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Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another? (A Roundtable Discussion of the ABA's Standards for Criminal Litigation)

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Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?

by JAMES E. MOLITERNO*

More than twenty years ago, the drafters of the Restatement of the Law Governing Lawyers struggled mightily with a hypothetical set of facts similar to the following:

> A criminal defense lawyer learns from his client that his client was the perpetrator of a crime for which someone else has been convicted and is scheduled to be executed. What may or must the criminal defense lawyer do?[1]

Under the law prior to the 2002 amendments to the Model Rules of Professional Conduct ("Model Rules" or "MR"), the formal, doctrinal answer was clear: No future crime was being committed in the hypothetical, so there was no existing exception to the confidentiality rule embodied in MR 1.6 (nor former DR 4-101). The

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1. American Law Institute, 66th Annual Meeting, The American Law Institute: Proceedings 1989, at 332–39 (1990) [hereinafter Proceedings] (addressing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132, illus. 4 (Tentative Draft No. 2, 1989)). The hypothetical was loosely based on the fact pattern in State v. Macumber, 582 P.2d 162 (Ariz. 1978), where the court refused to allow an alleged confession by a third party in a murder trial on the grounds of privilege. *See* Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating the Law Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1633 (1996) (arguing that the doctrinal answer was not clear); *see also* Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, A Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1616 (1996).

lawyer would be subject to discipline if she revealed the client's information. Despite the fairly clear doctrinal answer,[2] the American Law Institute ("ALI") could not agree on a resolution and eventually voted to eliminate the illustration, thereby avoiding the necessity of answering it in the Restatement.[3]

> To some, the execution of an innocent man was a morally intolerable result and the Illustration should have affirmatively rejected such an outcome; to others, any departure from a rule of absolute protection for such communications represented a slippery slope descent, leading to the ultimate disintegration of the attorney-client relationship; to still others, the Illustration accurately represented the state of the law, but should have been dropped from the Restatement or modified because of its starkness.[4]

At its 1996 meeting, the ALI expanded the draft Restatement's articulation of the future harm confidentiality exception, with the new provision eliminating the requirements that the threat to human life be the result of an act by the client and that the act be criminal.[5]

The ABA's 2002 amendments to Model Rule 1.6 opened a crack in the doctrinal wall, but a modest one.[6] Now, a lawyer would be permitted to reveal client information when necessary to prevent certain future *harms* as well as crimes. Execution is plainly a future harm. But what of non-capital, wrongful convictions? Is the presence of the wrongly convicted in prison such a future harm? In particular, is the wrongly convicted "reasonably certain" to suffer "substantial bodily harm?"[7]

This paper will suggest that "reasonably certain . . . substantial bodily harm" should include any incarceration. Failing such an

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2. ALI Reporter, Charles Wolfram, expressed some agreement with the criticism leveled at the illustration and its doctrinal answer, but then stated that, "This is law at its most logical and I think supportable as a matter of restatement." Proceedings, *supra* note 1, at 332-33; Freedman, *supra* note 1, at 1634.

3. In the end, the debate over the illustration ended in its elimination. The position of Professor Paul Carrington was adopted, after he stated, "[W]e don't need this Illustration. This is more clarity than we really need." The ALI members voted, 164 to 65, to eliminate the illustration. Freedman, *supra* note 1, at 1635.

4. Daly, *supra* note 1, at 1616.

5. Freedman, *supra* note 1, at 1639; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 (2000).

6. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2002) [hereinafter MR].

7. *Id.*

interpretation, an exception should be added to Model Rule 1.6 to permit disclosure of confidences to rectify wrongful incarceration.

I. Three Cases

The following three cases illustrate the issues involved.

A. Daryl Atkins Case

In 1998, Daryl Atkins was convicted in a jury trial for the murder of Eric Nesbitt in York County, Virginia, and sentenced to death in the York County Circuit Court.[8] This sentence was later vacated by the Virginia Supreme Court because of error concerning the verdict form.[9] On remand, a new jury imposed the death penalty, and the Virginia Supreme Court affirmed this sentence, holding that the death penalty was not disproportionate to penalties imposed for other crimes of premeditated murder with a firearm in the commission of a robbery, even though Atkins only had an IQ of 59.[10] In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment prohibits the execution of the mentally retarded.[11] The Supreme Court vacated Atkins's death sentence, and the case was remanded to the circuit court to conduct a jury trial on whether Atkins was mentally retarded.[12] In the circuit court, the jury found that Atkins was not mentally retarded and the court reinstated the death sentence, but this sentence was again vacated by the Virginia Supreme Court because of error in the process for determining whether Atkins was mentally retarded.[13] The case was remanded back to the circuit court to determine the issue of Atkins's mental retardation.[14] At this stage, Atkins for the first time raised the issue of prosecutorial misconduct. Atkins filed a motion requesting the imposition of a life sentence or a new trial, claiming, for the first time, that the prosecution had withheld exculpatory evidence and suborned perjury during the original trial.[15] This issue was raised at this late stage because it was not until that point that Atkins's co-defendant's

8. Atkins v. Commonwealth, 510 S.E.2d 445, 445 (Va. 1999).
9. *Id.* at 457.
10. Atkins v. Commonwealth, 534 S.E.2d 312, 321 (Va. 2000).
11. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
12. Atkins v. Commonwealth, 581 S.E.2d 514, 517 (Va. 2003).
13. Atkins v. Commonwealth, 631 S.E.2d 93, 102 (Va. 2006).
14. *Id.*
15. In re Commonwealth of Va., 677 S.E.2d 236, 237 (Va. 2009).

lawyer, Leslie Smith, came forward with the information concerning prosecutorial misconduct.[16]

The crucial issue in the original trial was whether Atkins or his co-defendant, William Jones, had shot the victim, as it is only the actual shooter who is eligible for the death penalty in Virginia.[17] Both Atkins and Jones admitted to taking part in the killing, but each claimed that the other was the actual shooter, and Jones's testimony against Atkins played a large role in Atkins's conviction.[18] During Jones's interview with the prosecution in July 1997, Jones told his version of the events that led to the killing in 1996.[19] However, his description of the crime, in which he alleged that Atkins was the shooter, did not match the physical evidence.[20] A prosecutor then turned off the tape recorder which had been recording the interview and told Jones's lawyer, Leslie Smith, that they had a problem.[21] For the next fifteen minutes, the prosecutor coached Jones so that his testimony matched the physical evidence, and then the tape recorder was turned back on to record the polished version of Jones's testimony that helped the prosecution's case against Atkins.[22]

Smith consulted the Virginia State Bar at the time of Atkins's original trial to see if he could reveal his client's confidential information in order to prevent the possibility of Atkins's wrongful death sentence.[23] The State Bar told him he could not reveal the information, and Smith then felt that "there was nothing that could be done."[24] However, Smith was upset over the situation, and in March 2007, he again wrote to the Virginia State Bar.[25] His client's case was now over, and he emphasized that in his letter to the State Bar.[26] A

16. Donna St. George, *Death Sentence Commuted in Va. Case*, WASH. POST, Jan. 18, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703172.html.

