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When Innocence is Confidential: A New and Essential Exception to Attorney-Client Confidentiality

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WHEN INNOCENCE IS CONFIDENTIAL: A NEW AND ESSENTIAL EXCEPTION TO ATTORNEY-CLIENT CONFIDENTIALITY

Adam Belsey*

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INTRODUCTION

"That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a maxim that has been long and generally approved," Benjamin Franklin, 1785.[1]

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1. Albert H. Smyth, The Writings of Benjamin Franklin, 293, (vol. 9 1906)

That maxim, in one form or another, has been repeated throughout history[2] and has permeated the legal system.[3] It is a part of Supreme Court precedent[4] and taught not just in law schools, but in grade schools as well.[5] Worldwide, this truism has been accepted by many different cultures.[6]

The legal system in the United States is based upon the foundation of the Constitution. Within that Constitution are certain rights that conform to the founding fathers' ideal. The Fourth Amendment provides the right to be secure in our homes, free from unlawful search and seizure without probable cause.[7] The Fifth Amendment provides the right to protection against self-incrimination and requires due process of law before a person may be denied life, liberty or property.[8] The Sixth Amendment provides that a person charged with a crime has the right to the effective assistance of counsel and to a compulsory process for obtaining favorable evidence in his case.[9]

However, what should the legal system do when the rights of one person are pitted against the rights of another? How can we reconcile allowing one person to exercise their rights when the exercise of those rights pose a threat to the life of another? What would you think if I told you that there is currently a loophole within the legal system that not only allows a known guilty party to remain free, but also allows an innocent person to suffer for that crime while officers of the court are aware of the truth?[10] As shocking and outlandish as this may sound, this loophole scenario has occurred numerous times, resulting in innocent people spending a large portion of

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(letter from Benjamin Franklin to Benjamin Vaughan, Mar. 14, 1785).

2. *See* Alexander VolokhVlokh, *n Guilty Men*, 146 University of Pennsylvania L. Rev. 174–76 (1997) (citing numerous high profile individuals throughout history using some form of this maxim in notes 1–15).

3. *Id.*

4. *See In re* Winship, 397 U.S. 358, 371–72, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

5. Dorsey D. Ellis, *A Comment on the Testimonial Privilege of the Fifth Amendment*, 55 Iowa L. Rev. 829, 845, 845 n.87 (1970).

6. *See* Alexander VolokhVlokh, *n Guilty Men*, 146 University of Pennsylvania L. Rev. 173 (1997) (Citing numerous high profile individuals throughout history using some form of this maxim notes 119–127).

7. U.S. Const. amend. IV.

8. U.S. Const. amend. V.

9. U.S. Const. amend. VI.

10. *See* discussion *infra* Part IV.

their lives in prison for a crime they did not commit.[11] This kind of result completely eviscerates the purpose behind the justice system. The purpose of the criminal legal system is to provide justice to those who are wronged, not to inflict punishment on those individuals the system knows are innocent. When a person spends time in prison for a crime that he or she did not commit, while the true perpetrator has confessed, there is a real problem that must be fixed.

Part II of this Comment will provide examples of actual cases in which these injustices have occurred and the problems unique to each. Part III will provide the legal ethics requirements and will discuss the legal loophole that allowed these injustices to occur, the many theories that have been proposed to fix the problem and why they have not yet proven to be a reliable solution. Part IV will proceed to propose a new solution based on the introductory maxim. While the solution may perhaps seem extreme, I hope to demonstrate that an extreme solution is justified by the founding principles of the legal system.

I. EXAMPLE CASES

A. Alton Logan Case

On January 11, 1982, two men committed a robbery at a McDonald's in Chicago, Illinois.[12] During the course of that robbery a security guard, Lloyd Wickliffe, was killed by a shotgun blast and another security guard, Alvin Thompson, was wounded.[13] Both guard's' handguns were taken, though no money was stolen.[14] On February 5, 1982, one of the perpetrators, Edgar Hope, was arrested after fatally shooting a police officer; he was still carrying the gun he had taken from Thompson at the McDonald's robbery.[15] There was no way Alton Logan could have known that this incident would not only change his life, but steal a great portion of it from him due to the loophole in the legal system's ethical rules.

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11. *See* example cases *infra* Part II.

12. Maurice Possley, *Inmate's freedom may hinge on secret kept for 26 years*, Chicago Tribune (Jan. 19, 2008), http://articles.chicagotribune.com/2008-01-19/news/0801180946_1_security-guard-attorney-client-privilege-andrew-wilson.

13. *Id.*

14. *Id.*

15. *Id.*

On February 7, 1982, Alton Logan was arrested and charged, along with Hope, for robbery and murder.[16] This arrest was based on a tip to the police and the erroneous testimony of three eyewitnesses who identified Logan as a participant in the McDonald's robbery and murder.[17] Alton Logan and Edgar Hope would later be convicted of the McDonald's robbery.[18] Hope was sentenced to death, while Logan was sentenced to life in prison.[19]

On February 9, 1982, only two days after Alton Logan's arrest in the McDonald's case, two Chicago police officers were shot to death.[20] Brothers Andrew Wilson and Jackie Wilson were arrested and charged with the murders.[21] While investigating this case, police recovered not only the weapons used to kill the police officers but also a cache of other weapons, including the murder weapon used in the McDonald's case.[22] The guns were found hidden at a location where Andrew Wilson was known to stay.[23] Police and prosecutors never pursued the connection between the killing of the police officers and the McDonald's murder.[24]

Two Cook County assistant public defenders, Dale Coventry and Jamie Kunz, were appointed to represent Andrew Wilson in the officer murders.[25] A few weeks later, Coventry and Kunz were approached by Marc Miller, Edgar Hope's defense attorney, with information indicating that Alton Logan had not committed the McDonald's murder.[26] Kunz reported that, "Hope said that [Logan] had nothing to do with the McDonald's case, and that it was Andrew Wilson who was with him and Andrew Wilson who shotgunned the security guard."[27] According to Kunz's recollection, when he and Coventry confronted Wilson about this claim "Wilson said,

16. *Id.*
17. CBS News, *26-Year Secret Kept Innocent Man In Prison*, (Mar. 6, 2008), http://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison; Possley, *supra* note 12. .
18. Possley, *supra* note 12.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Possley, *supra* note 12.
25. *Id.*
26. *Id.*
27. *Id.*

