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New Jersey
Federal District of New Jersey
United States Supreme Court

June 16, 2020

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Subj: Working Group on the Duty of Confidentiality and Wrongful Convictions
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037
Original via e-mail to Comments.Mailbox@njcourts.gov

**RE: COMMENTS TO THE REPORT OF THE SUPREME COURT WORKING
GROUP ON THE DUTY OF CONFIDENTIALITY AND WRONGFUL
CONVICTIONS**

Dear Judge Grant:

I want to congratulate you and the Supreme Court Working Group on the Duty of Confidentiality and Wrongful Convictions for the thoughtful work that went into the working group's report on this most important issue.

As an experienced criminal defense practitioner, former Deputy Attorney General with the Division of Criminal Justice and former Assistant Prosecutor in Essex and Middlesex Counties, I am respectfully submitting my comments to the Court for consideration.

After reviewing the majority and minority reports, as well as the discussion of immunity, I am respectfully suggesting that the Court follow the "wisdom of Solomon"; and, in essence, split the proverbial baby in half.

No one can doubt the tragedy of an innocent person being wrongfully convicted of a

crime. It becomes an even greater tragedy when a wrongful conviction results in a long period of incarceration of an innocent person.

Nothing is more sacrosanct than the attorney-client privilege, particularly in a criminal case. In order for a criminal defense attorney to be able to evaluate whether to file motions, go to trial, or attempt to work out a guilty plea to a lesser charge, the attorney must be able to have the client talk candidly about the case, without fear of what may be said being disclosed to law enforcement.

While a grant of immunity may appear to be a simple solution, the Committee raised important issues concerning the potential abuse of that process.

I respectfully suggest that the Court consider making the rule to disclose mandatory, as suggested in the majority report, thus lifting the burden off the shoulders of the individual attorney to make that decision; and, potentially, being sued by the client if the attorney does disclose voluntarily.

The next question is how much should be disclosed. Here is where the "wisdom of Solomon" would come into play.

I respectfully suggest that the Rule be amended to make it mandatory for a defense attorney, upon obtaining factual evidence that an innocent person was convicted of a crime, actually perpetrated by his/her client, to disclose the evidence of the wrongful conviction of the innocent person; however, the defense counsel should not be required to reveal any statements made by his/her client to the attorney in confidence, under the attorney-client privilege.

Upon learning that an individual was wrongfully convicted, the attorney, who represent(ed) the actual perpetrator, would be obligated to advise the Court before which the wrongful conviction took place, *in camera*, that the attorney believes he/she has knowledge that a wrongful conviction has taken place. That attorney would be required to reveal to the Judge all information that was not received from conversations directly with his/her client, such as a statement of a witness, forensic information, defense investigative results.

If the Court, after reviewing this information, *in camera*, believes that this information should be shared with the attorney, who represents(ed) the wrongfully convicted person, the Court would then notify the attorney, who represents(ed) the wrongfully convicted person; and, in chambers conference should take place, involving the attorney, who represents(ed) the wrongfully convicted person, and the prosecuting attorney. It would be the obligation of the wrongfully convicted person's attorney and the State to further investigate the case at that point. The attorney, who represents(ed) the actual perpetrator, would not take part in this conference.

I respectfully submit to the Court that this suggestion would preserve the essence of the attorney-client privilege and the ability for a defense counsel to effectively defend his/her client, while serving to protect the rights of an innocent person, who has been wrongfully convicted.

If I may be of any further service to the Court in this or any other matter, please do not hesitate to contact me, either via my cell phone at (732) 407-3000 or via email at rjb@mmgbblaw.com.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'RJB', with a long horizontal flourish extending to the right.

ROBERT J. BRASS, Esq.