17. *Id.*

18. *Id.*

19. Adam Liptak, *Lawyer Reveals Secret, Toppling Death Penalty*, N.Y. TIMES, Jan. 19, 2008, *available at* www.nytimes.com/2008/01/19/us/19death.html?_r=3&hp&oref=slogin.

20. *Id.*

21. *Id.*

22. *Id.*

23. Jon Cawley, *Prosecutorial Misconduct Case Against York-Poquoson Commonwealth's Attorney Moves Forward*, DAILY PRESS, Mar. 6, 2010, http://articles.dailypress.com/2010-03-06/news/dp-ocal_addison_0306mar06_1_miscooduct-atkins-and-william-jones-cathy-krinick.

24. *See* Liptak, *supra* note 19.

25. *Id.*

26. *Id.*

lawyer at the Virginia State Bar would not give an answer in writing, but did state over the phone that Smith could "come forward and make known what had gone on at the meeting."[27] After receiving this advice, Smith told Atkins's lawyers about what had occurred during Jones's meeting with the prosecution. Atkins's lawyers raised the issue when the case was on remand to the circuit court to determine the issue of Atkins's mental retardation, claiming that the prosecutor's conversation with Jones was exculpatory evidence that should have been disclosed to the defense under *Brady v. Maryland*.[28] Judge Prentis Smiley Jr. of York County-Poquoson Circuit Court commuted Atkins's sentence to life in prison because of Smith's testimony concerning prosecutorial misconduct.[29] The State then petitioned the Virginia Supreme Court for a writ of mandamus to vacate the circuit court's ruling, but the court held that it did not have the power to issue a writ of mandamus, allowing the ruling of the circuit court to stand.[30] As a result, Daryl Atkins is now serving life in prison for the crime and does not face the death penalty.[31]

The prosecutors involved in the case, Eileen Addison and Cathy Krinick, faced Virginia State Bar misconduct hearings regarding their handling of the Atkins prosecution.[32] Atkins's lawyer, George Rogers III, filed the complaint, which alleged prosecutorial misconduct based on Smith's testimony during Atkins's trial.[33] The Virginia State Bar's Sixth District Subcommittee certified those complaints to the Virginia State Bar Disciplinary Board and misconduct hearings were held before circuit court three-judge panels.[34] Addison publicly denied that she withheld any information from Atkins's attorneys during his trial.[35] The three-judge panels have dismissed the charges against each of the prosecutors.[36] The original trial judge, ruling on the *Brady* violations in 2008, found on essentially the same facts against the

27. *Id.*
28. In re Commonwealth of Va., 677 S.E.2d at 238.
29. *Id.* at 237–38.
30. *Id.* at 239.
31. Cawley, *supra* note 22.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Va. State Bar, *ex rel.* Sixth Dist. Comm. v. Addison, No. CL-10003200-00 (Va. Cir. Ct. Aug. 23, 2010), *available at* http://www.vsb.org/docs/Addison-083010.pdf; Va. State Bar *ex rel.* Sixth Dist. Comm. v. Krinick, No. CL-10-410 (Va. Cir. Ct. July 29, 2010), *available at* http://www.vsb.org/docs/Krinick-090910.pdf.

prosecutors and overturned the death sentence he had imposed over ten years prior.[37]

B. Alton Logan Case

On January 11, 1982, Lloyd Wickliffe, a security guard at a Chicago McDonald's was killed by gunshot during a robbery, and another security guard was wounded in the attack.[38] About a month later, on February 7, Alton Logan was arrested and charged with robbery and the murder of Wickliffe. He was charged along with Edgar Hope, who had just been arrested for the murder of a police officer on a Chicago bus.[39] At the bus shooting, Hope had been carrying a gun taken from the security guard who had been wounded during the McDonald's robbery.[40] Logan was arrested after the police received a tip and then found three eyewitnesses to identify him as a participant in the McDonald's robbery and murder.[41]

On February 9, two Chicago police officers were shot to death, and brothers Andrew and Jackie Wilson were arrested for these murders.[42] Dale Coventry and Jamie Kunz, both assistant Cook County public defenders, were appointed to represent Andrew Wilson.[43] Police found the guns of the murdered police officers hidden in a location where Andrew Wilson was known to stay, and with these guns they also found a shotgun that was linked to shotgun shells found at the McDonald's.[44] However, Hope and Logan were already charged with the McDonald's crime, and witnesses had already stated that crime had involved only two gunmen.[45] Neither the police nor prosecutors involved in the case pursued the link between the shotgun connected to Andrew Wilson and the McDonald's incident.[46]

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37. See transcripts of *Brady* hearing (on file with author).

38. Maurice Possley, *Inmate's Freedom May Hinge on Secret Kept for 26 Years*, Jan. 19, 2008, CHI. TRIB., http://articles.chicagotribune.com/2008-01-19/news/0801180946_1_security-guard-attorney-client-privilege-andrew-wilson.

39. *Id.*

40. *Id.*

41. *60 Minutes* (CBS television broadcast Mar. 9, 2008) *available at* http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml.

42. Possley, *supra* note 38.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

Logan's co-defendant, Hope, told his public defender, Marc Miller, that he had never seen Logan before their arrests and that Logan did not participate in the robbery and shooting at the McDonald's.[47] Hope told his lawyer that Andrew Wilson had been the other person involved in the McDonald's incident.[48] Hope's lawyer then told Jamie Kunz, one of the public defenders representing Wilson for his involvement in the murder of the two police officers, that Wilson was involved in this robbery and murder.[49] Kunz and his co-counsel, Dale Coventry, asked Wilson about his involvement in the McDonald's incident, and Wilson confessed to his participation in the crime. Kunz and Coventry described Wilson's confession as "gleeful," as Wilson was aware that he was getting away with a crime that he had committed.[50]

Kunz and Coventry did not disclose their client's confession at the time because of their duty to protect confidential communications from a client.[51] They believed that they could not reveal the information because the real killer was their client.[52] Twenty-six years later, Coventry told *60 Minutes*:

> Well, the vast majority of the public apparently believes that [we should have revealed the confession], but if you check with attorneys or ethics committees or you know anybody who knows the rules of conduct for attorneys, it's very, very—it's not morally clear—but we're in a position to where we have to maintain client confidentiality, just as a priest would or a doctor would. It's just a requirement of the law. The system wouldn't work without it.[53]

In 1982, Wilson agreed to let his attorneys reveal his confession after his death.[54] On March 17, 1982, Dale and Coventry drew up an affidavit that stated: "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

47. *A Killer's 26-Year-Old Secret May Set Inmate Free*, MSNBC.MSN.COM, ASSOCIATED PRESS, Apr. 12, 2008, http://www.msnbc.msn.com/id/24083675/.

