

# A Word of Caution: Consequences of Confession

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## I. INTRODUCTION

Once you are accused of a crime, no one likes you anymore. The police officer so detested you that he arrested you and put you in a cell. The “Officer Friendly” you knew from elementary school was less than friendly. The prosecutor was not so nice either and actually filed charges against you. Now in court that prosecutor not only won’t say a word to you, but he also will not even look at you. The judge is literally there to judge you. No metaphors here—he sits up high so he can actually look down on you. Your friends and family are disappointed in you. And this is all while you are presumed innocent. It gets worse if you actually did it. It is absolutely terrible if it was a serious crime.

I have noticed in my more than a decade of representing indigent people charged with crimes, that the criminally accused are judged by everyone around them. As an attorney who has practiced criminal law for her entire career, I firmly believe that the last thing the accused needs in his defense attorney is someone who is being critical of him.

The typical criminal defendant faces off against the police force, expert witnesses, government lawyers, and judges often with no resources other than a court-appointed lawyer. Because the defendant has so much stacked against him and is up against so much, in a criminal defense lawyer’s relationship with her client, she must put her client first. Not only is this a lofty goal but ethical rules require it. Ensuring the best outcome, consistent with the client’s goals, is the duty of the advocate. A defense attorney must do what is best for her *client* even if that is at odds with the attorney’s beliefs or even if it is inconvenient to her.<sup>1</sup> The best interest of her client must become the lawyer’s professional objective. And of course the defense attorney must pursue this goal zealously.<sup>2</sup>

As a result of the ethical requirement that a lawyer must always zealously represent a client’s goals, in the criminal justice system in particular, the defense attorney has to be firmly on the client’s side at every step. This is because she is the only person in the courthouse whose express purpose is to advocate on behalf of the defendant. For the system to work well, the defense attorney must

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<sup>1</sup> MODEL RULES OF PROF’L CONDUCT R.1.3 cmt. 1 (2009) states “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer . . . .”

<sup>2</sup> *Id.*

completely side with her client and his interests. Unfortunately for those accused, she is usually the *only* person. So a good defense attorney should seek the best bond conditions for her client, fight hard at trial regardless of the strength of the case, and in the event of a loss, pursue to the lowest possible sentence. Because there are so many players who can potentially align themselves *against* a criminal defendant, his defense attorney must vigorously pursue the client's interests at every turn.

Irrespective of the advocacy taking place in the courtroom, it is important that the defense attorney communicate that she is on her client's side through their out-of-court conversations. This is because the bulk of the attorney-client relationship is formed outside of the courtroom. In order for the defense attorney and her client to have a productive relationship, there should be no question in the client's mind that his attorney is there for him and his interest and serves no other role.

## II. THE CONVERSATION

With all that in mind, in my hypothetical representation of Steven my first goal is to figure out what *he* wants. It is impossible to give advice to any client on any issue, if you do not know his ultimate goals. To assess Steven's goals I have to ask him a number of questions and I have to give him some information. This conversation must be a real dialogue.

Probably the most important thing to assess is the truthfulness of Steven's confession to me. People confess to things they did not do all the time. Twenty-five percent of all DNA exonerations have involved false confessions.<sup>3</sup> Steven might be seeking to protect a friend. He may be coerced by someone else to confess in order to spare David.

Then I have to make sure that Steven knows all the facts. Given that David has been convicted, it is possible<sup>4</sup> that the prosecutor (despite his ethical obligations to seek the truth) will fight hard to uphold David's conviction.<sup>5</sup> But given that David has not yet been sentenced,<sup>6</sup> Steven still might be prosecuted. In that vein, I need to make sure that Steven doesn't harbor any illusions that the system will go easy on him if he comes forward to confess. This is a senseless crime. The facts as they have been explained do not seem to offer a legal

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<sup>3</sup> *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Facts\\_on\\_PostConviction\\_DNA\\_Exonerations.php](http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php).

<sup>4</sup> I understand that my friend Tucker Carrington believes the changes of Steven's prosecution are slim, and he certainly has more experience with post-trial litigation than I do. He may be more cynical than me too. I have never met a prosecutor who did not love a confession. And given that this confession is not coming years after conviction, but instead before actual conviction of David, I am more concerned with prosecution of Steven than Tucker.

<sup>5</sup> See Andrew Martin, *The Prosecution's Case Against DNA*, NY TIMES, Nov. 25, 2011, <http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html?pagewanted=all>. But given that David has not yet been convicted, this is unlikely.

