra* note 19, at 1195, 1198; Backus & Marcus, *supra* note 23, 1088–89.

At the same time, the defendant's ability to hold his attorney accountable rests at the discretion of the individual trial judge's willingness to record these lobby conferences.<sup>153</sup> Because lobby conferences are held for the purpose of settling cases as efficiently as possible, the primary focus is not equity.<sup>154</sup> Thus, the current framework in Massachusetts hinders a defendant from asserting an ineffective assistance of counsel claim and erodes this "essential barrier against arbitrary or unjust deprivation of human rights."<sup>155</sup>

## V. PROCEDURAL SOLUTION TO SAFEGUARD THE INDIGENT DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL

The practice of lobbying cases to relieve court congestion undermines the defendant's ability to take advantage of a procedural safeguard guaranteed by the Sixth Amendment.<sup>156</sup> Lobby conferences rob the defendant of the right to relief where there is ineffective assistance of counsel and deprive the court of an important tool of equity.<sup>157</sup> As a remedy, Massachusetts should adopt a categorical presumption of prejudice in assessing the defendant's ineffective assistance of counsel claim arising in the context of lobby conferences. This approach serves the policy of equity that has long defined the "right to counsel revolution" by remedying the increased burden lobbying cases places on the defendant.<sup>158</sup> In addition, this approach is consistent with the approach articulated by Justice Brennan in the context of conflict of interest cases but avoids the pitfalls of a blanket rule that mandates recording of lobby conferences.<sup>159</sup>

### A. Pitfalls of Mandating the Recording of Lobby Conferences

In an attempt to resolve the conflict between efficiency and the increased burden on the criminal defendant, many states mandate the

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<sup>153</sup> See *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 758 n.15 (Mass. 2007).

<sup>154</sup> See *Levinson*, *supra* note 28, at 163; *Murphy*, *supra* note 14, at 54.

<sup>155</sup> *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). *Johnson* marked a shift where the Court no longer engaged in case by case analysis and extended the right to counsel to all indigent defendants in federal courts. See *Metzger*, *supra* note 144, at 1644.

<sup>156</sup> See *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Murphy*, *supra* note 14, at 54.

<sup>157</sup> See *Backus & Marcus*, *supra* note 23, at 1088–89; *Metzger*, *supra* note 144, at 1642.

<sup>158</sup> See *Powell v. Alabama*, 287 U.S. 45, 66–68 (1932); *Metzger*, *supra* note 144, at 1640–41.

<sup>159</sup> See *Cuyler v. Sullivan*, 446 U.S. 335, 353–54 (1980) (Brennan, J., concurring); see also, e.g., *People v. Freeman*, 882 P.2d 249, 283 (Cal. 1994).

recording of lobby conferences in criminal proceedings.<sup>160</sup> The approaches taken by different states vary in the amount of discretion a judge has in deciding whether to record lobby conferences.<sup>161</sup> Even though the language and strictness of these rules vary, the result remains the same: these policies have failed to create a more complete record.<sup>162</sup> This is because judges are still the ones interpreting and applying these rules.<sup>163</sup> Across these jurisdictions, judges conclude that failure to follow the rules is harmless error.<sup>164</sup> The few times that the courts found that failure to record lobby conferences was not a harm-

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<sup>160</sup> See, e.g., TENN. CODE ANN. § 40-14-307 (West 2007); *State v. Hammons*, 737 S.W.2d 549, 551 (Tenn. Crim. App. 1987). The *Hammons* court recognized that the state of Tennessee specifically mandates that every criminal proceeding, whether or not it is held in open court, must have a court reporter present to preserve the record for appellate review. *Hammons*, 737 S.W.2d at 551. In accordance with this rule, the Tennessee Court of Appeals opinion stated:

The holding of off-the-record bench conferences impairs the ability of this Court to afford the parties a full and complete review of the issues. Such conferences create a void in the record, and prevent this Court from determining why the trial court may have ruled in a certain manner. For this reason trial judges should not conduct off-the-record bench conferences.