48. *Id.*

49. *Id.*

50. *Id.*

51. Possley, *supra* note 38.

52. *Id.*

53. *60 Minutes*, *supra* note 41.

54. *Id.*

not responsible for that shooting that in fact another person was responsible."[55] Kunz later 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."[56] The lawyers then placed the affidavit in a sealed metal box, which Coventry stored in his bedroom, in a closet at times and then under his bed.[57]

On November 19, 2007, Andrew Wilson died of natural causes in prison.[58] Harold Wilson, an Assistant Cook County public defender, was representing Alton Logan at that time.[59] He had heard rumors that Kunz and Coventry had information from Wilson that would help Logan's case, and after he learned of Wilson's death his first thought was to contact the lawyers.[60] Kunz and Coventry opened the sealed affidavit after learning of Wilson's death and were then summoned to court on January 11, 2008, where Criminal Court Judge James Schreier ruled that they could reveal the conversation with Wilson and the contents of the affidavit.[61] On April 18, 2008, Judge Schreier set aside Logan's conviction and ordered a new trial, and Logan was released on bail.[62] On September 4, 2008, the Illinois Attorney General Office moved to dismiss the charges against Logan, stating that it was unable to prove Logan's guilt, and Judge Schreier supported the state's decision, saying, "From all that I have heard, Mr. Logan, you did not commit this murder."[63] After his case was dismissed, Logan said, "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."[64]

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55. *Id.*

56. *Id.*

57. ASSOCIATED PRESS, *supra* note 47.

58. Possley, *supra* note 39.

59. *Id.*

60. Michael Miner, *The Greater of Two Evils: When is it Ok to Let an Innocent Man Rot in Jail?*, CHICAGO READER, Jan. 31, 2008, http://www.chicagoreader.com/chicago/the-greater-of-two-evils/Content?oid=1212988.

61. Possley, *supra* note 38.

62. Maurice Possley, *"I'm Not Bitter," Says Man Who Spent 26 Years in Prison for Allegedly Murdering a Security Guard*, May 6, 2008, CHI. TRIB., articles.chicagotribune.com/2008-05-06/news/0805050781_1_murdering-judge-james-schreier-new-trial/2.

63. Matthew Walberg, *South Side Man Free, Clear-Finally; State Drops Charges, Saying There is Insufficient Evidence in an '82 Murder, to Which Another Man Allegedly Confessed*, CHIC. TRIB., Sept. 5, 2008.

64. *Id.*

Kunz and Coventry kept Andrew Wilson's secret for twenty-six years, but they have said that it was not an easy task. Coventry told *60 Minutes*, "In terms of my conscience, my conscience is that I did the right thing. Do I feel bad about Logan? Absolutely I feel bad about Logan."[65] However, the attorneys did not reveal Wilson's confession because it was a privileged communication between their client and themselves.[66] They researched the rules on attorney-client privilege but could find no loophole for their situation.[67] Coventry told *60 Minutes*, "I researched the ethics of attorney-client privilege as much as I could. I contacted people who are involved in making those determinations. I know [Kunz] did the same thing."[68] Kunz stated, "I could not figure out a way, and still cannot figure out a way, how we could have done anything to help Alton Logan that would not have put Andrew Wilson in jeopardy of another capital case."[69] Even if they did come forward, they believed that their information would not be admitted in court because it was a breach of attorney-client privilege.[70]

The attorneys said they would have done something more than preparing an affidavit if Logan was facing the death penalty.[71] Kunz told the *Chicago Reader*, "[I] would have been prepared to lose my license. I wasn't going to let him be executed. It would have been an ethical lapse, but the execution I couldn't allow to happen."[72] He also stated,

> Once he got natural life instead of death, I still brooded about it but I wasn't going to do anything about it, because—well, I'm not sure why. If you put this to me as a hypothetical question, I could have argued both sides for hours. It wasn't hypothetical, it was real, and my gut said you can't let him die. To do something when Alton Logan was serving natural life would have been to submit my client [Wilson] to prosecution for a capital offense. I wasn't going to do that. But it's not a

65. *60 Minutes*, *supra* note 41.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. Miner, *supra* note 60.
72. *Id.*

> question I can answer, why I can live with natural life and not with execution.[73]

Coventry said, "None of this stuff is crystal clear. We were going to do something else [besides the affidavit] if he was facing death, but we didn't know what. It was a really tough call."[74]

C. Lee Wayne Hunt Case

In 1986, Lee Wayne Hunt, along with his co-defendant, Jerry Cashwell, were convicted in separate trials of the murders of Roland and Lisa Matthews, near Fayetteville, North Carolina.[75] In 2002, Hunt's co-defendant, Cashwell, committed suicide in prison.[76] After Cashwell's suicide, the public defender who had represented him at trial, Staples Hughes, came forward with the information that during Cashwell's trial for the murders of the Matthews, Cashwell had told Hughes that he had single-handedly killed the Matthews without the help of Hunt.[77]

Hughes had held this secret for twenty-two years, bound by the attorney-client privilege.[78] When asked if not disclosing this information bothered him, Hughes told *60 Minutes* that, "It bothered me most when Mr. Hunt was being tried. And it's bothered me ever since. There wasn't anything I could do about it. But I knew they were trying a guy who didn't do it."[79] Hughes decided to go public with the information after his client died in prison, as "it seemed to [him] at that point ethically permissible and morally imperative that [he] spill the beans."[80]

However, Judge Thompson, of the Cumberland County Superior Court in Fayetteville did not agree. At a hearing in 2007 on Hunt's request for a new trial, Judge Thompson told Hughes that he would have to report him to the State Bar if he violated attorney-client

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73. *Id.*

74. *Id.*

75. John Solomon, *The End of a Failed Technique–but Not of a Prison Sentence*, WASH. POST, Nov. 18, 2007, at A15.

76. Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES, May 4, 2008, http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html.

77. *60 Minutes* (CBS television broadcast Nov. 18, 2007); *available at* http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml?tag=contentMain;contentBody.

78. Liptak, *supra* note 76.

79. *60 Minutes*, *supra* note 77.

