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THE ROLE OF LENIENCY OFFERS IN CORRECTING WRONGFUL CONVICTIONS

I. INTRODUCTION

Imagine this: You're a criminal defense attorney, sitting in your office and meeting with a newly retained client. Your client, facing charges of armed robbery, has begun to build trust in you, relying on the authority of attorney-client confidentiality that you earnestly instilled into him. However, during this decisive meeting, your client suddenly confesses to you that five years ago he had been a part of another robbery that resulted in someone's death, that he was never caught, and that someone else was wrongfully convicted for the crime. Further, your client does not wish to come forward and has explicitly requested that you take no action in rectifying the situation since he is unsure of the consequences for such an admission. As the seriousness of this confession sets in, you are faced with unimaginable moral and ethical dilemmas. What options do you, as the defense attorney, have now? How do you reconcile your ethical obligations with the unsettling truth laid before you?

In response to the ethical dilemmas posed by the above scenario, one possible approach for addressing the competing demands of justice required to rectify a wrongful conviction while upholding ethical obligations involves a new proactive solution that incentivizes cooperation and accountability. This paper will argue that prosecutors should use their discretionary power to extend leniency offers to individuals in return for admissions to wrongful convictions. This

approach offered not only facilitates the rectification of past injustices but also fosters a culture of accountability and cooperation within the optimistically reforming criminal legal system.

II. THE GENERAL ROLE OF THE PROSECUTOR AND ITS EFFECTS

a. Ministers of Justice

It is widely recognized that prosecutors have a significantly different role and professional ethos from that of other lawyers.¹ This unique role stems from the understanding that prosecutors serve not just a single client but represent the broader interests of society.² The American Bar Association (“ABA”) Model Rule 3.8 outlines the Special Responsibilities of a Prosecutor, affirming that prosecutors have an ethical duty to “seek justice”³. The Comment supplementary to the Rule further clarifies that the “prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”⁴ This concept emphasizes a duty beyond advocating for a single party, and highlights the obligation to serve the overarching goals of fairness and public welfare, a principle embedded within the duties of the prosecutor.⁵

As ministers of justice, prosecutors must continuously navigate complex ethical dilemmas, weigh competing interests, and consider the broader societal impact of their actions.⁶ In considering such societal impact, prosecutors often find themselves advocating for outcomes that

¹ See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *Fordham Urb. L.J.* 607, 610 (1999) (asserting that a prosecutors duty has always been to seek justice).

² *Id.*

³ See Bruce A. Green, *Should Prosecutors Be Expected To Rectify Wrongful Convictions?*, 10 *Tex. A&M L. Rev.* 167 (2023).

⁴ Model Rules of Prof'l Conduct r. 3.8 cmt. (Am. Bar Ass'n 2016).

⁵ *Id.*

“This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”

⁶ See Bruce A. Green, *supra* note 1.

prioritize justice over mere convictions.⁷ While it may seem natural for a prosecutor to prioritize their win count, given the adversarial nature of the legal system, such a focus plainly contrasts with their primary duty to seek justice.⁸ The tension between seeking justice and securing convictions influences prosecutors' decisions in various duties, such as charging, sentencing recommendations, and participation in systemic reform efforts. Consequently, prosecutors wield significant influence on the communities they serve as well as shaping the course of the criminal legal system as a whole.

b. Prosecutor's Discretion

As previously established, the role of the prosecutor is undeniably unique and carries extensive weight within our criminal legal system. To delve deeper into the prosecutor's role as minister of justice, it's essential to recognize the true extent of their discretionary power. This discretion allows prosecutors to wield considerable influence in making charging decisions as they operate independently from the judiciary.⁹ This discretionary authority allows them to make critical decisions during all stages of the charging process, including whether to pursue charges, which charges to bring, and how to approach plea negotiations.¹⁰ Furthermore, this discretion extends to negotiating plea deals specifically by giving prosecutors power in offering leniency in exchange for cooperation.¹¹ Such power means that similarly situated individuals within the

⁷ See Ross Galin, *Above The Law: The Prosecutor's Duty To Seek Justice And The Performance Of Substantial Assistance Agreements*, 68 Fordham L. Rev. 1245 (2000) (stating that the responsibility to obtain convictions is subsumed within the larger duty to seek justice).