'Yeah' or 'Uh-huh,' nodded, grinned, and said, 'That was me.'"[28] Coventry also recalled that Wilson "kind of chuckled over the fact that someone else was charged with something he did."[29]

Coventry and Kunz were bound by legal ethics rules not to disclose any of the conversation between them and Andrew Wilson.[30] Without Wilson's express permission, their conversation was confidential, and Coventry and Kunz's metaphorical hands were tied.[31] On March 17, 1982, in the hope that they may one day be able to reveal their conversation with Andrew Wilson, the two assistant public defenders drew up an affidavit stating, "I have obtained information through privileged sources that a man named Alton Logan who was charged with the fatal shooting of Lloyd Wickliffe at on or about 11 Jan. 82 is in fact not responsible for that shooting that in fact another person was responsible."[32] Coventry and Kunz both signed the affidavit, as well as a witness and notary public.[33] The affidavit was then sealed in a metal box, held by Coventry, until after Andrew Wilson's death twenty-five years later on November 19, 2007.[34] Kunz stated that they prepared the document "so that if we were ever able to speak up, no one could say we were just making this up now."[35]

Harold Winston, a Cook County Assistant Public Defender, was representing Alton Logan at the time of Andrew Wilson's death.[36] He was aware of the rumor that for years, "Coventry and Kunz had information about Andrew Wilson's involvement in the McDonald's case."[37] After Wilson's death, he contacted Kunz.[38] Kunz then contacted Coventry, and he located the metal box and unsealed the envelope that he had been faithfully keeping for over twenty-five years.[39] Coventry and Kunz were then summoned to court on January 11, 2008, "where Criminal Court Judge James Schreier ruled that they

28. *Id.*
29. *Id.*
30. Possley, *supra* note 12.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id*.
36. Possley, *supra* note 12.
37. *Id.*
38. *Id.*
39. *Id.*

could reveal the conversation [they had with Andrew] Wilson and the contents of the affidavit."[40]

On April 18, 2008, after twenty-six years in prison, Alton Logan's conviction was set aside.[41] Logan was released on bail, pending a new trial.[42] On September 4, 2008, the Illinois Attorney General's office dismissed the charges against Logan stating it was unable to prove Logan's guilt.[43] Judge Schreier supported the decision, stating, "From all that I have heard, Mr. Logan, you did not commit this murder."[44] Alton Logan responded, "I've been telling everybody for the last 26 years, 'I didn't do this,' and finally they did the right thing. . . . I'm happy that I can finally get on with my life, try to do some of the things I want to do."[45] Later, Logan reported to 60 Minutes, "I never stopped giving up hope. I've always believed that one day is gone—somebody's gonna come forth and tell the truth. But I didn't know when."[46]

Coventry and Kunz were faced with a strange dilemma, though unfortunately one that is not uncommon in the legal system.[47] In their interview with 60 minutes, correspondent Bob Simon remarked that they "chose to allow [Alton Logan] to rot away in jail."[48] Coventry replied, "It seems that way. But had we come forward right away, aside from violating our own client's privilege, and putting him in jeopardy, would the information that we had have been valued? Would it have proved anything?"[49] Coventry and Kunz believe it would never have been allowed in court.[50] As they felt there was no way out, they at least did what they believed to be their best option: write the affidavit and get Andrew Wilson's permission to

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40. *Id.*

41. Maurice Possley, *"I'm Not Bitter," Says Man Who Spent 26 Years in Prison for Allegedly Murdering a Security Guard* (May 6, 2008), Chicago Tribune, http://articles.chicagotribune.com/2008-05-06/news/0805050781_1_murdering-judge-james-schreier-new-trial.

42. *Id.*

43. Matthew Walberg, *South Side Man finally free after 26 years*, Chicago Tribune (Sept. 5, 2008).

44. *Id.*

45. *Id.*

46. CBS News, *supra* note 17.

47. *See infra* Parts II.B, II.C.

48. CBS News, *supra* note 17.

49. *Id.*

50. *Id.* (concluding that the information would never have been allowed in court because it was a violation of attorney-client privilege).

reveal what he told them after his death.[51]

Logan's case represents two major problems within the legal system. The first is the issue of confidentiality, and the loophole which allows an innocent man to remain imprisoned for twenty-six years while the true perpetrator remains unpunished for their crimes.[52] The second issue is, had they come forward with the confession earlier, the system may have turned away such exculpatory evidence, effectively putting the constitutional rights of a confessed guilty party above the constitutional rights of an innocent man sitting in jail for a crime he did not commit.[53] Perhaps this sounds completely absurd and improbable, but the next few sample cases will demonstrate the concerns raised by Coventry and Kunz in the Logan case.

B. Lee Wayne Hunt Case

Lee Wayne Hunt and Jerry Cashwell were both separately convicted in 1986 of killing Roland and Lisa Matthews..[54] The Matthews had been shot execution style and had their throats slit in their home near Fayetteville, North Carolina.[55] Lee Wayne Hunt was convicted based in large part on FBI testimony regarding bullet analysis, testimony later discredited by the FBI.[56] In 2005 the FBI reported that composite bullet lead analysis was found to be scientifically invalid.[57] While conceding that the FBI's testimony was unreliable, prosecutors still argued that Hunt's conviction should stand due to two witnesses implicating him in the murders.[58] Both of those witnesses, one a prison informant, were provided plea deals at the time in exchange for their testimony.[59] The circumstantial evidence matching bullets to Hunt stood unchallenged until 2002.[60]

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51. *Id.*
52. *See infra* Part III.B.
53. *See infra* Part IV.
54. John Solomon, *The End of a Failed Technique—but Not of a Prison Sentence*, The Washington Post (Nov. 18, 2007), http://www.washingtonpost.com /wp-dyn/content/article/2007/11/17/AR2007111701641.html.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. Solomon, *supra* note 54.