80. Liptak, *supra* note 76.

privilege by revealing what his client had told him.[81] Hughes went ahead and testified that his client told him that Hunt was not involved in the Matthews's murders.[82] Judge Thompson refused to consider the evidence offered by Hughes, writing in his opinion that Hughes had committed professional misconduct.[83] Judge Thompson also refused to grant Hunt a new trial, finding that the other new development, new scientific evidence regarding the analysis of the bullet, was not compelling enough to warrant another trial.[84] The state court of appeals upheld Judge Thompson's ruling, and the Supreme Court of North Carolina also refused to hear the case, and Hunt remains in prison.[85] In January 2008, the North Carolina State Bar, in a confidential decision, dismissed the disciplinary complaint against Hughes.[86]

Examining the case, the *New York Times* observed that "[b]oth 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."[87] The *Times* asked Monroe Freedman for his opinion on the ethics involved in revealing confidential client information after the client's death, and he stated that there remains room for a case-by-case analysis of each situation.[88] In this case, Professor Freedman said that Hughes was probably able to reveal his information, noting that, "If 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."[89] Hughes agreed with this analysis, stating, "What reputational interest did Jerry [Cashwell] 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."[90]

81. *Id.*
82. *Id.*
83. *Id.*
84. Solomon, *supra* note 75.
85. *Supreme Court Refuses to Consider Hunt's Appeal*, FAYETTEVILLE OBSERVER, Jan. 25, 2008, 2008 WLNR 1496357.
86. Liptak, *supra* note 76.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

D. Distinctions Among the Three Cases

There are distinctions of note among the three example cases.

The lawyers in *Logan* obtained an "after-death" waiver from their client, placing them in a more favorable position than the revealing lawyers in *Hunt* and *Atkins*. Further, in *Atkins*, the revealing lawyer's client had perjured himself at the original trial. The only perjury known to the defense lawyer in the *Atkins* trial was the co-defendant's responses when asked by prosecutors if he had been told what to say by anyone.[91] And further, the co-defendant's lawyer was not counsel at the *Atkins* trial. If the standards of the Virginia version of Model Rule 3.3 were met, he may have been able to reveal the truth at that time.

II. The Current State of the Law

May a lawyer reveal client confidences to rectify the wrongful[92] conviction of another?

A. The Massachusetts and Alaska Approach

At present, at least when wrongful incarceration is occurring, two states are on record as answering this question in the affirmative, although both used expanding modifications in the Model Rule 1.6(b)(1) language to achieve that result.[93] According to Massachusetts Rule 1.6(b)(1), a lawyer may reveal information "to prevent the commission of 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.*"[94]

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91. See dialogue regarding *Napue* claims in the state hearings, on file with author.

92. By "wrongful" in this paper, I mean to include only the factual innocence of the wrongly convicted person. I do not mean to include convictions made wrongful by a legal error during the proceedings.

93. At least one additional state is currently considering such a language change. In June 2010 the New Jersey Supreme Court's Professional Responsibility Rules Committee invited the New Jersey State Bar Association to comment on adopting the part of the Massachusetts rule that allows for lawyers to reveal confidences "to prevent wrongful execution . . . [or] incarceration." *See* Andrew Perlman, *New Jersey Considering the "Massachusetts Exception" to Rule 1.6*, LEGAL ETHICS FORUM (June 22, 2010, 7:31 PM), http://www.legalethicsforum.com/blog/2010/06/new-jersey-considering-an-unusual-exception-to-rule-16.html.

94. MASS. R. PROF. C. 1.6 (2006) (emphasis added).

According to comment [9A], "The reference to bodily harm is not meant to require physical injury as a prerequisite. Acts of statutory rape, for example, fall within the concept of bodily harm."[95] Wrongful incarceration is mentioned specifically to permit disclosure where the failure to disclose does not necessarily involve the commission of a crime.[96] Rule 1.6(b)(1) is derived in part from the original Kutak commission proposal for the ABA Model Rules.[97]

There are no legal ethics opinions or reported cases that apply Rule 1.6(b)(1) in Massachusetts.

According to the Alaska Rules of Professional Conduct, specifically Rule 1.6(b), "A lawyer may reveal a client's confidence or secret to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain: (A) death; (B) substantial bodily harm; or (C) wrongful execution or incarceration of another."[98] Alaska has adopted comment [6] from the Model Rules of Professional Responsibility. There is an additional comment specifying that Rule 1.6(b)(1)(C) is modeled on the similar Massachusetts rule. The lawyer's decision whether to disclose is judged on the objectively reasonable standard.

There are no reported cases or legal ethics opinions applying Rule 1.6(b)(1)(C) in Alaska.

Neither Massachusetts nor Alaska would allow a lawyer to rectify a wrongful conviction that was not currently producing incarceration. The balance point has been struck as follows: Rectifying a wrongful conviction alone does not warrant revelation of client confidences; rectifying a wrongful conviction that is producing incarceration does.

B. The Meaning of "Substantial Bodily Harm"

Outside of Alaska and Massachusetts, may a lawyer reveal client confidences to rectify the wrongful conviction of another? Policy arguments and considerations aside, the doctrinal starting point is MR 1.6(b)(1).[99] If the daily life of the wrongly incarcerated is producing "reasonably certain . . . substantial bodily harm," then the lawyer may reveal the client information necessary to prevent it.

95. MASS. R. PROF. C. 1.6 cmt. 9A (2006).

96. *Id.*

97. *Id.*

98. ALASKA R. PROF. CONDUCT 1.6(b)(1)(B)(2010).

99. A state-by-state collection of MR, *supra* note 6, 1.6(b)(1) clones is in the Appendix to this article.

There is precious little authority specifically treating the application of the "substantial" bodily harm language of MR 1.6(b)(1).

The Comment to the Model Rules provides some insight into the meaning of "substantial bodily harm." The Comment illustrates "future substantial bodily harm" with an example about water supply pollution. In the example, the lawyer's client has in the past introduced contaminants into a community's water supply. The result will be reasonably certain substantial bodily harm to the drinkers of the water. No violence was involved in producing the harm. Nor was the client's act necessarily a crime, and it was certainly not a crime yet to be committed. The Comment has been widely adopted (sometimes with minor alterations) by states that have adopted some form of Model Rule 1.6. Based on the water pollution example included in the Comment, at least it can be said that the substantial bodily harm need not be the result of violence.

Nearly every state has adopted some version of Rule 1.6. There are alterations regarding the permissive nature of disclosure, and whether it is necessary that the client be involved in causing the harm. Below is a sampling of state applications of the MR 1.6 clones. The authority is sparse and this rendering of it reflects its scattered nature.

A legal ethics opinion in Utah stated that child abuse can constitute a substantial bodily harm that would permit disclosure, though the nature of the abuse was not discussed.[100] According to a New York Legal Ethics Opinion, a lawyer may not reveal his client's continued possession of stolen property. Being without one's property is not a substantial bodily harm.[101] Two ends of the definitional spectrum—child abuse is substantial bodily harm, while possession of stolen property is not.