⁸ *Id.*

⁹ See, e.g., Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992).

¹⁰ See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, And The Federal Sentencing Guidelines.*, 42 UCLA L. Rev. 105 (1994).

¹¹ *Id.*

criminal legal system can have significant variations in their treatment, as well as the ultimate outcome of their similar cases.¹²

Historically, prosecutorial discretion has come under scrutiny due to its association with the alarming rates of incarceration in the United States that had significantly increased between 1970 and 2000.¹³ The misuse of prosecutorial discretion has led to “prosecutorial abuse, including racial and gender bias, overcharging, vindictiveness, plea-bargaining abuses, and wrongful convictions.”¹⁴ Many of these factors and other prosecutorial misconduct are the result of both implicit and explicit biases inherent in the exercise of individual prosecutors' discretion which impact such cases both before and after a conviction.¹⁵ A national prosecutor study¹⁶ surveyed a wide range of prosecutors across the country and concluded that prosecutorial discretion is indisputably broad, largely unsupervised, highly unpredictable, and inconsistent; having a deep and systematic impact on the incarceration rates and discrepancies in the United States.¹⁷ Individuals could receive extremely disparate sentences solely depending on the prosecutor that was handling their case.¹⁸ The broad and often unsupervised nature of prosecutorial discretion poses significant challenges to the fairness and integrity of the criminal legal system. The potential

¹² *Id.*

¹³ Vera Institute of Justice, Causes of Mass Incarceration, <https://www.vera.org/ending-mass-incarceration/causes-of-mass-incarceration> (last visited Apr. 27, 2024).

¹⁴ See Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration* 94 S. Cal. L. Rev. 1123 (2021).

¹⁵ See Bruce A. Green and Ellen Yaroshefsky, *Symposium: Prosecutorial Discretion: Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467 (2009) (stating that cognitive bias significantly impact prosecutorial and police decision-making regarding conviction rates).

¹⁶ *Id.* (surveying 541 prosecutors completed the study for a 12.09% response rate that studying how prosecutors nationally decide whether to charge a defendant and its effect on mass incarceration resulting in rampant charging variation depending on the individual prosecutor).

¹⁷ *Id.*

¹⁸ *Id.*

for abuse underscores the need for greater oversight and accountability in prosecutorial decision-making.

However, amidst and in light of these challenges, there has been a notable shift of interest in redefining the role of prosecutors as true ministers of justice. This attention to hopeful changes in prosecutorial power coincides with the rise of "progressive prosecutors" and the growing national demand for prosecutors to wield their discretion for positive change.¹⁹ In response to systematic prosecutorial misconduct and other damaging factors, and in an effort to change the system, there has a significant change in public demand for broad reform initiatives.²⁰ This movement sees prosecutorial discretion as a key opportunity for driving meaningful criminal justice reform.²¹ Progressive prosecutors advocate for the exploration of alternatives to traditional convictions, including the dismissal of minor offenses and the adoption of diversion programs.²² Overall, while prosecutorial discretion has historically been associated with concerns regarding the integrity within our criminal legal system, the emergence of progressive prosecutors and the growing demand for reform signify a shift towards a change in how such discretionary power is viewed.

¹⁹ See Jeffrey Bellin, *Theories of Prosecution*, 108 *Calif. L. Rev.* 1203 (2020).

²⁰ See Melanie D. Wilson, *The Common Prosecutor*, 53 *Loy. U. Chi. L.J.* 325 (2022) (supporting long-lasting reform to prosecutorial offices by implementing the "common prosecutor" which is defined as a prosecutor that has a lack of privilege or special status and can justly give the common people representation.)

²¹ *Id.*

²² *Id.*

IV. THE DILEMMA OF THE DEFENSE ATTORNEY

a. Client Confidentiality and Best Interests

“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.”²³

Following the proposed hypothetical at the start of this paper, it is imperative to explore the ethical dilemmas faced by the defense attorney and the significant role they play in such a complex situation.