*See id.* Nevertheless, the reviewing court did not find that the trial court abused its discretion in conducting the proceedings off the record. *See id.* at 552. Even though the reviewing court acknowledged that the record did not provide much information about what was discussed at these proceedings, the court concluded that “it takes very little imagination to perceive the reason why” the trial court did not accept the plea agreement which formed the basis for defendant’s appeal. *See id.* 551-52. In the end, even though there was a clear violation of the state statute, the reviewing court failed to find a violation of defendant’s procedural rights. *See id.*

<sup>161</sup> See *Hammons*, 737 S.W.2d at 551-52. Compare *Jones v. Dist. Court of Second Judicial Dist.*, 780 P.2d 526, 528-29 (Colo. 1989) (concluding that the court has an affirmative duty to ensure that all proceedings are recorded), with *Atkins v. State*, 558 S.E.2d 755, 759 (Ga. Ct. App. 2002) (concluding that the defendant has the burden to supplement the record after the fact).

<sup>162</sup> See, e.g., *State v. Pittman*, 420 S.E.2d 437, 441 (N.C. 1992) (finding harmless error because seven unrecorded bench conferences did not result in any “significant ruling”).

<sup>163</sup> See CAL. PENAL CODE § 190.9(a)(1) (West 2008) (“In any case in which a death sentence may be imposed, all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.”); *Freeman*, 882 P.2d at 283. Even though the reviewing court stressed that all proceedings must be on the record, they applied an abuse of discretion standard of review. *See Freeman*, 882 P.2d at 284. Given the high standard of review, the court found no abuse of discretion by the trial court in conducting proceedings off the record. *See id.*

<sup>164</sup> See, e.g., *Freeman*, 882 P.2d at 283; *Pittman*, 420 S.E.2d at 441. For example in *Freeman*, the reviewing court’s rationale was self-defeating. *See* 882 P.2d at 283-84. The court found harmless error, reasoning that the defendant could settle the record when the parties returned to open court and on the record. *See id.* However, in practice, the trial judge maintained the final discretion in deciding what went on the record. *See id.*

less error occurred when a defendant proved a clear Constitutional violation in addition to the lack of record.<sup>165</sup> For example, in *Sudler v. State*, the Delaware Supreme Court held that the lack of record prejudiced the defendant, but only in the context of his right to a trial by jury.<sup>166</sup> Even in jurisdictions that mandate the recording of lobby conferences, the policy of efficiency may outweigh the criminal defendant's interests in recorded lobby conferences.<sup>167</sup> Similarly, in Massachusetts, judges would most likely circumvent a rule mandating the recording of lobby conferences and would continue to deny indigent defendants effective relief.<sup>168</sup>

In *Douglas v. California*, decided on the same day as *Gideon v. Wainwright*, the Supreme Court extended the right to counsel to appellate cases.<sup>169</sup> In that decision the Court stressed equal protection to the "rich and poor alike."<sup>170</sup> The Court stated that "where the record is unclear or the errors are hidden, [an indigent defendant] has only the right to a meaningless ritual, while the rich man has a meaningful appeal."<sup>171</sup> In this landmark opinion, the Court for the first time recognized what may be seen as discrimination based on poverty.<sup>172</sup>

However, when only the rich are able to take advantage of these procedural safeguards, the courts are discriminating against indigent defendants.<sup>173</sup> Adopting a rule that judges will circumvent only perpetuates discrimination against indigent defendants by denying them

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<sup>165</sup> See, e.g., *Sudler v. State*, 611 A.2d 945, 947 (Del. 1992). In *Sudler*, after holding at least five unrecorded bench conferences, the trial judge dismissed five jurors after the criminal trial had already begun and without the required finding of necessity on the record. See *id.* at 947–48. The court reversed the conviction because the trial judge reduced the panel of jurors below the constitutionally mandated number without a record of any preliminary findings. See *id.* at 948. Even after such a blatant constitutional violation, the reviewing court stepped in only after the trial court was unable to reconstruct the record on remand. See *id.* at 946. The court held that failure to record the five sidebar conferences hampered effective appellate review. See *id.* at 947. The court reasoned that, "[i]t is inappropriate to recreate sidebar conferences *ex post facto*, particularly after the trial judge has taken irrevocable steps, related to or resulting from sidebar conferences, that effectively violated a fundamental right of the defendant." See *id.*

<sup>166</sup> See *id.* at 946–47.

<sup>167</sup> See, e.g., *Freeman*, 882 P.2d at 283.

<sup>168</sup> See *Douglas v. California*, 372 U.S. 353, 358 (1963).

<sup>169</sup> See *id.*

<sup>170</sup> See *id.* at 356.

<sup>171</sup> *Id.* at 358.