In 2002, after serving more than a decade in prison for the killings of Roland and Lisa Matthews, Jerry Cashwell committed suicide.[61] Prosecutors had long maintained that Hunt participated in the killings, and Cashwell did nothing to refute them.[62] However, after Cashwell's death, Staples Hughes, the public defender who represented Cashwell at trial, came forward with information that Cashwell confessed to him in private that he had single handedly killed the Matthews after an argument over the television being too loud.[63] According to Hughes, "Lee Wayne Hunt had nothing to do with it."[64] Hughes decided to testify regarding Cashwell's confession after his client's death stating that, "it seemed to me at that point ethically permissible and morally imperative that I spill the beans."[65] Unfortunately, unlike the Alton Logan case, Hughes never received permission from Cashwell to reveal his secrets after death.[66]

The Cumberland County Superior Court in Fayetteville did not agree with Hughes.[67] At the 2007 hearing for Hunt's request for a new trial, Judge Jack A. Thompson told Hughes to stop.[68] Judge Thompson warned Hughes, "If you testify . . . I will be compelled to report you to the state bar. Do you understand that?"[69] Despite the dire warning, Hughes decided to continue.[70] Hughes told Judge Thompson that he had "never, ever, ever before violated a client's confidence . . . [b]ut Jerry's dead. My disclosure can't hurt him and I have to weigh that disclosure against the continuing harm" to Lee Wayne Hunt.[71] Judge Thompson refused to consider the evidence, writing in his opinion that Hughes committed professional misconduct.[72] Staples Hughes was reported to the bar for violating attorney-client privilege by revealing what his client

61. Adam Liptak, *When Law Prevents Righting a Wrong*, The New York Times (May 4, 2008), http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. Liptak, *supra* note 61.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

had told him.[73]

The North Carolina Court of Appeals upheld Judge Thompson's ruling.[74] The North Carolina Supreme Court refused to consider new evidence in the case.[75] Today, Lee Wayne Hunt, now fifty-five years old, still sits in prison after serving twenty-eight years and counting.[76] Richard Rosen, 'Hunt's attorney, stated, "I think as a whole, the judicial system of North Carolina should be ashamed of their treatment of this case form (sic) top to bottom."[77] The state Supreme Court did not offer an explanation for its refusal to review the case.[78] In 2008 Hunt's attorneys expressed their intention to appeal the case in federal court.[79] In a letter written by Lee Wayne on September 2014, he stated "that he is possibly getting a new trial in federal court."[80]

Once again, we have the situation of a lawyer withholding evidence exonerating an innocent man and a judicial system blocking his efforts to disclose the evidence after his client's death. The legal system has placed barriers for unfortunate people like Alton Logan and Lee Wayne Hunt to have exonerating evidence placed just out of reach. "Both the United States Supreme Court and the North Carolina Supreme Court have said the lawyer-client privilege survives death, though they recognized that narrow exceptions might be possible."[81] Chief Justice William H. Rehnquist writing for the majority in a 1998 Supreme Court decision said, "'[c]lients may be concerned about reputation, civil liability or possible harm to friends of' family if their secrets were disclosed after they died."[82]

In Lee Wayne Hunt's case, the battle continues. The New

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73. *See* Liptak, *supra* note 61.

74. *Supreme Court Refuses to Consider Hunt's Appeal,* Fayetteville Observer, Jan. 25 2008, 2008 WLNR 1496357.

75. WRAL Local News, *State Supreme Court Won't Hear Murder Appeal on Bullet Evidence*, (Feb. 2, 2008), http://www.wral.com/news/local/story/2388477.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Free Lee Wayne Hunt Now*, Facebook (last visited Dec. 12, 2014, 2:56 PM), https://www.facebook.com/FreeLeeWayneHuntNow. (posting that a letter was received from Lee Wayne).

81. Liptak, *supra* note 61.

82. *Id.* (quoting Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998)).

York Times asked legal ethics professor Monroe Freedman, for his opinion on the case.[83] Professor Freedman said that, "[i]f there is no threat of civil action against the client's estate and there are no survivors who continue to believe in the client's innocence, . . . there is no confidentiality obligation to begin with."[84] Hughes agreed, "[w]hat reputational interest did Jerry have? . . . He had pleaded guilty to killing two people. He didn't have an estate. His estate was a pair of shower shoes and two paperback books."[85]

Lee Wayne Hunt had to wait, like Alton Logan, until the confessed killer died to gain access to the confidential information held by lawyers adhering to the rules of legal ethics.[86] Now, he also faces the arduous task of convincing a court to consider the exonerating evidence and dismiss the case against him. The legal system prevents certain evidence from being admitted in a criminal court to ensure that a person found guilty was given a fair trial.[87] Should these same rules be used to bar exculpatory evidence from being used to fix an injustice and free an innocent man?

C. Macumber Case

In 1962 a young couple was murdered in the desert north of Scottsdale, Arizona.[88] That murder went unsolved until 1974 when Carol Macumber, "a sheriff's department employee going through an ugly divorce," claimed that her ex-husband, Bill Macumber had confessed to the killings.[89] Corroborating evidence was found in an evidence locker at the sheriff department, which Carol had access to.[90] What Carol could not know is that Ernesto Valenzuela, already "in prison for two markedly similar murders, had already bragged to his defense counsel, Thomas O'Toole, that he had committed [the murders]."[91] O'Toole later said that Valenzuela actually

83. *Id.*
84. *Id.*
85. *Id.*
86. *See supra* Part II.A.
87. *See supra* notes 7–9.
88. Richard Zitrin, *Viewpoint: When Can A Lawyer Break Privilege?*, The Recorder, (Mar. 01, 2013), http://www.uchastings.edu/news/articles/2013/03/zitrin-breaking-privilege.php.
89. *Id.*
90. *Id.*
91. *Id.*

"relished committing the murders."[92]

Following the legal ethics guidelines and abiding by his duty of confidentiality, O'Toole said nothing initially.[93] If O'Toole revealed this information Valenzuela, his client, would have been charged with the murder.[94] However, just prior to Macumber's arrest in 1973, Valenzuela was killed while in prison.[95] O'Toole, after first obtaining permission from Valenzuela's mother, agreed to testify at Macumber's trial.[96] His testimony was not permitted.[97] "[F]irst the trial court and then the appellate court refused to consider O'Toole's testimony.".[98] Arizona had codified the attorney-client privilege[99] and the courts ruled that Valenzuela's privilege survived his death and that permission from his mother was insufficient.[100] The Supreme Court of Arizona also agreed, ruling that the attorney-client privilege automatically barred O'Toole's testimony.[101] Macumber was convicted.[102]

It was not' until 2009 that Macumber's case was finally brought before the Arizona clemency board.[103] With the continued assistance of O'Toole and an Arizona innocence project, Macumber was able to convince the clemency board "that he had be framed by his wife, and that Valenzuela was the [true] perpetrator."[104] Unfortunately, that was not enough.[105] Although the board recommended Macumber's release in 2009 and again in 2012, noting that his conviction was a "miscarriage of justice", Arizona Governor Jan Brewer denied clemency.[106] Brewer "then fired the majority of the board."[107] It was not' until Macumber made a deal and plead no contest to second-degree murder that he was finally freed in