Does the client need to be the source of the substantial bodily harm?

The applicable Restatement rule does not require that the "serious bodily harm" be the result of any action or inaction on the part of the client or attorney, criminal, fraudulent, or otherwise.[102] Indeed, it specifically refers to the results of long-term imprisonment:

> Serious bodily harm within the meaning of the Section includes life-threatening illness and injuries and *the consequences of*

100. Utah Eth. Op. 97-112.

101. N.Y. Eth. Op. 2002-1.

102. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 66 (2000).

> *events such as imprisonment for a substantial period* and child sexual abuse. It also includes a client's threat of suicide.[103]

Under the Model Rules, disclosure of a suicide threat would be permitted, whether criminal in itself or not.[104] In Utah the harm need not be the result of any particular conduct.[105] A suicide threat may be disclosed.[106]

And clearly, the substantial bodily harm need not be the result of a future criminal act.

Delaware has adopted MR 1.6 as well as comment [6]. Delaware does not require that the substantial bodily harm be the result of criminal conduct, prospective or otherwise.[107] The New York rule does not require that substantial harm be the result of a prospective criminal act.[108] The Model Rule itself belies any such requirement.

The authority is sparse, but it may be said in summary that substantial bodily harm need not be the result of criminal conduct, it need not be the result of the client's own conduct, and it need not be connected with violence. If revelation of the client's information will prevent it, the information may be (and in some states "must be")[109] revealed. Future harm from whatever source, with or without its cause in violence or crime, triggers the exception. When such substantial bodily harm can be prevented by the revelation of confidential information, that revelation is permitted.

C. Harm to the Wrongly Convicted

Is there *harm* that comes to all wrongfully convicted persons? Doubtless the answer is yes. The very experience of being wrongfully

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103. *Id.* at cmt. c, illus. 3 (2000) (emphasis added).

104. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 83-1500 (1983).

105. UTAH R. PROF. CONDUCT 1.6 (2010).

106. Utah Ethics Op. 95, 1989 WL 509363 (1996).

107. DEL. R. PROF. CONDUCT 1.6(b)(1) (2010).

108. N.Y. R. PROF. CONDUCT 1.6 (2009).

109. I am advocating for a permissive rule rather than a mandatory one. There will undoubtedly be cases in which the harm that may come from revelation would be unusually significant and revelation would be unwarranted. For example, if the potentially revealing lawyer's client and the wrongly convicted were gang members, and revelation would result in violence being done to family members of the wrongly convicted, revelation would be unwarranted. "May" language would permit the lawyer to balance the extraordinary harms in such an instance.

accused, let alone convicted, implicates significant mental torment.[110] Conviction adversely affects a person's employment prospects[111] and leads to all of the collateral harm that flows from such a handicap. Felony convictions deprive the felon of certain civil rights or encumber their exercise.[112] Immigration status is affected by a felony

110. The mental torment is much in evidence in numerous films by Alfred Hitchcock. *See* All About Alfred Hitchcock, www.Classicfilm.about.com/od/alfredhitchcock/tp/Alfred_Hitchcock_Page.htm ("One of the most enduring themes in Hitchcock's work is that of a good man falsely accused, pursued by the authorities while trying to clear his name . . . . The theme allegedly took root when Hitchcock was briefly held by the police as a small boy, and can be seen in his early British works as well as later movies.").

111. Generally, a federal conviction does not automatically disqualify a person from federal employment, but it is considered a factor in evaluating suitability for employment. In most circumstances, the greater the relationship between the offenses committed and the type of employment, the more likely the felon will be precluded from federal employment. Persons convicted of a felony after September 1, 1989, may lose or have restrictions placed upon grants, licenses, contracts and other federal benefits. Excluded from these restrictions are welfare, social security, retirement, health and disability benefits. A federal felon may also be restricted by the sentencing court in his or her occupational choices if there exists a reasonably direct relationship between the defendant's criminal conduct and his occupation. A person convicted of a federal felony will also be restricted in his ability to become an officer, director, employee or controlling shareholder or an institution that is a federally insured depository or owns or controls a federally insured depository. A person who trades in commodities may be refused registration by the Commodity Futures Trading Commission. When a person has been convicted of robbery, bribery, extortion, embezzlement, murder and assault with intent to kill, he or she may be prohibited from serving as a consultant, officer or director of a labor organization or employee benefit plan. The prohibition term is thirteen years after the conviction or end of imprisonment, whichever is later, unless the court sets a shorter period. *See* 29 U.S.C. §§ 504, 1111. Once a person is convicted of a federal felony, he is ineligible for enlistment in the armed services.

Aside from official employment disqualifications, convictions have a generalized, adverse effect on employment prospects. *See, e.g.*, How Does a Person With a Felony Find A Job After He Has Served His Time?, http://wiki.answers.com/Q/How_does_a_person_with_a_felony_find_a_job_after_he_has_served_his_time.

112. The right to vote is guaranteed to all mentally competent adults in the United States with the exception of convicted criminal offenders. In the United States, approximately 3.9 million convicted individuals are disenfranchised, including over one million individuals who have completed their sentences. In forty-six states and the District of Columbia, disenfranchisement laws deny voting rights to all convicted adults in prison. Thirty-two states disenfranchise felons on parole, twenty-nine disenfranchise those on probation and in fourteen states offenders who have fully served their sentences remain disenfranchised. Ten states permanently disenfranchise convicted felons. These states include Alabama, Delaware, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia, and Wyoming. Arizona and Wyoming permanently disenfranchise individuals convicted of a second felony. Tennessee permanently disenfranchises individuals convicted prior to 1986 and Washington permanently disenfranchises anyone convicted of a felony prior to 1984. In Texas, a convicted felon's right to vote is not restored until two years after discharge from prison probation or parole. Only four states, Maine, Massachusetts, Utah, and Vermont, do not disenfranchise convicted felons. Thirteen

conviction.[113] For innocent persons convicted of some crime, any crime, there are these baseline harms that diminish their lives. These harms are only enhanced by the torment of knowing that they flow from no act of the wrongly convicted person.

Do all wrongfully convicted persons suffer *substantial bodily* harm? Doubtless the answer is no. Some who are wrongfully convicted are not sentenced to incarceration at all, as in the instance of some modest financial crimes or low-level drug crimes, for example. Without taking lightly the very significant difficulties that *any* conviction can occasion,[114] not all wrongly convicted persons suffer substantial bodily harm. In such instances, the doctrinal path to revelation under MR 1.6 (b)(1) is closed.