<sup>172</sup> See *id.*

<sup>173</sup> See COLE, *supra* note 1, at 69 ("Every day our system offers opportunities and privileges to those who can afford them while denying them to those who cannot. Any public good that is available at a price effectively discriminates against the poor . . .").

constitutionally guaranteed relief.<sup>174</sup> A defendant with means, who is not satisfied with the representation, will be able to seek different counsel.<sup>175</sup> An indigent defendant, on the other hand, does not have the financial means to pick initial counsel or seek a replacement if the current one proves to be ineffective.<sup>176</sup> In a system where defense counsel is seen as the “‘equalizer’ in the [plea] bargaining process,” failure to do his or her job leaves only the procedural safeguard to protect the substantive rights of the defendant in the adversarial system.<sup>177</sup> The current practice of plea bargaining jeopardizes this procedural safeguard because any gaps in the record increase the likelihood that an indigent defendant will not be able to meet the prejudice prong of the ineffective assistance of counsel claim.<sup>178</sup>

### B. *Benefits of a Categorical Presumption*

Resolving the current conflict will require a solution that recognizes the entrenched practice of lobby conferences in Massachusetts district courts, as well as balance the increased burden the current practice places on an indigent defendant.<sup>179</sup> The Supreme Court, in laying out the test for ineffective assistance of counsel, recognized that the prejudice prong of the test may be satisfied without the case-by-case analysis.<sup>180</sup> The Court proposed that a categorical presumption of the prejudice prong may be deemed satisfied when violations are easy for government to identify and correct:

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel’s assistance. . . . Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that

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<sup>174</sup> See *id.*

<sup>175</sup> See *id.* at 76 (describing how wealthy people can afford to be discriminating when choosing counsel).

<sup>176</sup> See *id.*

<sup>177</sup> See Alschuler, *Defense Attorney’s Role*, *supra* note 19, at 1179; see also *Strickland*, 466 U.S. at 687.

<sup>178</sup> See Backus & Marcus, *supra* note 23, at 1088–89 (noting that the appellate court will review the trial record to assess whether the prejudice prong of the ineffective assistance of counsel claim has been met).

<sup>179</sup> See *id.*; Murphy, *supra* note 14, at 54.

<sup>180</sup> See *Strickland*, 466 U.S. at 692.

reason and because the prosecution is directly responsible, easy for the government to prevent.<sup>181</sup>

The lack of record at lobby conferences acts as a “constructive denial of the assistance of counsel” because both the prosecution and the judge are aware of it and it is within their power to prevent.<sup>182</sup>

In addition to being easy to identify and correct, placing the burden for holding off the record lobby conferences on the prosecution and the court is consistent with the Sixth Amendment’s policy of equity.<sup>183</sup> The Supreme Court has recognized that “the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. . . . [Holding] a criminal trial itself implicates the State.”<sup>184</sup> Procedural fairness requires that both the courts and the prosecution share the burden of perpetuating a practice that undermines a criminal defendant’s right to counsel, especially one that is within their power to correct.<sup>185</sup>

Adopting a categorical approach, which presumes the satisfaction of the prejudice prong, should be limited to instances where the court holds lobby conferences off the record and the defendant alleges that ineffective assistance arose out of these proceedings. With the prejudicial prong under *Strickland* presumed satisfied, an indigent defendant no longer has the burden of supplementing the record and is left to prove the performance prong of the *Strickland* test.<sup>186</sup> The Court in *Strickland* wanted to make sure that the rule would allow for variation in tactical decisions that an attorney may adopt.<sup>187</sup> The rule would not

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

<sup>183</sup> See *Powell*, 287 U.S. at 66–68; Metzger, *supra* note 144, at 1640–41.

<sup>184</sup> See *Cuyler*, 446 U.S. at 344.

<sup>185</sup> See Backus & Marcus, *supra* note 23, at 1084–86. The authors explain that:

Prosecutors and judges must also bear some responsibility in maintaining . . . standards within the criminal justice system . . . .

. . . .

In appointing counsel, monitoring pretrial activities and evaluation counsel’s preparedness, observing courtroom performance and participating in plea bargaining negotiations, the judge must be cognizant that “[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.”

*Id.* (quoting *Lakeside v. Oregon*, 435 U.S. 333, 341–42 (1978)); see also *Glasser v. United States*, 315 U.S. 60, 71 (1942) (“Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.”).

<sup>186</sup> See *Strickland*, 466 U.S. at 687.