92. *Id.*
93. *Id.*
94. Zitrin, *supra* note 88.
95. *Id.*
96. *Id.*
97. Arizona v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976).
98. Zitrin, *supra* note 88.
99. Macumber, 544 P.2d at 1086.
100. Zitrin, *supra* note 88.
101. Macumber, 544 P.2d at 1086.
102. Zitrin, *supra* note 88.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*

late 2012.[108] Macumber is free, as a convicted felon, after spending 37 years behind bars.[109]

In the Arizona Supreme Court case, Arizona v. Macumber,[110] Justice Holohan filed a specially concurring opinion.[111] First, Justice Holohan argued that the United States Supreme Court in Chambers v. Mississippi,[112] "ruled that it is a violation of due process for a state rule of evidence to preclude the admission of reliable hearsay declarations against penal interest when such evidence is offered to show the innocence of an accused."[113] According to Justice Holohan, the evidence offered by O'Toole is admissible under both Arizona and Federal law.[114] Second, Justice Holohan argued that, "[t]he real problem is whether the privilege can survive the constitutional test of due process."[115] Citing United States Supreme Court precedents *Washington v. Texas*[116] and *Roviaro v. United States*[117], Justice Holohan pointed out that an accused has a basic right to present a defense and, in doing so, has a right to present witness testimony even in the face of a claim of privilege.[118] According to Justice Holohan, "[t]he problem of balancing competing interests, privilege versus a proper defense, is a difficult one, but the balance always weighs in favor of achieving a fair determination of the cause."[119]

II. THE CURRENT LEGAL ENVIRONMENT SURROUNDING ATTORNEY-CLIENT CONFIDENTIALITY

The argument has often been made, that a person's constitutional right to present witness testimony should outweigh a deceased client's right to confidentiality.[120] While

108. Zitrin, *supra* note 88.
109. *Id.*
110. Macumber, 544 P.2d at 1084.
111. Macumber, 544 P.2d at 1087.
112. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).
113. Macumber, 544 P.2d at 1088 (Holohan, J., specially concurring).
114. *Id.*
115. *Id.*
116. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).
117. Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).
118. Macumber, 544 P.2d at 1088 (Holohan, J., specially concurring).
119. *Id.*
120. *See e.g.*, Inbal Hasbani, When the Law Preserves Injustice: Issues Raised by A Wrongful Incarceration Exception to Attorney-Client Confidentiality, 100 J.

this paper agrees with that view, it also argues that the right should weigh in favor of an individual's constitutional right even when the source of the confidential information is still living. This loophole must be closed to prevent such absurd forms of injustice in situations like the ones described above.

While attorney-client privilege and confidentiality of information are distinct doctrines, together they function as the gatekeeper of client secrets.[121] The Supreme Court has asserted that a trial is a "search for truth."[122] However, maintaining client secrets flies in the face of truth when those secrets are kept from the court. The American Bar Association's Model Rules of Professional Conduct (Model Rules) require devotion to the client despite the consequences of maintaining those secrets.[123] Not once in the Model Rules, upon which most state ethical codes are based, will a direct reference to the discovery and production of the truth be found.[124] Aside from the few exceptions currently allowed, strict attorney loyalty is required of all lawyers.[125] This has been a long accepted standard in the legal profession dating back as far as 1820 when Lord Brougham famously described a lawyer's role:

> To save [the] client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.[126]

Though certain rules do require that a lawyer not mislead, act deceptively, or commit fraud, there is no rule instructing a lawyer to proffer the truth.[127] "Devotion to the client, not truth,

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Crim. L. & Criminology 277, 307 (2010).

121. *See Id.* at 282.

122. Nix v. Whiteside, 475 U.S. 157, 171 (1986).

123. Mod. R. Prof. C. § 1.6 (2014).

124. Peter J. Henning, *Lawyers, Truth and Honesty in Representing Clients*, 20 Notre Dame J.L. Ethics & Pub. Pol'y 209, 213 (2006).

125. Mod. R. Prof. C. § 1.6(b)(1–7) (2014).

126. Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 71–72 (3d ed. 2004) (citing Lord Henry Brougham).

127. Henning, s*upra* note 124.

is the lawyer's ultimate duty."[128] The Model Rules, for example, instructs a lawyer to question the credibility of a witness the lawyer knows to be truthful.[129] The judicial system charges a lawyer with the task of being a "zealous advocate for the client, putting that person's interest ahead of all others."[130] Although attorney-client confidentiality is touted as one of the most highly valued precepts in the law, the Model Rules do recognize exceptions to confidentiality in certain situations.[131]

A. The Model Rules of Professional Conduct

Most state ethics rules governing attorney conduct are based on the Model Rules.[132] A large majority of the states have adopted some of the language and the numbering system suggested by the Model Rules.[133] Every lawyer, while not subject to the Model Rules itself, is subject to discipline for a breach of the rules of professional conduct adopted by their state.[134] In order to ensure that lawyers are well informed on the Model Rules, law students in all but three U.S. jurisdictions (Maryland, Wisconsin, and Puerto Rico) are required to take the Multistate Professional Responsibility Examination before they may be admitted to the bar in their state.[135] The Model Rules are a collection of proposed rules that provide guidelines for the states to draft their own professional conduct rules.[136]

B. Confidentiality of Information

The Model Rules codify confidentiality of information in rule 1.6.[137] Rule 1.6 provides that, "A lawyer shall not reveal

128. Hasbani, *supra* note 120 at 282.
129. *Id.*
130. Henning, s*upra* note 124 at 210.
131. Mod. R. Prof. C. 1.6(b)(1–7). *See* Mod. R. Prof. C. 1.6(c) (providing a list of exceptions when a lawyer may reveal confidences such as; the client intends to commit a crime, has already used the lawyer's services for an illegal or fraudulent act, or to defend against an accusation of wrongful conduct).
132. Stephen Gillers, Roy D. Simon & Andrew M. Perlman, Regulation of Lawyers, Statutes and Standards, 3 (Con. 25th ed. 2014).
133. *Id.*
134. *Id.*
135. *The Multistate Professional Responsibility Examination*, National Conference of Bar Examiners (last visited Sept. 16. 15, 2015 115:24 AMPM), http://www.ncbex.org/about-ncbe-exams/mpre/.
136. Gillers, *supra* note 132.
137. Gillers, *supra* note 132 at 30.