Within the group of wrongfully convicted who are incarcerated there is wide variation of risk of substantial bodily harm, including assault, sexual assault, death, contraction of AIDS, and generalized harmful health effects of long-term incarceration.[115] At one end of the

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percent of African-American men or 1.4 million are disenfranchised representing over one-third (thirty-six percent) of the total disenfranchised population. In two states, one in three black males are disenfranchised and in eight states one in four black males are disenfranchised. Human Rights Watch, The Sentencing Project, http://www.hrw.org/reports98/vote/usvot98o.htm.

Federal law prohibits firearm possession by anyone convicted of a crime with a potential imprisonment of more than one year, but some white collar crime are exempt under this law. State laws may be more restrictive than federal laws. For example, federal laws do not prohibit the possession of muzzle-loading rifles if one is convicted of a felony, but many state laws do. Federal felony conviction results in the loss of the right to vote, sit of juries, run for or hold public office. 28 U.S.C. § 1865 restricts the right to serve on a federal grand jury or petit jury for a person convicted in state or federal court for a crime punishable by imprisonment for more than one year. Felony convictions in eleven categories have varying consequences ranging from the inability to enlist in the military to ineligibility for federal public housing (these are usually felonies that involve disrupting other tenants peaceful enjoyment of the premises such as shootings or drug convictions, 42 U.S.C. § 1437f(d)(1)(B)(iii)). Other federal rights that may be lost include disqualification from receiving federal contracts and inability to receive federal student assistance. *See generally* Cindy Ellen Hill, *What Rights Are Denied to Convicted Felons?*, http://www.ehow.com/about_5444897_rights-denied-convicted-felons.html.

113. Aliens who have been convicted of a felony are disqualified from temporary or permanent residence status as well as temporary residence status as a special agricultural worker. 28 U.S.C. §§1255 (a)(4)(B), (b)(1)(C)(ii); 8 C.F.R. 216.3. Persons convicted of a felony usually cannot obtain a passport.

114. *See* nn. 110–113.

115. Among many reports and statistical studies, *see generally* Cindy Struckman-Johnson and David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. INTERPERSONAL VIOLENCE 1591 (2006) (finding that between 3-12 percent of prison inmates are raped at some point during their incarceration); About.com, Sexual Violations Increase in U.S. Prisons, usgovinfo.about.com/b/2006/08/02/sexual-violations-increase-in-us-prisons.htm?p=1; Just Detention

spectrum is the wrongfully convicted person awaiting execution. At the other end is the wrongfully convicted person who is sentenced to a very short term in a local jail or minimum security facility. The latter has had freedom of movement limited for a short time, but is less likely to suffer substantial bodily harm as a result of the wrongful conviction. The spectrum has a full range in between.

As currently drafted, Model Rule 1.6(b)(1) is a somewhat unwieldy vehicle to support a doctrinal path that would allow a defense lawyer to remedy a wrongful conviction of another. There are wide variations in the harm to the wrongfully convicted based on the nature of the conviction, the length of the sentence, the nature of the incarceration, if any. To use 1.6(b)(1) for this purpose would require a case-by-case measurement of the level of harm being inflicted on the wrongfully convicted. The Restatement contemplates this approach by listing "imprisonment for a substantial period" among those conditions amounting to "serious bodily harm,"[116] but even if that interpretive guidance were added to the MR Comments or read into it by virtue of the Restatement's influence, a case-by-case inquiry would be required for the rule's application.

D. A Contrast Between MR 1.6 and the Massachusetts/Alaska Approach

If there were an exception to MR 1.6 that simply allowed revelation of information necessary to rectify any wrongful conviction, or a wrongful conviction that resulted in incarceration (the Massachusetts and Alaska approach), then the nature and length of incarceration would be immaterial. The goal would be to remedy whatever adverse effects have flowed from a wrongful conviction of an innocent person. Adoption of such a rule requires an institutional choice to harm a client who has committed an offense for which he

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International, *The Basics About Sexual Abuse in U.S. Detention*, January 2009, http://www.justdetention.org/en/factsheets/TheBasics.pdf (noting that research shows that 20 percent of inmates in male prisons are sexually abused at some point during incarceration); *Rate of Confirmed AIDS in Prison 2.5 Times the Rate in the U.S. General Population*, Office of Justice Programs, U.S. Department of Justice, http://bjs.ojp.usdoj.gov/content/pub/ascii/hivp08.txt (noting that in 2007, about forty-three per 10,000 prison inmates were estimated to have confirmed HIV compared to seventeen per 10,000 persons in the U.S. general population). The U.S. Department of Justice Bureau of Justice Statistics has a detailed report on its website www.ojp.usdoj.gov/bjs which includes charts of local, state and federal prisons listing the causes of death, divided by year, between 2000 and 2006.

116. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 66 cmt. c, illus. 3 (2000).

was not charged and to assist an innocent person who has been wrongfully convicted.

Bodily harm or not, there are serious consequences that flow from all wrongful felony convictions. The felon's civil rights are in jeopardy,[117] his employment and professional opportunity are dramatically diminished, and he unjustly receives the reproach of community and family. The master of the mystery film, Alfred Hitchcock, placed any number of main characters in the unenviable and emotionally tortured position of being wrongly accused.[118]

The "may" language in the Massachusetts and Alaska rules allows the lawyer to make the case-by-case judgments about the balance of harms and the instances when revelation should ensue. Any reasonable reading of the current MR 1.6 exception, even with the Restatement gloss, leaves these choices first with the rule interpretation, and only then with the lawyer possessing the information. The rule advocated for here is cast in permissive, "may" terms. Too much discretion should not be read into this choice. The ABA has opted for permissive language even where the circumstances of the confidentiality exception clearly make revelation mandatory. The lawyer "may" reveal when the lawyer must "comply" with other law or court order.[119]

The harm to one's client occasioned by revelation would be of approximately the same quality and measure as the harm that has come to the wrongly convicted, with one chief distinction. The harm to the client would flow from his own felonious conduct. The harm to the wrongly convicted has also resulted from the client's same felonious conduct and from no fault of the wrongly convicted. As such, the moral stance of the two harms is highly distinguishable, even if the measure of the harm is largely the same.

The lawyer-protective exceptions to the confidentiality duty that exist rest on far less weighty moral grounds,[120] allowing a lawyer to use confidences to make claims or defend claims that involve the client or

117. *See generally* Alan Ellis and Peter J. Scherr, *Federal Felony Convictions, Collateral Civil Disabilities*, Criminal Justice (1996), http://www.alanellis.com/CM/Publications/federal-felony-conviction.asp; *see also Civil Disabilities of Convicted Felons: A State-by-State Survey*, U.S. Department of Justice, Office of the Pardon Attorney (October 1992).

118. *See supra* note 110.