Now that the defense attorney is in possession of information regarding a wrongful conviction, along with the request to maintain confidentiality regarding this admission, they are faced with the critical task of determining their next course of action in accordance with their ethical obligations and irrespective of their personal beliefs regarding what aligns with justice. The defense attorney must consistently refer to the Model Rules when navigating such ethical decisions. Specifically, the attorney must look to Model Rule 1.6, which gives guidance during such a situation. Rule 1.6 states that “a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”²⁴

It is evident that, in this situation, the defense attorney is prohibited from disclosing the admission of wrongful conviction that they have just learned about.²⁵ Furthermore, if the defense attorney were to disclose their client's information against their client's wishes, they would likely face disciplinary action by breaking a Model Rule.²⁶ Consequently, this factor weighs against the

²³ See James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?* (2011).

²⁴ Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n 2016).

²⁵ *Id.*

²⁶ *Id.*

defense attorney being able to counsel their client to disclose the wrongful conviction admission in any meaningful way. Therefore, the defense attorney may find themselves with limited leverage in persuading their client to come forward, as it would not be the client's best interest.²⁷ The competing principles of needing to protect the confessing client while at the same time preventing harm caused by a wrongful conviction are at the heart of a complex ethical and practical conundrum.²⁸

In 2002 the ABA amended Rule 1.6 to allow lawyers to reveal client information when necessary to prevent reasonably certain death or substantial bodily harm. Although an argument can be made that being wrongly incarcerated always necessarily results in the substantial bodily harm of the wrongfully convicted, Model Rule 1.6 leaves room for a broad interpretation that does not directly equate substantial bodily harm and wrongful convictions.²⁹ As a result, this interpretation has been adopted by only two states, Alaska and Massachusetts, which have extended the application of Rule 1.6 within their jurisdictions to encompass wrongful incarceration as falling under the definition of "substantial bodily injury."³⁰ While the defense attorney may personally believe that prioritizing justice by setting an innocent individual free should outweigh the duty of confidentiality, the model rules explicitly prohibit such a decision from being made.

The absence of an exception in the Model Rules for the hypothetical scenario described above underscores a significant ethical dilemma that has come to occasion in real-world contexts numerous times. The well-known Alton Logan case serves as a poignant example of the ethical

²⁷ Model Rules of Prof'l Conduct r. 1.4 (Am. Bar Ass'n 2016).

²⁸ See Ken Strutin, *Preserving Attorney-Client Confidentiality At The Cost Of Another's Innocence: A Systemic Approach*, 17 Tex. Wesleyan L. Rev. 499 (2011).

²⁹ See Vania Smith *Wrongful Incarceration Causes Substantial Bodily Harm: Why Lawyers Should Be Allowed To Breach Confidentiality To Help Exonerate The Innocent*, 69 Cath. U.L. Rev. 769 (2020)

³⁰ *Id.*

conflict between maintaining client confidentiality and rectifying a wrongful conviction.³¹ Alton Logan served twenty-six years in prison for a murder that he did not commit.³² He remained in prison even though his innocence was known to the lawyers of Andrew Wilson, the man that actually committed the crime.³³ Although it is almost incomprehensible to the lay person that an attorney would have to keep such information confidential, the ethical rules required Wilson's attorneys to remain silent for twenty-six years.³⁴ Wilson's attorneys ultimately came forward with the confession once their client had died of natural causes, in their view, thereby relinquishing them of their ethical duties.³⁵ Although the lawyers were only following the ethical rules they were bound to, "the lawyers silence produces a sense of outrage towards the ethical constructs that are meant to guide lawyers in the American [legal] system."³⁶

While this case is among the most prominent examples illustrating this dilemma, it prompts the obvious question, how many other attorneys are safeguarding similar confidences right now?³⁷ Does society wish to wait until the potential death of the nation's defense attorneys' clients to uncover each of these situations? Given the absence of exceptions for scenarios like Alton Logan's case and the hypothetical presented in the paper, it becomes imperative to explore alternative

³¹ *Id.*

³² *Id.*

³³ Northwestern University School of Law, Center on Wrongful Convictions, Alton Logan, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/alton-logan.html> (last visited [April 27, 2024])

³⁴ See Vania Smith *supra* note 29.

