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Viewpoint: When Can a Lawyer Break Privilege?

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Last May, Arizona Governor Jan Brewer fired the majority of her clemency board. Most observers agreed that Brewer's decision had everything to do with the Macumber case.

The 1962 murder of a young couple in the desert north of Scottsdale, Ariz., remained unsolved until 1974, when Bill Macumber's ex-wife, Carol, a sheriff's department employee going through an ugly divorce from Macumber, claimed that Macumber had confessed to the killings. Corroborating evidence was found in a sheriff's evidence locker to which Carol had access.

Unbeknownst to the sheriff and prosecutors, another man, Ernesto Valenzuela, in prison for two markedly similar murders, had already bragged to his own defense counsel, Thomas O'Toole, that he had committed those crimes. O'Toole, who soon after became a state judge, later said Valenzuela actually "relished committing the murders."

O'Toole, of course, said nothing at first, abiding by his duty of confidentiality. Speaking about the unsolved crime would have resulted in Valenzuela being charged. But in 1973, Valenzuela was killed in prison, and coincidentally the arrest of Macumber followed soon after. O'Toole, having first gotten permission from Valenzuela's mother, felt released from his duty of confidentiality, and agreed to testify at Macumber's trial. Justice would surely prevail.

But first the trial court and then the appellate court refused to consider O'Toole's testimony, ruling that the attorney-client privilege survived Valenzuela's death and that permission from his client's mother was insufficient. Macumber was convicted.

Decades later, in 2009, with Macumber's cause reinvigorated by O'Toole and an Arizona innocence project, the Arizona clemency board became convinced that he had been framed by his wife, and that Valenzuela was the perpetrator. The board recommended release in 2009 and again in 2012, even noting that Macumber's conviction was a "miscarriage of justice." But Brewer denied clemency both times and then fired the majority of the board.

Finally, the elderly and infirm Macumber made a political deal by pleading no contest to second-degree murder. He was freed three months ago. And justice was ... well, not served, exactly. Macumber remains a convicted felon, and there are those 37 years he lost behind bars.

The Macumber case has been used by Brewer's critics to further support the view that Brewer, who is best known for her militant anti-immigration stance, is both rigid and lacks compassion. But the case's primary interest for me has been to arouse an old debate I've been having with myself for some years now. As a former criminal defense specialist, I have long believed not only that the duty of criminal defense lawyers to vigorously defend includes always maintaining confidentiality, but that those who do this work serve society and the ends of justice by protecting important human rights, including the sanctity of the lawyer-client relationship.

But now I'm not so sure.

Several recent cases in the past five years — in Illinois, North Carolina and Virginia as well as Arizona — have brought this issue to the forefront in academic and journalistic circles: a spate of law review articles; profiles of each case from *The New York Times*' Adam Liptak; often, *60 Minutes* or other TV news magazine pieces. The thrust of the TV reports and much of the academic discussion has been to ask 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. Fewer voices are raised in defense of confidentiality, though those voices, such as Hofstra University law professor Monroe Freedman's, are strong, learned and well-respected.

But could it be that the academics and the TV reporters have a point? Recently, I've been wondering 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.

Here are some of the questions I've been asking myself: First, when does attorney-client confidentiality end? At death? Not in Arizona, apparently. When no further harm can befall the client through revelation? Not in most states. Never? That's the majority rule. (California is actually an exception to this rule. *See* *HLC Properties v. Superior Court*, 35 Cal.4th 54 (2005).)

Second, when should attorney-client confidentiality give way in the face of grave harm to an innocent person? Does it have to be the imminent implementation of the death penalty? Or is

there an argument that just sitting on death row or in prison for life itself the "substantial bodily harm" exception to confidentiality, as defined in the ethics rules of most states?

Freedman, a legal ethics giant, long a scholar of criminal defense ethics, and one of the strongest defenders of confidentiality, told *NYT*'s Liptak a few years ago that he'd "draw the line at the life-and-death situation" before revealing a confidence, noting that "extend[ing] it to incarceration in general" would make it far too broad. But later in the same article, Freedman acknowledged that if the client 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," perhaps wider revelation would be justified.

In Virginia in 2008 attorney Leslie Smith didn't wait until his client was dead to implement the "no-more-possible-harm" exception. Smith had represented William Jones on murder charges. Jones and co-defendant Daryl Atkins forced a man to make a withdrawal form an ATM and then killed him. Both were convicted, but Atkins was sentenced to death while Jones received life in prison without possibility of parole. Under Virginia law only the actual perpetrator may get the death penalty.

Smith knew that the prosecutors had coached Jones to say Atkins was the shooter. After Jones' appeals were exhausted and his case final, Smith asked the Virginia ethics authorities to reveal what he knew. They told him he could speak, since doing so would have no adverse effect on Jones. Atkins was eventually resentenced.

I have come to believe that in situations that involve an innocent person on death row or in prison for life, if I know this person is innocent because my client has admitted the crime to me, I should be able to reveal it at least upon my client's death.

But is even that enough? In 1982, Alton Logan was convicted of killing a McDonald's security guard and sentenced to life. He was innocent. Another man, Andrew Wilson, convicted and sentenced to prison for life for killing two police officers, had killed the guard. Wilson had told his two lawyers about it, sounding — as Valenzuela had — almost gleeful. Wilson's lawyers knew that Logan was simply the victim of a case of mistaken identity.

But Wilson's lawyers felt that they could reveal nothing until after his death, when he had given them permission to speak. When they learned that Wilson had died in prison in November 2007, they came forward. Logan was exonerated and released in April 2008, 26 years after his incarceration.

Was justice served? Not for Logan; he didn't get his 26 years back.

Incarceration on death row or for life without possibility of parole is, for me, "substantial bodily harm" within the meaning of the ethics rules, including California's own Rule 3-100. Lawyers should be able to reveal what they know in order to free an innocent man facing a life sentence, even if their client is still alive, if the client's case is final and he is incarcerated for life.

This is a sea change for me. Back in the day, I tried my share of murder cases. My friends in the defense bar may be surprised by my position. But I also represented a lot of prisoners, and I know how cruel and harmful prison can be.

Am I right? There is no right or wrong here, only a personal decision. Nor, in my eyes, can you pit "legal ethics" against "personal morality," because they're both part of the same thing: who you are as a human being.

I remain free to change my views again, but here, as food for thought, is where I come out today, as I think of Bill Macumber.

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The Recorder *welcomes submissions to Viewpoint. Contact Vitaly Gashpar at vgashpar@alm.com.*