119. MR, *supra* note 6, 1.6(b)(6).

120. Similar views were expressed during the ALI discussion of this issue in the late 1980s and 1990s. Proceedings, *supra* note 2; Freedman, *supra* note 2, at 1633.

conduct involving the client.[121] The lawyer using this exception and the wrongly convicted may be compared. Each would benefit from using the client's confidences in making her own claim or defense. Under current law, the lawyer may use the information on his own behalf, but not on behalf of the wrongly convicted.

When a new exception to the confidentiality duty is proposed, the oft-heard argument suggests that a new exception to the confidentiality duty must be accompanied by a warning to the client, and if warned, a client will not tell the lawyer the incriminating information, and damage to the delicate establishment of lawyer-client trust will result.[122] No doubt the foundation of the lawyer-client privilege and its close relative the duty of confidentiality is the encouragement of open communication between lawyer and client, and the benefits that flow from candor and openness:[123] the lawyer's work for the client will be more effective; the client's revelations may lead to opportunities for the lawyer to counsel the client about the client's conduct. But the scholarly suggestions that lawyers warn clients about exceptions to the confidentiality duty[124] have not affected practice,[125] and the current exceptions do not routinely produce such warnings, nor are they likely to appreciably diminish open communication.[126] The argument that a new exception must be accompanied by a warning—which would therefore prevent any such disclosures from being made—fails to persuade.

It might be suggested that this exception is different because the other exceptions traditionally allow lawyers to counsel clients before having to reveal their future acts. The lawyer's counseling may dissuade the client from the future act that requires or permits revelation. With respect to the old "future crime" exception, this

121. *See* MR, *supra* note 6, 1.6(b)(5)(permitting lawyer use of client confidences to collect the lawyer's fee or otherwise establish the lawyer's claims or defenses in controversies involving the client or the client's conduct).

122. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 n.4 (1998) (summarizing the limited empirical evidence that the privilege encourages open communication).

123. 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); *Swidler*, 524 U.S. at 403; Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

124. *See* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients about Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990).

125. Clark D. Cunningham, *How to Explain Confidentiality*, 9 CLINICAL L. REV. 579 (2003).

126. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382, 386 (1989).

argument would have been on the mark and availing. But with the dawn of the "future harm" exception in 2002, this argument loses its efficacy. In future harm settings, the act of the client may already have occurred and cannot be "put back in the bottle." Just as is the case with the proposed revelation that cures a wrongful conviction, a future harm revelation is about a past event, one that the lawyer's counseling function cannot prevent. The proposed exception stands on no different "warning" footing than does the future harm exception.

E. The Lawyer's View

Although individual lawyers involved in matters such as those discussed in this paper will likely feel significant angst and misgivings about the revelation of confidences and the loss of hard-earned convictions, both prosecuting and defense lawyers generally should want these revelations to be made.[127]

1. The Prosecutor's View

Individual prosecutors understandably hope to preserve their well-earned convictions. They tend to bemoan reversals. In some celebrated instances, prosecutors have fought to the end to avoid reversals when it appeared clear that the original conviction had been erroneous.[128] Prosecutors' understandable reliance on "the system," makes innocence-based reversals incongruous. If the original jury convicted, then the defendant was guilty by our legal definition. To exacerbate the reversed-prosecutor's angst, when such revelations occur, they may come at a time when a conviction of the actual perpetrator has been made impossible by the passage of time or other factors.[129]

Yet all know that the government seeks justice, and justice is perhaps most severely disserved when an innocent person is convicted. The generalized prosecution view would prefer that some guilty persons go unpunished rather than the innocent being convicted. Naturally, the government wants crimes to earn

127. *See, e.g.*, Achieving Justice: Freeing the Innocent, Convicting the Guilty (ABA Section of Criminal Justice, 2006).

128. Among many such examples, see cases recounted in the film, AFTER INNOCENCE (American Film Foundation 2005).

129. One often-made proposal at the Roundtables was that immunity accompany the revelation, thereby relieving the revealing lawyer of having harmed her client.

punishment, but punishing the wrong person is not in the government's interest.

2. *The Defense View*

Likewise, the individual defense lawyer will likely despise revealing client confidences that implicate his client in another crime. Defense lawyers' sense of loyalty simply does not readily permit such a compromise of a client's interest, as the anxiety of the defense lawyers in the *Atkins*, *Hunt*, and *Logan* cases amply demonstrate. Some defense lawyers undoubtedly would prefer that no one be convicted of a particular crime. Certainly the celebration attending acquittals in cases of factual guilt is understandable. Such instances are wins.

But in the cases discussed in this paper, the wrong person is being punished. This circumstance is far different from the "no one convicted" circumstance. In a generalized view of the criminal defense bar, wrongful convictions are anathema. The tendency in these cases is to focus on the confidence-revealing defense lawyer. But there is another defense lawyer, the one who represented the wrongly convicted person. Further, the defense orientation is not meant to exist in the service of defense lawyers. It serves and privileges defendants. There are two defendants in the cases discussed in this paper: One of them has been convicted of a crime he did not commit. Nothing could be more opposed to the generalized interest of the defense bar.

Conclusion

Except in Alaska and Massachusetts, the defense lawyer whose client reveals his commission of a crime for which another has been wrongly convicted faces an unclear legal landscape. An interpretation of the standard future harms exception, especially with the Restatement illustration gloss, may yield permission to reveal the client's information and rectify the wrongful conviction. But that result is far from certain and is weighted down with significant factor-weighing to determine if the wrongly convicted is suffering "substantial bodily harm." The nature and length of the wrongful sentence must be considered. Despite a broader view that would dictate revelation of such information, the individual defense lawyers and prosecutors are likely to resist results of factor-weighing that favor revelation. The Alaska and Massachusetts approach is cleaner

but still requires what may be unpalatable to some: Inflicting harm on one's own client to aid an innocent other.

The justice system has been shaken by revelations of wrongful convictions. Thus far, most of the attention has been paid to wrongful convictions in capital cases. These most grave cases receive more attention and resources than any others at the time of trial. Reason says that if there are significant numbers of wrongful convictions in capital cases, there are at least as high a percentage of wrongful convictions in less weighty matters where fewer defense and prosecution resources are expended at trial. Confidence in the justice system cannot long survive in the face of long-past revelations of wrongful convictions when silence was mandated by lawyer ethics law. The change advocated for in this paper is overdue and now needed if confidence in the justice system is to be preserved.

Appendix

A. State-by-State Collection of MR 1.6(b)(1) Clones

Alabama: "(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

Ala. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 3/1/2010.

Alaska: "(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain:

(A) death;

(B) substantial bodily harm; or

(C) wrongful execution or incarceration of another."

Alaska R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 4/1/2010.