<sup>187</sup> See *id.* at 688–89.

affect this part of the test because the presumption that the attorney's conduct was adequate is part of the performance prong of the test.<sup>188</sup> The reviewing court, in adopting the rule that lobby conferences are *per se* prejudicial to criminal defendants, would still require the defendant to overcome the presumption that the attorney's conduct was adequate.<sup>189</sup> This approach will guarantee that "fair process [is] an essential element of an adversary system."<sup>190</sup>

### C. Justice Brennan's Approach

There are quite a number of cases where the Court has held that a showing of prejudice is presumed satisfied.<sup>191</sup> These include where defendant was deprived counsel by the court, when counsel was absent during a critical stage of trial, where the attorney was not licensed to practice law, where counsel was implicated in defendant's crime, where counsel's performance was extremely egregious, and where counsel had a conflict of interest.<sup>192</sup> These categories define a continuum of cases where the Court has found that the prejudice prong of the *Strickland* test satisfied.<sup>193</sup>

The conflicts of interest that arise in lobby conferences are analogous to those that arise in the context of multiple representation cases.<sup>194</sup> Justice Brennan, in his concurring opinion in *Cuyler v. Sullivan*,

<sup>188</sup> See *id.* at 689.

<sup>189</sup> See *id.* at 687.

<sup>190</sup> See Metzger, *supra* note 144, at 1642. Justice Marshall's dissenting opinion in *Strickland* proposed a more extreme version of this approach. See 466 U.S. at 710–12 (Marshall, J., dissenting). He stated that if the defendant is able to satisfy the performance prong of the test, then a defendant should not have to prove the prejudice prong. *Id.* Justice Marshall reasoned that if the attorney's conduct fell below standards prescribed by the Constitution then the defendant should not have the added burden of proving that the attorney's deficiency affected his case. *Id.* In those instances, Justice Marshall believed that the prejudice of the case may be presumed. See *id.*

<sup>191</sup> See, e.g., *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984); Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 440 (1996).

<sup>192</sup> Kirchmeier, *supra* note 191, at 441–44.

<sup>193</sup> *Id.* at 463. Kirchmeier proposes that ineffective assistance of counsel cases can be put on a continuum from the most to least egregious. See *id.* Kirchmeier argues that conflict of interest cases fall somewhere in the middle of the continuum and have a lower burden of proof. See *id.* at 464.

<sup>194</sup> See *Cuyler*, 446 U.S. at 343. In *Cuyler*, the defense attorney represented several co-defendants charged for the same crime. See *id.* at 337–38. The defendant alleged ineffective assistance of counsel based on defense counsel's conflict of interest. See *id.* The majority held that the defendant had the burden of objecting to the multiple representations to raise the issue on appeal. See *id.* at 346–47. Only once such an objection was brought to the court did the court have a duty to consider whether a conflict of interest existed. See *id.*

argued that if a court identifies a conflict of interest, it then has an affirmative duty to step in and apply a rebuttable presumption to the *Strickland* test.<sup>195</sup> The conflict of interest in *Cuyler* involved multiple representation, where defendants were charged with the same crime and represented by a single attorney.<sup>196</sup> Justice Brennan quoted the majority's holding that a "possible conflict inheres in almost every instance of multiple representation" to conclude that upon discovery of joint representation the court has an affirmative duty to ensure that the defendant actually waived his constitutional right to counsel and understands the potential dangers of such waiver.<sup>197</sup> As in earlier right-to-counsel cases, a court must presume that a defendant may not be aware of their rights or how to raise them.<sup>198</sup> Justice Brennan argued that only when the record indicates that the defendant made a knowing and intelligent choice should the defendant have the burden of showing that the conflict affected the adequacy of representation.<sup>199</sup> Otherwise, Justice Brennan advocated for a presumption that the prejudice prong of the *Strickland* test is satisfied.<sup>200</sup> The government, however, is still able to rebut the presumption by showing that the possibility of conflict did not actually affect the defendant's representation.<sup>201</sup>

Justice Brennan's approach in *Cuyler* recognizes the difficulty of proving the prejudice prong when there is a conflict of interest.<sup>202</sup> The Supreme Court, in the context of multiple representations, has concluded that assessing the impact of conflict of interest in plea negotiations is almost impossible.<sup>203</sup> Plea negotiations are often informal discussions between the defense counsel and the prosecution.<sup>204</sup> A defendant often may not understand what is appropriate under the

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Thus, the majority in *Cuyler* did not recognize that a judge had an affirmative duty to investigate whether there was a conflict of interest; that burden rested with the defendant. *See id.* at 347–348. In dicta, the Court suggested that a lower standard should be applied to conflict of interest cases. *See id.* at 349–50; *see also* Kirchmeier, *supra* note 192, at 454 & n.135.