information relating to the representation of a client unless the client gives informed consent. . . . "[138] This covers a very extensive range of information that a lawyer must keep confidential. The purpose in providing such an expansive protection is so that every client may receive competent representation as allotted by the constitution.[139] Competent representation requires that a lawyer be "fully informed of all the facts of the matter he is handling."[140] The widely held belief is that clients will not provide a lawyer with full disclosure without that promise of confidentiality.[141]

Benefits aside, confidentiality is at odds with the truth. The Fifth Amendment provides protection against self-incrimination.[142] An advocate, aware of his client's guilt, must not reveal that fact to the court. As every person has a right to competent representation,[143] which requires full disclosure to a person's lawyer, as well as a right not to incriminate one"s self, there must be a way to maintain both in a criminal case. Model Rule 1.6 is that answer, and it is meant to be upheld in all but the few cases where an exception applies. Adherence to this rule means that evidence of a person's guilt will be hidden from court proceedings, sometimes allowing the guilty to go free. The courts have accepted this as "the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure."[144] They have explained that the "social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweighs the harm that may come from the suppression of the evidence."[145]

C. Attorney-Client Privilege

The United States Supreme Court recognized that the attorney-client privilege is one of the oldest recognized privileges of the different confidential communications.[146] The

138. *Id.*
139. Freedman & Smith, *supra* note 126.
140. *Id.* at 129. (Citing Upjohn Co. v. United States, 449 U.S. 383, 391 (1981)).
141. Hasbani, *supra* note 120 at 286.
142. *Supra* note 8.
143. *Supra* note 9.
144. In re A John Doe Grand Jury Investigation, 408 Mass. 480, 482 (1990)(quoting In re Grand Jury Investigation, 723 F.2d 447, 451 (6th Cir. 1983)).
145. *Id.*
146. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998).

basis for this privilege is premised on the theory that encouraging clients to make "full and frank" disclosures provides their attorneys the ability to offer candid legal advice and effective representation.[147] The United States Supreme Court has stated that the, "public benefit in encouraging clients to fully communicate . . . outweighs the harm caused by the loss of relevant information."[148]

While the attorney-client privilege is not expressly codified in the Model Rules, Rule 1.6 provides similar protection.[149] The attorney-client privilege is derived from common law and the Federal Rules of Evidence.[150] Each state may adopt their own version of the attorney-client privilege and, just as the Model Rules provide guidance, Proposed Federal Rule of Evidence 503 (Rule 503), also can assist in the creation of state rules governing attorney-client privilege.[151] Under Rule 503, "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."[152]

Thus, ethically, the combination of Model Rule 1.6 requiring a lawyer not to reveal "information relating to the representation of a client" and Rule 503 preventing disclosure of any "confidential communications made for the purpose of facilitating the rendition of professional legal services," requires an attorney to keep secret almost anything he may learn from his client.[153] The combination of these two doctrines fortify the rights every individual has to competent representation without self incrimination. Although attorney-

147. UpJohn Co. v. United States, 449 U.S. 383, 389 (1981).

148. *Id.*

149. Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, American BarAssociation (May 2007) http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf (explaining that attorney-client privilege only protects the essence of communications by the client and lawyer, extending to information given for the purpose of obtaining legal representation, while client-lawyer confidentiality is much more extensive, covering all information relating to the representation regardless of whether the information came from the client or any other source).

150. Proposed Fed. R. of Evid. § 503.

151. Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence Manual § 18.03[1](8th ed. 2007).

152. *Supra* note 150.

153. *Supra* notes 131 and 150.

client confidentiality is generally upheld, there are certain situations in which the ethical guidelines have deemed exceptions acceptable.[154] The Model Rules provide seven exceptions when a lawyer may be allowed to reveal confidential information.[155] Relevant to this discussion is Model Rule 1.6(b)(1) providing a lawyer the ability to break confidentiality in order "to prevent reasonably certain death or substantial bodily harm."[156]

III. IDENTIFICATION OF THE LEGAL PROBLEM

In the cases described above, the legal system not only allowed, but also staunchly defended the right of a confessed guilty party over the rights of individuals falsely accused. A legal system that would knowingly allow an innocent person to remain in jail or face execution, while the true perpetrator remains protected by client confidentiality is a broken legal system. These cases, especially those of Alton Logan and Lee Wayne Hunt garnered quite a bit of media attention.[157] CBS News' 60 Minutes aired specials on both cases.[158] The heightened attention brought this issue to the forefront in academic and journalistic circles.[159] Much of the discussion has centered around the question of, "how our society can allow lawyers to keep secrets about a man's innocence for decades because of some seemingly attenuated notion of confidentiality owed to a client imprisoned for murder, even, in some cases, after that client dies."[160] One wonders "how we can praise defense lawyers who wait half a lifetime until their client dies before revealing that a long-imprisoned man is innocent, while criticizing and even punishing them if they say anything while the client is still alive."[161] While we can praise those lawyers for having such a commitment to the ethical rules, I propose that there should be no such commitment required. In the face of such a tremendous injustice, the rules must change.

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154. *Supra* note 131.
155. *Id.*
156. *Id.*
157. Hasbani, *supra* note 120 at 277.
158. CBS News, *supra* note 17.
159. Zitrin, *supra* note 88.
160. *Id.*
161. *Id.*

IV. ANALYSIS

The two most common arguments that supports breaching confidentiality where the client holding the privilege still lives are: 1) the line should be drawn at life and death, allowing breach of confidentiality when a person is sentenced to death[162] and 2) the Model Rules exception to substantial bodily harm should be read to include incarceration.[163] There are also currently two states that have adopted rules of professional conduct that specifically allow a lawyer to reveal confidential information in cases of wrongful incarceration.[164] Massachusetts and Alaska have each adopted similar modifications to Model Rule 1.6.[165] Both states allow a lawyer to reveal confidential information in order to prevent the "wrongful execution or incarceration of another."[166] This section will proceed to analyze both solutions, as well as the modified rules adopted by Massachusetts and Alaska, and discuss whether any are sufficient to assist in cases such as those illustrated above.

A. Drawing the Line at Life and Death

Drawing the line at life and death could potentially cover two arguments: 1) that confidential information should be revealed when an innocent person is facing the death penalty and 2) that confidential information should be revealed when the client holding the privilege is no longer alive. While both of these arguments provide exceptions that may help in certain situations, as will be explained, they would be unavailable to help in most cases of wrongful incarceration. In the cases where these exceptions would be available, the protection afforded is not enough.