<sup>6</sup> A conviction is not final until sentencing.

justification or defense.<sup>7</sup> Above all else, at the end of our meeting, if Steven learns nothing else, he must know that if he is prosecuted, he would probably spend the rest of his life in prison or at least a very large percentage of it.

To make that crystal clear to a young person, Steven needs to know from me all the things he will miss in his life if he confesses to this crime and is convicted. He will need to know that he will never ever have Thanksgiving or Christmas dinner with his family, never experience the birth of a child, or spend a birthday with his mother ever again. It is my job to make sure Steven understands how serious a thing he is considering, how ugly its ramifications are, and how irreversible a decision it is.

To do that I would also make sure that Steven knows just how truly horrible prison is. Time moves slowly in prison. But far worse than the mere passage of time is what must be endured in prison. Steven will be made to understand that prison rape is common.<sup>8</sup> HIV and AIDS deaths are higher than in the general population.<sup>9</sup> Solitary confinement is an increasingly popular prisoner management policy.<sup>10</sup> Prison conditions are often characterized as squalid. Steven should know that at minimum he will eat unhealthy food, get poor medical care, and have very few forms of educational or creative opportunities. Prison life is not fun. It bears very little resemblance to the lives the rest of us lead. And Steven needs to know that if he confesses to this crime he will likely be in prison for the rest of this life.

In addition to knowing the hard facts, Steven needs to know the law too. He is entitled to know everything I know about the law as it applies to his situation. As his attorney, making sure that he knows the law is probably my most obvious responsibility to him. Steven should know that it may be possible that he is never prosecuted and David never freed. Assuming justice for David is Steven's stated goal, this outcome would completely undermine that goal. Steven needs to understand that David's continued incarceration is a real possibility if the government fights to uphold David's conviction. David staying in jail despite Steven coming forward might make Steven feel even worse if all of their mutual friends, family, teachers, and neighbors know it was Steven who committed the

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<sup>7</sup> Investigation and a good lawyer might be able to come up with some self-defense facts given that the decedent was involved in the drug trade and two were involved in an argument. The decedent might have a record for violence that could be exploited.

<sup>8</sup> Back in 2001, Human Rights Watch estimated that as many as 140,000 men had been raped in American Prisons. JOANNE MARINER, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS, SUMMARY AND RECOMMENDATIONS PT.1 (2001).

<sup>9</sup> Laura M. Maruschak, *HIV in Prisons, 2007-08*, BUREAU OF JUSTICE STATISTICS BULLETIN (Dec. 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf>.

<sup>10</sup> According to a recent New Yorker article, 50,000 men are in solitary confinement in American prisons every day. Adam Gopnik, *The Caging of America*, NEW YORKER, at 1, Jan. 30, 2012, [http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat\\_atlarge\\_gopnik?currentPage=1](http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=1).

murder while David continues to sit in jail for it. This could even put Steven's life in jeopardy.

On the opposite end of the spectrum, because I also represent him in his ongoing probation matter, I have to advise Steven of the impact his coming forward about the murder will have on that case. Clearly his misdemeanor drug possession is not in the forefront of his mind. Its punishment pales immensely with what he is facing should he confess to this very serious crime. However, I am his lawyer in that case too and I have a duty to at least address that case and to tell him that his probation will be revoked and he will have to serve that sentence as well. Focusing on this relatively minor crime and discussing how much we did for him to avoid jail time at sentencing in that case is another way for us to discuss how much he will dislike the ramifications of his coming forward and telling the truth about the murder.

### III. THE ETHICS

Because of the defense attorney's role as advocate for the client, as I mentioned at the beginning of this piece, I believe strongly that defense attorneys should not judge their clients or their behavior. So I will not initiate a conversation with Steven about whether the decision not to come forward is a moral one. Psychologists and clergy members may feel it is their obligation to talk to Steven about his conscience and soul, but my advice to him will not take that into account. And if Steven goes to see a clergyman or mental health provider, then he is inviting this sort of advice and counseling. But since I can presume that Steven comes to me for my *legal* expertise, my opinion of what is ethical or moral is of absolutely no moment to the question asked of me by Steven. And I must represent my client's interest with absolutely no judgment. Otherwise in judging him, I am not on his side. A discussion between Steven and me in which I use the terms "right" and "wrong" would absolutely be one in which I am impliedly judging his behavior (the murder he claims to have committed) and his possible future behavior (not turning himself in). My only professional goal should be to give him the *legal* advice necessary for him to come to his own decision. There are plenty of people who can offer that perspective of what is "right" if he actually wants it. But Steven came to me—his lawyer. And hopefully Steven came to me because he knows I am on his side—that I am his advocate.