³⁵ See *supra* note 33.

³⁶ See Inbal Hasbani, *When The Law Preserves Injustice: Issues Raised By A Wrongful Incarceration Exception To Attorney-Client Confidentiality*, 100 J. Crim. L. & Criminology 277 (2010).

³⁷ See Vania Smith *supra* note 29.

What these statistics lack, however, is an understanding of the number of confessions that do not lead to exoneration because those confessions were made as a part of the attorney-client relationship and therefore kept confidential. MRPC 1.6 allows an attorney to disclose confidential information if the disclosure falls under an exception.

approaches beyond the confines of the existing rules. These approaches will aim to support defense attorneys in mitigating the unjust consequences of wrongful incarceration.

III. PROSECUTORS' DUTY REGARDING WRONGFUL CONVICTIONS

a. Prevalence of Wrongful Convictions

Wrongful convictions are a pervasive and deeply troubling issue within our criminal legal system, causing significant and lasting harm to both the individuals and communities they impact. In the past few decades, there has been a steady increase in the interest and concern of wrongful convictions, both within the legal field and the broader public.³⁸ Such exposure has resulted in heightened scrutiny of the systemic factors that contribute to wrongful convictions, prompting ongoing reform efforts and holding necessary contributing individuals accountable.³⁹ The National Registry has recognized more than 3,000 wrongly convicted individuals who have been exonerated since 1989.⁴⁰ Similarly, since 1989 and late 2020, the Innocence Project has helped exonerate 375 wrongfully convicted individuals.⁴¹ Further, the National Registry of Exonerations has recorded that 582 (DNA) and 2214 (non-DNA) individuals were exonerated between 1989 and 2021.⁴² It must also be highlighted that these numbers reflect cases that have been already identified, presumably there being vastly more that have not been yet identified or exonerated. Looking to which factors have most significantly caused wrongful convictions the three highest are, perjury or false accusation: 58%, official misconduct (police and prosecutorial): 54%, and Mistaken

³⁸ See Marvin Zalman and Robert J. Norris, *Measuring Innocence: How To Think About The Rate Of Wrongful Conviction*, 24 New Crim. L. R. 601 (2021).

³⁹ *Id.*

⁴⁰ *Id.*; See also <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

⁴¹ See Leona D. Jochnowitz and Tonya Kendall, *Analyzing Wrongful Convictions Beyond the Traditional Canonical List of Errors, for Enduring Structural and Sociological Attributes*, (Juveniles, Racism, Adversary System, Policing Policies), 37 Touro L. Rev. 579 (2021).; See also *DNA Exonerations in the United States*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited April 27, 2024).

⁴² *Id.*

Witness Identification: 28%.⁴³ Further, race and socioeconomic factors significantly influence the occurrence of wrongful convictions within the United States, 91% of exonerees are male and 62.7% of exonerees are from racial or ethnic minority backgrounds (48.8% Black; 11.6% Hispanic; 2.3% Native American, Asian, or race/ethnicity.⁴⁴

These statistics underscore the urgent need for comprehensive reforms and resolutions aimed at addressing the systemic inequalities that disproportionately impact marginalized communities and perpetuate wrongful convictions. Over the past few decades, heightened awareness of this problem has sparked increased scrutiny and reform efforts, leading to the exoneration of thousands of wrongly convicted individuals. However, as previously stated, these figures likely represent only a fraction of those affected, underscoring the need for continued awareness and reform.