Under the Model Rules, a lawyer may reveal confidential information in order to prevent reasonably certain death.[167] According to the drafter's comments to the Model Rules, "[s]uch harm is reasonably certain to occur if it will be suffered

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162. *Id.*

163. Colin Miller, Ordeal by Innocence: Why There Should Be A Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality, 102 Nw. U.L. Rev. Colloquy 391, 393 (2008).

164. Mass. R. Prof. C. § 1.6 (2013), Ak. R. Prof. C. § 1.6 (2014).

165. *Id.*

166. *Id.*

167. *Supra* note 123.

imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat."[168] This vague definition has left open to interpretation when a threat meets the definition of "imminent" and "substantial" so as to allow revelation. Some studies have provided that being convicted and sentenced to death may not meet the requirement for imminent harm.[169] The harm in being sentenced to death may not be realized for many years, as the person convicted will likely endure many appeals before actually facing death.

Professor Freedman, considered to be a legal ethics giant and one of the strongest defenders of confidentiality, told the New York Times that he would "draw the line at the life-and-death situation" before revealing a confidence.[170] According to Freedman, it would make the exception far too broad to "extend it to incarceration in general."[171] Freedman also noted, however, that if the holder of the privilege were dead, and "there is no threat of civil action against the client's estate and there are no survivors who continue to believe in the client's innocence," then perhaps a broader exception would be justified.[172]

These exceptions both fall short in the cases of Alton Logan, Lee Wayne Hunt and the many others like them. Forcing an innocent person to endure decades in prison for a crime he or she did not commit, only to be freed once the actual perpetrator dies is not justice. There are three major problems with this approach: 1) the statute *allows* a lawyer to reveal the confidential information, it does not require it;[173] 2) there is too much room for interpretation allowing a different result in different jurisdictions and; 3) under this exception, a person may still remain in prison for years before gaining access to evidence proving their innocence, and risks a chance that the information will be lost before it can be revealed.

168. *Id.* at Comment 6.
169. Miller, *supra* note 163 at 395–97.
170. Zitrin, *supra* note 88.
171. *Id.*
172. *Id.*
173. *Supra* note 123.

B. Reading the Model Rules to Include Incarceration within the Substantial Bodily Harm Exception

Reading the Model Rules to include incarceration within the substantial bodily harm exception rests upon the interpretation that incarceration itself is a substantial bodily harm. Arguably, incarceration in any form may be construed as harm, but is it "substantial bodily harm" as required under the exception? Only when the wrongful incarceration of an innocent man falls within the definition of "substantial bodily harm" under Model Rule 1.6(b)(1) may a lawyer reveal the confidential information to prevent or correct it.[174]

In order to determine the meaning of "substantial bodily harm" under Model Rule 1.6(b)(1), we must look to the structure of the Model Rule.[175] The comments following each Model Rule "explains and illustrates the meaning and purpose of the Rule."[176] "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[177] The information that helps provide interpretation of substantial bodily harm is contained in Comment 6, which provides:[178]

> Paragraph (b)(1) recognized the overriding value of life and physical integrity and permits disclosure necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.[179]

The comment provides that an interpretation of substantial bodily harm must include two things; 1) the harm must be "reasonably certain to occur"; and 2) it must be suffered imminently OR have a present and substantial threat that it will occur at a later date if a lawyer does not take action.[180] In order to further assist in the interpretation of substantial harm, Comment 6 also provides an example of a

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174. *Id.*
175. *Id.*
176. Gillers, *supra* note 132 at 14.
177. *Id.*
178. Gillers, *supra* note 132 at 31.
179. Gillers, *supra* note 132 at 31–32.
180. *Supra* note 123 at Comment 6.

situation in which a lawyer can reveal confidential information under this rule:

> [A] lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.[181]

Thus, we may construe from the hypothetical posed in Comment 6, that the harm need not be the product of a criminal act, nor must it be imminent if the harm is likely to occur without the lawyer's intervention.

Colin Miller, an associate professor of law at the University of South Carolina School of Law, has provided an interesting interpretation that may be construed to include wrongful imprisonment as a substantial bodily harm.[182] Miller bases his argument on the fact that three acts are statistically more likely to occur to an individual in prison.[183] According to various studies cited by Miller, an inmate faces an increased risk of physical violence, a heightened rate of contracting communicable diseases, and is subject to an increased risk of same sex rape.[184] Comparing this increase risk factor to a situation where a lawyer reasonably believes his client may physically harm another person, Miller writes, "if we believe that the risk of an intended assault and battery victim actually suffering from substantial bodily harm is analogous to the aggregate increased risk of a prisoner suffering from violence, contracting a communicable disease, or being raped, disclosure should be permitted or required in the wrongful incarceration scenario."[185] Thus, by being incarcerated, a prisoner is likely to incur harm unless the lawyer intervenes.

Miller provides a well thought out argument for revelation of confidential information under the current rules.[186] Most states have adopted some form of Model Rule 1.6 or have a

181. *Id.*
182. *See generally* Miller, supra note 163.
183. Miller, *supra* note 163 at 397–98.
184. *Id.*
185. *Id.* at 398.
186. *Id.* at 402.

similar rule.[187] In those states, Miller's argument may provide a possible solution. However, this method of interpretation still provides insufficient protection for known innocent parties wrongfully incarcerated. There are three major issues with this approach: 1) revealing confidential information of a living client violates their Fifth Amendment right not to incriminate themselves; 2) there is too much room for interpretation allowing a different result in different jurisdictions; and 3) this interpretation still only *allows* a lawyer to reveal the confidential information, it does not require it.

C. Modifying Rule 1.6 to Allow Revelation to Prevent Wrongful Execution or Incarceration of Another

Modifying Model Rule 1.6 to specifically allow revelation in the case of wrongful incarceration would eliminate the guesswork for a lawyer faced with a scenario similar to the example cases. Simply allowing revelation of confidential information in order to prevent or rectify a wrongful incarceration would provide a much broader scope of exemptions to Model Rule 1.6. Adoption of such a rule would require an institutional choice to place the rights of those wrongfully incarcerated above the rights of the confessed lawbreaker. Considering the inverse view can lead to grave injustices against the innocent, as exemplified above, it should not be a difficult leap to make.[188]

Two states have adopted a specific exception to prevent the wrongful execution or incarceration of another.[189] Massachusetts and Alaska have adopted similar text in their versions of Model Rule 1.6 that specifically allow a lawyer to reveal confidential information in order to prevent the "wrongful execution or incarceration of another."[190] Both states still provide that the lawyer exercise discretion deciding whether to disclose, it does not require disclosure.[191]

Massachusetts Rule 1.6(b)(1) provides that a lawyer may reveal confidential information "to prevent the commission of

187. James E. Moliterno, Rectifying Wrongful Convictions: May A Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?, 38 Hastings Const. L.Q. 811, appendix (2011).