Indeed, I will point out to Steven, that while it might be against the law to take affirmative steps to cover up a crime you have committed, no additional crime is committed by merely remaining silent. That is the very crux of the Fifth Amendment privilege against self-incrimination. It is without question his constitutional right to keep quiet. The advice to keep quiet is advice that every good attorney gives to any client facing criminal charges. It would not be my legal advice, as Steven's lawyer, to give up that right.

I will not even address the moral issue of whether it is right to allow someone else to be incarcerated for a crime that you have committed. While ABA model

Rule 2.1, Advisor, certainly gives me the latitude to discuss the moral implications of both choices, it is at odds with the specific role of the criminal defense attorney in almost every instance without an invitation by the client to have that precise discussion.<sup>11</sup> I have to be completely aligned with Steven's interests. I am not Steven's pastor or his psychologist. However, if he wants to discuss the looming moral issue with me, I am happy to. But I certainly would not broach the topic without a direct question from Steven.

#### IV. THE ADVICE

If Steven does engage me in the question of whether he *should* turn himself in, I would probably tell him he should take some time to think about the question. He should only turn himself in if he feels he honestly could not live and enjoy his life if he does not confess to this murder. No doubt Steven feels bad about taking someone's life. He probably feels even worse about the fact that someone else was arrested for it—someone he knew and at least had an association with. So clearly this question is something that any human being would wrestle with.

As someone who has spent her career trying to help people avoid criminal prosecution and especially prison, I would feel bad for David. I personally would love to see David free, but David is not my client. I believe that ethically I must put my own feelings aside to represent Steven well.

If Steven insists on turning himself in or giving a confession to someone, the question as to whom he confesses to would be very important to discuss. A confession to a murder with an attorney present given to law enforcement could not be dismissed or overlooked by the government. Under the *Brady* doctrine,<sup>12</sup> the government would have to provide this information to the defense and while the government might doubt the veracity of the confession, it would not deny that it happened. The chances of the government prosecuting Steven would be higher with a factually-detailed confession to law enforcement. The confession could be used to get David a new trial and even a dismissal of the charges by the government. Steven's statement to the police could then be introduced as evidence at Steven's trial, all but ensuring a conviction for the government.

A confession to David's attorney might have another outcome. If, and only if, Steven seems really torn about what he should do, and is considering going forward to the authorities, I might suggest this as an alternative to turning himself into the police or the prosecutor. A motion for a new trial, especially before sentencing, might get David a new trial without Steven being prosecuted.

At a new trial, as a general matter, Steven cannot be compelled to testify for the defense (or anyone else) because of his privilege against self-incrimination, but there might be ways for David's team to make use of this information getting Steven the outcome he wants. When a defense witness can offer exculpatory

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<sup>11</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009).

<sup>12</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

evidence, it may be possible for that witness to be immunized so David's attorney could seek immunity for Steven.<sup>13</sup> David's defense attorney might try to get in Steven's out-of-court statement as a statement against penal interest. Or David's defense attorney might decide to go to the eyewitness and show him or her a picture of Steven to see whether he or she would identify Steven as the shooter. No doubt that the defense at the second trial would be that Steven did it—but that does not have the same result as a prosecution of Steven by the government. Clearly there is a big risk there to both men—Steven might be prosecuted or David might never go free. But there is a big upside—David might win at his second trial, and the government might feel its case against Steven is too weak after pursuing David so vigorously and not prosecute Steven at all—so Steven and David could potentially both be free.

Going through every permutation of the hypothetical illustrates how involved the conversation between Steven and his lawyer would be. But assuming the hard question of what the advice to Steven should be if Steven did not have his heart set on confessing to anyone, if I was just left with the question of “what should Steven do” my advice, as Steven's advocate would be for him to remain quiet and a free man. Murder obviously is a serious crime. Based on what he has told me, with a confession to law enforcement, he is likely to be convicted. Prison is terrible. Steven's sentence would be long—he might die in prison. My duty is to Steven, not to David, not to justice. So, my legal advice to Steven must be to keep quiet and say nothing.

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<sup>13</sup> See *Carter v. United States*, 684 A.2d 331, 344–45 (D.C. 1996). Usually this is a hard-fought battle for the defense attorney however.