b. Prosecutorial Misconduct and its Role in Wrongful Convictions

Following, and as a natural extension of Section II and the above subsection, this section will examine prosecutorial misconduct directly affecting wrongful convictions. Deep-rooted systemic factors within the criminal legal system contribute to wrongful convictions, including but not limited to, eyewitness misidentification, inadequate legal representation, tunnel vision, and prosecutorial misconduct.⁴⁵ Prosecutorial misconduct is perhaps the most troubling factor, both because of its frequency and normative implications.⁴⁶ Three institutional conditions contribute to such prosecutorial misconduct, “vague ethics rules that provide ambiguous guidance to

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Peter Joy, *The Relationship Between Prosecutorial Misconduct And Wrongful Convictions: Shaping Remedies For A Broken System*, 2006 Wis. L. Rev. 399 (2006).

prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct”.⁴⁷ Prosecutorial misconduct has been responsible for an “astonishing” amount of wrongful convictions and thereby inflicting the communities they serve with a vast amount of injustice.⁴⁸ One of the driving factors for such mass prosecutorial misconduct is the complete lack of discipline or investigation that results from such misconduct.⁴⁹ The New York Bar Association conducted a study wherein they investigated fifty-three cases that resulted in wrongful convictions wherein no prosecutor was sanctioned and only two prosecutors received any time of internal investigation or discipline.⁵⁰ Despite prosecutors being tasked as minister of justice, historical review suggests that their actions have habitually exacerbated the rate of wrongful convictions. Given the significant harm prosecutors have historically contributed to regarding wrongful convictions, it is more imperative than ever for these offices to leverage their authority to rectify past injustices and address the consequences of their previous misconduct.

b. Model Rule 3.8 and Remedial Measures

In 2008 the ABA amended Model Rule 3.8 by adding subsections (g) and (h), and thereby establishing that prosecutors *must* take action upon discovering evidence indicating the potential innocence of a convicted person.⁵¹ These amendments not only underscored that prosecutors’ inherent responsibilities regarding wrongful convictions but also establish the remedial steps a prosecutor must take after securing a criminal conviction when evidence has been brought forward that an injustice has occurred.⁵² Model Rule 3.8(g) states that when a prosecutor learns of new,

⁴⁷ *Id.*

⁴⁸ See Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, And A Modest Proposal*, 63 Cath. U.L. Rev. 51 (2013)

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Bruce A. Green, *supra* note 3; See also Model Rules Of Pro. Conduct r. 3.8(g)(h).

⁵² *Id.*

credible evidence suggesting a defendant's innocence, they must promptly disclose it to the court and defendant, and initiate or facilitate further investigation to confirm innocence.⁵³ Likewise, 3.8(h) confirms that after a post-conviction reinvestigation, if a prosecutor finds clear and convincing evidence of a wrongful conviction, they are obligated to seek remedies to rectify the miscarriage of justice.⁵⁴ By formally including the remedial steps that prosecutors must take in the face of evidence suggesting an individual's innocence, the ABA codified prosecutors' commitment to rectifying the potential innocence of a convicted individual.

c. The Emergence of Conviction Integrity Units

Although it is argued that prosecutors' duties always included the obligation to investigate and correct wrongful convictions, the recent shift in paradigm is finally allowing some offices to truly make an effort to systemically remedy such wrongs.⁵⁵ The rapid emergence of Conviction Integrity Units (CIUs), and the hundreds of exonerations that have followed, demonstrate this shift toward proactive efforts by prosecutors' offices to address wrongful convictions.⁵⁶ CIUs typically operate as a separate unit in the chief attorney's office, tasked specifically with reviewing cases where there are allegations of wrongful conviction.⁵⁷ By having units that are solely investigating wrongful convictions, the criminal legal system will promote "non-adversarial post-conviction reinvestigations" and efforts to learn from its previous errors.⁵⁸ Additionally, CIUs have initiated the hope of creative solutions in the post-conviction space; "this freedom to "see" more broadly, and a shared good faith dedication to ensuring just and reliable outcomes, ought to generate new,

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Elizabeth Webster, *Criminology: The Prosecutor As A Final Safeguard Against False Convictions: How Prosecutors Assist With Exoneration*, 110 J. Crim. L. & Criminology 245 (2020)

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 Ohio St. J. Crim. L. 705 (2017).

constructive, and creative ideas beyond resolution of the individual cases.⁵⁹ This undeniable shift in the importance of rectifying wrongful convictions must continue to evolve and expand. Moving forward, it is imperative for prosecutors to uphold the principles of justice by embracing innovative approaches that are fueled by the ethical imperatives of 3.8(g) and (h). Prosecutors must explore new avenues to ensure the integrity and end goals of rectifying wrongful convictions.