188. *See* example cases *supra* Part II.

189. *Supra* note 164.

190. *Id.*

191. *Id.*

a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another."[192] Massachusetts comment [6A] further provides that Rule 1.6(b)(1) "also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution."[193] Thus, a lawyer is permitted to reveal confidential information only after a known innocent person has been sentenced to imprisonment. A conviction without a prison sentence still requires a lawyer to maintain his clients secret. Currently, there are no legal opinions or cases that apply this particular exception in Massachusetts.

Alaska Rule 1.6(b)(1)(C) provides that, "A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary to prevent reasonably certain. . . wrongful execution or incarceration of another."[194] The Alaska Comment notes that, "In paragraph (b)(1)(C), the court included an additional limited exception to the normal rule requiring lawyers to preserve the confidences and secrets of their clients. This provision is modeled on the similar Massachusetts rule: its core purpose is to permit a lawyer to reveal confidential information in the specific situation in which that information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution."[195] Analogous to the Massachusetts exception, a lawyer in Alaska may, at their discretion, reveal confidential information after an innocent person has been incarcerated.

While the addition of specific rules is a step in the right direction, they still fall short of protecting the rights of all the parties involved. These rules certainly hold the possibility that a lawyer could choose to assist an innocent person wrongfully imprisoned but it does not require it. The addition of a wrongful incarceration exception solves the dilemma of a lawyer who is unsure whether or not they may reveal

192. Mass. R. Prof. C. § 1.6 (2013).
193. *Id.* at Comment [6A].
194. Ak. R. Prof. C. § 1.6 (2014).
195. *Id.* at Alaska Comment.

confidential information, but it still leaves unsolved two of the major issues: 1) revealing confidential information of a living client violates their Fifth Amendment right not to incriminate themselves, possibly subjecting them to prosecution; and 2) this statute still only *allows* a lawyer to reveal the confidential information, it does not require it.

The Problems Inherent to Establishing a New Exception

To resolve this moral and ethical duality, each issue must be defused. In order to provide the protection from wrongful incarceration a known innocent is entitled there must be a balance. Aside from the issues presented in the solutions proposed above, there are also concerns about the impact such an exception would have on attorney-client confidentiality.[196] In order to better extrapolate a practical solution, we must take into consideration every issue.

A statute that would presume to assist the wrongfully incarcerated must be written narrowly, allowing no room for interpretation amongst jurisdictions. It should make revelation of confidential information mandatory. Allowing revelation of confidential information to be optional in the case of wrongful incarceration is not likely to produce a large influx of defense attorney's coming forward with their client's confidential information.[197] Defense lawyers' loyalty to their client's is not based solely on the Model Rules. The average defense lawyer will likely resist a rule forcing them to implicate their client in another crime.[198] Their job is to zealously defend their client, even in the face of known guilt.[199] If the revelation of a client's secret is optional, no doubt most criminal defense lawyers would balk at exercising that option. The practice of law is a business, and who would choose to hire a criminal defense attorney who has a reputation for breaching confidentiality when it was not required?

A hypothetical posed by Professor Fred C. Zacharias in *Rethinking Confidentiality* illustrates the problem of an optional rule.[200] He presented the following scenario: "A client

196. Hasbani *supra* note 120 at 284.

197. *See* Hasbani *supra* note 120 at 299–303 (citing Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81, 97 (1994)).

198. *Id.*

199. *Id.*

200. Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 404 (1989).

makes her attorney the following proposition: 'If I double your fee, would you waive your right to disclose?'"[201] Professor Zacharias warns that drafters of a new code must decide whether clients and attorneys should be allowed to change confidentiality contractually.[202] However, even barring a contractual limit, what will keep a lawyer from negotiating his silence if his disclosure is merely optional?

Finally, there must be a consideration of the effect a new exception to confidentiality would have on the attorney client relationship. Many proponents for a new exception worry that a new exception might chill communication between a client and their attorney.[203] Those opposed to further exceptions "contend that confidentiality exceptions will interfere with the development of client trust and will discourage clients from using or freely communicating with their counsel."[204] An optional rule would contribute even further to this problem. Without clear guidelines lawyers would increasingly be saddled with the dilemma of whether or not to reveal confidential information, an inconsistency that may result in distrust between a client and his attorney. A mandatory rule provides assurance to a client by letting them know how their attorney is going respond. This knowledge in itself speaks for a lawyer's integrity, rather than constantly questioning whether a lawyer would decide to reveal information based on their personal sense of right or wrong.

Many studies have been conducted about the potential effects that confidentiality exceptions have on the candid and frank disclosure by clients.[205] These studies have uncovered that many attorneys do not discuss the subject of mandatory disclosures "because they [felt] that discussions about confidentiality exceptions would interfere with client trust."[206] In those cases, when mandatory disclosure requires a lawyer to reveal his client's information, that client is more likely to distrust an attorney and the legal profession in general. Unfortunately, these studies have also concluded that a typical

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201. *Id.*
202. *Id.*
203. Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev. 81, 97 (1994).
204. *Id.*
205. Freedman & Smith, *supra* note 126.
206. Levin, *supra* note 203 at 103–04, 122.

client will not understand the complexities of the rule of confidentiality and its exceptions.[207] A clients misunderstanding of attorney-client confidentiality coupled with the fact that attorneys choose not to explain possible exceptions could lead to a general assumption that lawyers 'hide the ball' and are not up front and honest.

A significant contrast found in these studies is that discussing disclosure exceptions with a client may actually reduce "the likelihood that clients will say any more about the subject."[208] Warning clients about all the possible exceptions available to an attorney before discussing a case would almost certainly lead to inhibited discussion as the client would closely consider everything he wants to reveal before revealing it. If an attorney counsels a client about a wrongful incarceration exception, the client may choose to withhold that information and essentially making a new exception self-defeating. Given the importance of preventing wrongful incarceration, a new exception would at least afford an attorney in the position of receiving such information the ability to prevent the injustice.