Arizona: "A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."

Ariz. R. Prof. Conduct 1.6(b)

Current with amendments received through 5/15/10.

Arkansas: There is no future bodily harm exception, only this:

"(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the commission of a criminal act;

(2) to prevent the client from committing a fraud that is reasonably certain to result in injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

Ark. R. Prof. Conduct 1.6(b)(2)

State Court Rules current with amendments received through 4/28/2010.

California: "A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

Cal. R. Prof. Conduct 3-100(B)

Current with amendments received through 4/1/2010.

Colorado: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm"

Colo R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 5/15/2010.

Connecticut: "A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm."

Conn. R. Prof. Conduct 1.6 (b)

Current with amendments received through 12/1/2009.

Delaware: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Del. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 3/1/2010.

Florida: "(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another."

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the attorney to disclose information reasonably necessary to prevent the future death or substantial bodily

harm to another, even though the act of the client has been completed.

Fla. R. Prof. Conduct 4-1.6(b)(2), Comment.

Current with Amendments received through 3/4/10.

Georgia: "(b)(1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;

ii) to prevent serious injury or death not otherwise covered by subparagraph (i) above."

Ga. R. Prof. Conduct 1.6(b)(1)(ii)

Current with amendments received through 4/1/2010.

Hawai'i: "(c) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing 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."

Haw. R. Prof. Conduct 1.6(c)(1)

Current with amendments received through 1/1/2010.

Idaho: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;

(2) to prevent reasonably certain death or substantial bodily harm."

Idaho R. Prof. Conduct 1.6(b)(2)

Current with amendments received through 6/15/2010.

Illinois: "A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."

Ill. R. Prof. Conduct Rule 1.6 (c)

Current with amendments received through 6/1/2010.

Indiana: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Ind. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 3/1/2010.

Iowa: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm"

Iowa R. Prof. Conduct 1.6(b)(1)

"(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm."

Iowa R. Prof. Conduct 1.6(c)

Current with amendments received through 6/15/2010.

Kansas: There is no harm exception

Kan. R. Prof. Conduct 1.6

Current through October 1, 2009.

Kentucky: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Ky. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 1/01/2010.

Louisiana: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

La. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 02/25/2010.

Maine: "(b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain substantial bodily harm or death."

Me. R. Prof. Conduct 1.6(b)(1)
Current with amendments received through 2/15/2010.

Maryland: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Md. R. Prof. Conduct 1.6(b)(1)
Current with amendments received through 2/1/2010.

Massachusetts: "(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information:

(1) to prevent the commission of 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."

Mass. R. Prof. Conduct 1.6(b)(1)
Current with amendments received through 1/15/2010.

Michigan: There is no harm exception
Mich. R. Prof. Conduct 1.6
Current with amendments received through 12/1/2009.

Minnesota: "(b) A lawyer may reveal information relating to the representation of a client if:

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm."

Minn. R. Prof. Conduct 1.6(b)(6)
Current with amendments received through 3/15/2010.

Mississippi: "(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Miss. R. Prof. Conduct 1.6(b)(1) (1987).

Missouri: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent death or substantial bodily harm that is reasonably certain to occur."

Mo. R. Prof. Conduct 4-1.6(b)(1)

Current with amendments received through 3/24/2010.

Montana: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Mont. R. Prof. Conduct 1.6(b)(1)

Current through Rules received through 3/5/2010.

Nebraska: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm."

Neb. R. Prof. Conduct 3-501.6(b)(1)

Current with amendments received through 2/1/2010.

Nevada: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Nev. R. Prof. Conduct 1.6(b)(1)

Current through Rules received through 04/15/2010.

New Hampshire: "(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another."

N.H. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 11/15/2009.

New Jersey: "(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another."

N.J. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 04/15/2010.

New Mexico: "B. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

N.M. R. Prof. Conduct 16-106(B)(1)

Current with amendments received through 2/1/2010.

New York: "(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

N.Y. R. Prof. Conduct 1.6(b)(1)

Current 4/1/2009.

North Carolina: "(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(3) to prevent reasonably certain death or bodily harm."

Comment 6 refers to the exception as allowing for disclosure in order to prevent substantial bodily harm.

N.C. R. Prof. Conduct 1.6(b)(3)

Current with amendments received through 1/15/2010.

North Dakota: "A lawyer is required to reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary to prevent reasonably certain death or substantial bodily harm."

N.D. R. Prof. Conduct 1.6(b)

Current with amendments received through 2/1/2010.

Ohio: "(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

to prevent reasonably certain death or substantial bodily harm."

Ohio R. Prof. Conduct 1.6(b)(1)

Effective 2/1/2007.

Oklahoma: "A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Okla R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 5/1/2010.

Oregon: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(2) to prevent reasonably certain death or substantial bodily harm."

Or. R. Prof. Conduct 1.6(b)(2)

Current with amendments received through 1/20/2009.

Pennsylvania: "(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Pa. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 5/10/2010.

Rhode Island: "(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

R.I. R. Prof. Conduct 1.6(c)(1)

Current with amendments received through 5/10/2010.

South Carolina: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(2) to prevent reasonably certain death or substantial bodily harm."

S.C. R. Prof. Conduct 1.6(b)(2)
Current with amendments received through 12/15/2009.

South Dakota: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

S.D. R. Prof. Conduct 1.6(b)(1)
Current through the end of the 2010 Regular Session and Supreme Court Rule 10-03

Tennessee: "(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm.";

Tenn. R. Prof. Conduct 1.6(c)(1)
Current with amendments received through 2/1/2010.

Texas: "When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act."

Tex. R. Prof. Conduct 1.05(e)
Current with amendments received through 2/1/2010.

Utah: "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm."

Utah R. Prof. Conduct Rule 1.6(b)(1)
Current with amendments effective 4/1/2010.

Vermont: "(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

(1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act.";

Vt. R. Prof. Conduct 1.6(b)(1)

"(c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

(1) to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act."

Vt. R. Prof. Conduct 1.6(c)(1)

Current with amendments received through 02/01/2010.

Virginia: There is no harm exception

Va. R. Prof. Conduct 1.6

Current with amendments received through 4/1/2010.

Washington: "(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm."

Wash. R. Prof. Conduct 1.6(b)(1)

Current with amendments received through 1/15/2010.

West Virginia: There is no harm exception

W.Va. R. Prof. Conduct 1.6

Current with Amendments received through 12/1/2009.

Wisconsin: "(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing 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 interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm."

Wis. R. Prof. Conduct 20:1.6(b)-(c)(1)
Current with court orders received through 05/25/2010.

Wyoming: There is no harm exception.
Wyo. R. Prof. Conduct 1.6
Current with amendments received through 5/15/2010.