V. A PROACTIVE APPROACH

a. Leniency Offers

As previously emphasized, Model Rule 3.8 mandates prosecutors to pursue justice, firmly including rectifying wrongful convictions, particularly highlighted in subsections 3.8(g) and (h).⁶⁰ Moreover, prosecutors' discretion empowers them to discover and dismiss false convictions, a responsibility they must actively fulfill.⁶¹ Leveraging this duty and authority, prosecutors should use the goals of Model Rule 3.8(g) and (h) to offer leniency deals to individuals who admit to wrongful convictions by lessening the sentence of a newly committed crime. By offering leniency agreements in accordance with Model Rule 3.8(g) and (h), prosecutors can foster cooperation and transparency, encouraging individuals with knowledge of wrongful convictions to step forward.

First and foremost, leniency agreements incentivize cooperation from individuals who may hold critical information. By incentivizing cooperation through leniency agreements, prosecutors can expedite the remedial process outline in Rule 3.8(g) and (h). However, it is crucial to recognize that the effectiveness of such leniency offers will hinder on the substantiveness of deal, smaller offers are unlikely to prompt meaningful admissions of wrongful convictions. The leniency

⁵⁹ *Id.*

⁶⁰ *See* Bruce A. Green, *supra* note 3; *See also* Model Rules Of Pro. Conduct r. 3.8(g)(h).

⁶¹ *Id.*

agreements offered will have to include substantially lessened sentences to have any real effect on wrongful conviction admissions and may be hard for the criminal legal system to accept. However, implementing significant change in the prevalence of wrongful convictions may require embracing seemingly unconventional or creative approaches. Further it is crucial to acknowledge that offering these lenient sentences is a corrective measure for injustices perpetrated by the government and that the admitter is facilitating justice with their admission. Ultimately, the decision on the extent of leniency to be offered will rely on factors such as the level of cooperation and honesty displayed by the admitting defendant, as well as the nature of the subsequent crime committed.

b. Cooperation Agreements

To gain a better understanding of why and how prosecutors should use their discretion to offer leniency agreements in exchange for wrongful conviction admissions, it is helpful to draw a parallel with the already widely utilized practice of cooperation agreements. Cooperation agreements are agreements between the government and defendants wherein the defendant provides information and truthful testimony in the prosecution of another criminal.⁶² Further, the prosecutor's obligation to seek justice rules the actions of prosecutors extending to the negotiation and performance of plea agreements.⁶³

The practice of extending lesser sentences in exchange for inside information has existed for centuries and has remained a basis of our criminal legal system.⁶⁴ Prosecutors have used their discretion to reward thousands of defendants who provided information and assistance.⁶⁵ Such

⁶² See Ross Galin, *supra* note 7.

⁶³ See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 Vand. L. Rev. 1 (2003)

⁶⁴ *Id.*

⁶⁵ See Ross Galin, *supra* note 7.

agreements have been accepted due to the notion that cooperation agreements help to ensure fairness, maintain public confidence, and assist in punishment for the guilty.⁶⁶ Cooperation agreements enable prosecutors to seek truth and fairness by uncovering valuable information that would otherwise remain undisclosed.⁶⁷ These types of agreements also promote accountability and responsibility by requiring defendants to confess to their involvement while providing further information for actors and crimes that remain at large.⁶⁸