<sup>195</sup> *See Cuyler*, 446 U.S. at 351 (Brennan, J., concurring).

<sup>196</sup> *See id.* at 337 (majority opinion).

<sup>197</sup> *See id.* at 352 (Brennan, J., concurring) (quoting the majority).

<sup>198</sup> *See id.*; *Powell*, 287 U.S. at 69.

<sup>199</sup> *See Cuyler*, 446 U.S. at 353 (Brennan, J., concurring).

<sup>200</sup> *See id.* Several lower courts have applied the Court's reasoning in *Cuyler* to a variety of conflict of interest cases other than multiple representations. *See* Kirchmeier, *supra* note 191, at 453.

<sup>201</sup> *See Cuyler*, 446 U.S. at 353–54 (Brennan, J., concurring).

<sup>202</sup> *See id.*

<sup>203</sup> *See* *Holloway v. Arkansas*, 435 U.S. 475, 490–91 (1978).

<sup>204</sup> *See* *Commonwealth v. Gaumond*, No. 98–2813–14–15, 2002 WL 732152, at \*4 n.2 (Mass. Super. Ct. Apr. 19, 2002).

circumstances.<sup>205</sup> Only a careful review of the record after the fact by an attorney who can understand the legal complexities may reveal the consequences of the counsel's errors.<sup>206</sup>

Likewise, plea negotiations in lobby conferences present an inherent conflict of interest for the parties involved.<sup>207</sup> The plea discussions are not merely between counsel, but take place off the record with the judge who will be trying the case if the settlement negotiations are not successful.<sup>208</sup> Thus, a similar solution as the one articulated by Justice Brennan should be adopted in the context of lobby conferences.<sup>209</sup> In Massachusetts, if the court identifies that an unrecorded lobby conference was held, it should make sure that the defendant properly waived his constitutional right when agreeing to an off the record lobby conference.<sup>210</sup> Unless a proper waiver is made on the record, the court must recognize a categorical presumption of prejudice for ineffective assistance of counsel claims.<sup>211</sup> This would be a rebuttable presumption that the prosecution can overcome by showing the defendant has not been prejudiced in the lobby conference.

#### CONCLUSION

Given the ever increasing stress on the courts' resources, Massachusetts district courts lobby cases in the name of efficiency. In a system stretched to capacity where defense counsel already have financial incentive to resolve cases as quickly as possible, the lack of record in these proceedings makes the ineffective assistance of counsel claim nothing more than a meaningless ritual for indigent defendants. By robbing indigent defendants of a procedural safeguard to hold their attorneys accountable, lobby conferences undermine the policy of procedural fairness and equity that has defined the right to counsel jurisprudence.

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<sup>205</sup> See *Powell*, 287 U.S. at 69.

<sup>206</sup> See *id.*

<sup>207</sup> See *Holloway*, 435 U.S. at 490–91; Backus & Marcus, *supra* note 23, at 1088–89.

<sup>208</sup> See *Gawmond*, 2002 WL 732152, at \*4 n.2.

<sup>209</sup> Massachusetts adopted a version of Justice Brennan's approach in *Cuyler* in conflict of interest cases. See *Commonwealth v. Allison*, 751 N.E.2d 868, 888 (Mass. 2001). Under Article 12 of the Massachusetts Declaration of Rights, the courts presume the prejudice prong of the *Strickland* test satisfied if the defendant shows an actual conflict of interest, "detailing the precise character of the alleged conflict of interest." See *Commonwealth v. Davis*, 384 N.E.2d 181, 186 (Mass. 1978). However, unlike Justice Brennan's approach in *Cuyler*, the presumption of prejudice for the purposes of Article 12 analysis is not rebuttable. See *Cuyler*, 446 U.S. at 353 (Brennan J., concurring); *Davis* 384 N.E.2d at 186.

<sup>210</sup> Cf. *Cuyler*, 446 U.S. at 353 (Brennan J., concurring).

<sup>211</sup> Cf. *id.*

Adopting a rebuttable presumption of prejudice in the context of lobby conferences will allow the district courts to maintain a practice they have been unwilling to abandon while, at the same time, meaningfully assess the ineffective assistance of counsel claims. By allocating the burden of plea bargaining in lobby conferences among all the parties, the categorical approach reinvigorates the policy of equity under the Sixth Amendment.