As a society, we have relied on the proposition that allowing the guilty to go free on occasion is more acceptable than allowing an innocent to remain in prison. It is with this maxim in mind that the following solution is proposed, which permits an exception with a consideration to all issues.

V. A MANDATORY EXCEPTION FOR WRONGFUL INCARCERATION SHOULD BE ADOPTED

The current exceptions to Model Rule 1.6 afford attorney's very broad discretion. The fact that, as of this writing, I was unable to find a single reported case of an attorney coming forward based on the Massachusetts or Alaska wrongful incarceration statutes supports the theory that an optional rule may not be effective. A mandatory rule would at least guarantee that the person wrongfully incarcerated would have a means of obtaining the truth.

In a wrongful incarceration scenario, where an attorney reveals confidential information of his client, we still have the problem of the clients Fifth Amendment privilege. The Fifth

207. Lloyd B. Snyder, *Is Attorney-Client confidentiality Necessary?*, 15 Geo. J. Legal Ethics 477, 505 (2002).

208. Levin, *supra* note 203 at 125.

Amendment prevents "*the use*, in a criminal prosecution, of a defendant's testimony elicited by compulsion."[209] (emphasis added). The Supreme Court in *Fisher v. United States* held that an attorney cannot be compelled to break the attorney-client privilege, as it would be a violation of the clients Fifth Amendment right.[210] *Fisher* ascertained that any information that would be protected under the Fifth Amendment for the individual must also be protected by their lawyer.[211] In a wrongful incarceration situation however, it is not the compulsion to elicit information that triggers a Fifth Amendment violation, it is triggered if used against that person. In order to resolve this problem of violating the confessed criminal's Fifth Amendment right not to incriminate themselves, use of immunity for the confessing client must be part of the solution.

Use of immunity prevents the prosecution from using the confidential information elicited by compulsion against the criminal defendant.[212] In the case of a wrongful incarceration situation, the elicited confidential information would be used to free the innocent, but it would be unavailable in a criminal prosecution against the client. Without use of immunity, any attorney who reveals confidential information that is used against a client in a criminal prosecution is a violation of the client's constitutional rights.

Use of immunity in these cases would not necessarily constitute a get out of jail free card for self-confessed criminals. An attorney under these circumstances would only reveal confidential information to the extent necessary to ascertain the innocence of a person wrongfully incarcerated. While any information revealed by the attorney would be protected from use, it would not prevent the prosecution from continuing to investigate the unsolved crime and prosecuting the client based on independent evidence.

Use of immunity would protect a guilty client's constitutional rights at the expense of the evidence presented

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209. Harry I. Subin, *The Lawyer as Superego: Disclosure of client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1120 (1985).

210. *Fisher v. United States*, 425 U.S. 391, 401 (1976).

211. Freedman & Smith, *supra* note 126.

212. Celeste Bacchi, Immunity in Exchange for Testimony, (last visited Dec 15, 2014, 2:40 PM), http://www.nolo.com/legal-encyclopedia/immunity-exchange-testimony.html.

to prove the innocence of a person wrongfully incarcerated. Its use may be looked upon with disdain by victims and their families, knowing that the actual criminal cannot be held responsible for the crime in some situations. Even more difficult to accept is the knowledge that the self-confessed criminals who benefit from this rule may be free from prosecution and have the ability to continue committing similar crimes. The Supreme Court has said that the "social good derived from the proper performance of the function of lawyers acting for their clients . . . outweighs the harm that may come from the suppression of evidence."[213] This reasoning should also apply to the social good of righting the injustice of wrongful incarceration.

A mandatory wrongful incarceration exception to the attorney-client privilege provides a solution to all the issues presented.[214] While there are certainly serious drawbacks to this type of an exception, those drawbacks will likely still exist without an exception and an innocent person will be incarcerated for a crime he did not commit. The guilty party whose confessed crime remains confidential will still be free to commit similar crimes. While the victims and their family may feel better believing the responsible party is being held responsible, their comfort in a false belief does not justify the unjust suffering of an innocent person.

The following proposed modification to Model Rule 1.6[215] should be adopted:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraph (b).

(b) A lawyer may reveal**, and must reveal in subsection (8),** information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(Exceptions 1 through 7 excluded)

(8) to rectify the wrongful execution or incarceration of another; a person whose information is

213. Possley, *supra* note 12.
214. *See supra* Part IV.
215. Gillers *supra* note 132 at 30.

revealed in this manner is granted use immunity for the information provided.

This proposed modification should include a comment similar to Massachusetts's comment [6A] permitting "a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution."[216] The requirement that the innocent person has already been convicted and sentenced is absolutely necessary. Without a wrongful conviction requirement, there would be many self-confessed criminals attempting to take advantage of use immunity when revelation may not be necessary. The innocent person may still be found innocent by a court of law. The revelation of confidential information and subsequent granting of use immunity should only be used after an innocent person has been convicted and sentenced and the guilty party has essentially gotten away with their crime.

Granting use immunity also provides a solution to the client-trust issue. A client is more apt to trust a lawyer who discloses that he may be required to reveal confidential information, even against his will, and that any information disclosed will not be used to harm the client. In these cases, the attorney may even be seen as having more integrity obeying the rules while preventing harm to his client. With use of immunity required under the Fifth Amendment, the likelihood that this new exception would chill communication between clients and their attorneys would be minimal and any damage to the client lawyer trust relationship would be far outweighed by the injustice done to an innocent person wrongfully incarcerated.

CONCLUSION

Wrongful incarceration is a grievously unfortunate flaw in the legal system. In most cases, when an innocent person is wrongfully convicted, the truth is only ever known by the guilty parties and the unfortunate person wrongfully convicted. In those rare cases where a lawyer, who is an officer of the court, knows the truth, failure to right this wrong is an unacceptable breakdown within the justice system.

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216. *Supra* note 192 at Comment [6A].

A wrongful incarceration exception is not a perfect solution. The solution posed by this paper allows the possibility that a client who confesses to murder may never be prosecuted for the murder. Contrast that scenario with one in which the murderer is never prosecuted because an innocent person was found guilty for their crime and serving life in prison or facing capital punishment. The choice is an obvious one. A system founded upon the ideal "That it is better 100 guilty Persons should escape than that one innocent Person should suffer" should readily embrace a wrongful incarceration exception. The solution proposed in this paper that chooses to right the wrong to the innocent rather than preserving the right to prosecute the guilty is consistent with that maxim.