It should be recognized that cooperation agreements have faced recent immense scrutiny, arguably with valid concerns. Cooperation agreements have morphed into a practice that has an absence of clear guidance, potential for promoting false information, and the risk of facilitating wrongful convictions.⁶⁹ It is crucial to note that these critiques should not dissuade consideration of leniency offers in the scenario at hand. Though the offered approach is another type of leniency offer, the concerns associated with cooperation agreements do not necessarily transfer to wrongful conviction admissions, primarily due to the investigatory tools that should be used to confirm such admissions. The critical comparison between cooperation agreements and leniency offers for wrongful conviction admissions lies in the prosecutor's ability to create such an offer and the historical acceptance of the use of this discretion within the criminal legal system. The unique ethical duties of prosecutors in turn give them the responsibility of negotiation and performance of contracts in the name of fairness, due process, and public confidence.⁷⁰ Ultimately, while

⁶⁶ *Id.*

⁶⁷ See Michael A. Simons *supra* note 63.

⁶⁸ *Id.*

⁶⁹ See Ian Weinstein, *Regulating the Market for Snitches*, 47 *Buffalo L. Rev.* 563 (1999)(advocating for imposing limits on the use of cooperation agreements do to their overuse by prosecutors which has negatively affected the criminal legal system at large), See Miriam Hechler Baer, *Cooperation's Cost*, 88 *Wash. U. L. Rev.* 903 (2011)(highlighting the challenges faced by prosecutors and government agents in dealing with inaccurate or false information especially considering the rate of their impact on wrongful convictions).

⁷⁰ See Ross Galin *supra* note 7.

acknowledging the concerns of cooperation agreements, it's imperative to recognize that leniency offers for wrongful conviction admissions present a distinct and ethically sound approach for rectifying past injustices within the criminal legal system.

c. Due Diligence in Confirming Admissions

Perhaps the most significant foreseeable challenge in implementing these leniency deals is the potential for the criminal legal system to encounter a vast number of false admissions from defendants seeking lighter sentences. In order to avoid this dilemma, each admission made under such circumstances will require a comprehensive investigation to confirm its validity, carried out by both the defense attorney and the prosecution. Preliminarily, the defense attorney must take the initial steps into investigating such a claim. This would require the defense attorney to gather evidence, review relevant documentation, conducting interviews, and consult with an expert when necessary. Once well-reviewed and comprehensive evidence has been gathered and there is a substantial basis for a claim, the defense attorney will bring the admission to the government. Once the claim is brought to the government's attention, the prosecution will undertake its own thorough investigation to corroborate the evidence presented by the defense attorney. One potential solution to address the challenges posed by false admissions in exchange for leniency deals is to entrust the investigation of such claims to dedicated wrongful conviction units within prosecutor's offices.

As previously stated, there has been a recent emergence of these kind of units in prosecutor's offices across the nation.⁷¹ Once a wrongful conviction admission has been brought to the prosecution, if the office has a CIU or a similar dedicated unit, it should be tasked with

⁷¹ See Elizabeth Webster *supra* note 55.

conducting the investigation. CIUs have the intended goals and resources that would be required to confirm a wrongful conviction admission.⁷² Although there is not a definitive outline for what a CIU's process or investigation should entail, examining the practices of individual offices provides insight into their typical procedures. Taking the Queens County District Attorney's office as an example, their CIU outlines the process for investigating cases where evidence suggests an incarcerated individual's innocence:

The CIU will conduct a thorough and deliberate investigation of the crime and the integrity of the evidence used to convict the defendant. Where appropriate, this investigation will be done in coordination with defense counsel. The CIU's investigation may include DNA, fingerprint, or other relevant forensic testing. As part of the investigation, information regarding the case will be shared by both sides pursuant to an agreement with defense counsel.⁷³

Similarly, the Brooklyn District Attorney's Office shares other insight their CIU's investigative process:

They re-interview witnesses, consult with experts and use the most up-to-date science and technology to reevaluate the evidence. This includes forensic science like DNA, as well as social science research on issues like faulty eyewitness identification and false confessions.⁷⁴

The procedures outlined by both the Queens County District Attorney's office and the Brooklyn District Attorney's Office demonstrate a commitment to diligence in investigation. CIUs go through a comprehensive investigation of wrongful conviction claims by looking at scientific and social evidence. Additionally, the willingness to collaborate and share information with defense counsel shows transparency and cooperation. These strategies embody the aforementioned "non-adversarial post-

⁷² *Id.*

⁷³ Queens District Attorney's Office, Conviction Integrity Unit, <https://queensda.org/conviction-integrity-unit/> (last visited [April 27, 2024]).

⁷⁴ Brooklyn District Attorney's Office, Post-Conviction Justice Bureau, <http://www.brooklynda.org/post-conviction-justice-bureau/> (last visited [April 27, 2024]).

conviction reinvestigations”⁷⁵ that are conducive to criminal justice reform. It's evident that CIUs are naturally equipped for wrongful conviction investigations, possessing the resources and means to effectively review such admissions.

d. The Impact of Legal Representation Disparities

When examining the potential implementation of leniency offers for wrongful conviction admissions, it is imperative to consider the disparities that may arise in which cases are brought forward. Legal offices offering inexpensive or free services, such as public defenders or other similar organizations, often face significant resource constraints and heavy caseloads.⁷⁶ Because public defender offices often struggle with limited time and resources allocated to each client⁷⁷, such factors may hinder their ability to target, discuss, and investigate claims of wrongful convictions thoroughly. In contrast, individuals with access to “high-quality” legal representation are more likely to suggest favorable deals. Therefore, a wrongfully convicted individuals’ fate will be dependent on the level of representation of the admitting client. While this paper won't attempt to solve these complex issues, it's crucial to consistently promote leniency offers to defense attorneys across the board, ensuring they are aware of and prioritize such opportunities. Furthermore, emphasizing the imperative of addressing wrongful conviction admissions, even in the face of time and resource constraints, is essential and will become more attainable as criminal justice reform continues to advance.

⁷⁵ See Barry C. Scheck *supra* note 58.

⁷⁶ See generally Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L.J.* 1031 (2006)

⁷⁷ *Id.*

d. Counsel in Encouraging Admissions

As noted previously, defense attorneys are bound by the Model Rules when it comes to current clients admitting to wrongful convictions as the duty of confidentiality leaves little room for exceptions.⁷⁸ Lawyers, who are aware that their client committed a crime for which someone else is serving prison time, are required to remain silent, even though this contradicts the fundamental notion of justice.⁷⁹ Leniency offers in exchange for wrongful conviction admissions can foster collaboration between prosecutors and defense attorneys to rectify instances of wrongful incarceration. Such agreements allow defense attorneys leverage to effectively counsel their clients in pursuing justice and corrective action. In the event of a wrongful conviction admission, the prospect of a potential leniency offer empowers defense attorneys to engage in more candid and open discussions with their clients while still adhering to the best interests of their client. Granting defense attorneys this leverage will contribute to the objective of avoiding the necessity of waiting until their clients' death⁸⁰ to come forward with the admission. It provides them with another significant option to consider, one that encourages timely and ethical disclosure.

VI. CONCLUSION

The issue of wrongful convictions presents a unique challenge to the criminal legal system requiring proactive solutions to rectify past injustices and to make lasting changes. Through a comprehensive examination of the roles played by both prosecutors and defense attorneys, it becomes clear that the use of leniency offers could have an effective impact on such wrongful conviction errors.

⁷⁸ Model Rule 1.6

⁷⁹ See Inbal Hasbani *supra* note 22.

⁸⁰ See *supra* note 33.

The American legal system must continue its trajectory toward remedying wrongful convictions by implementing new proactive measures that are in line with prosecutors' duty to seek justice. Prosecutors have held vast discretionary power to offer reduced sentences in the pursuit of justice, extending this approach to the admission of a wrongful conviction should be accepted in their role as minister of justice. With the recent widespread implementation of CIUs in prosecutorial offices across the nation, the necessary investigation that would be required to confirm such admissions can be assigned to such units thereby providing many of the resources required.

Given the innovative nature of this approach, it's crucial to recognize and tackle the potential challenges that may arise with leniency offers. These challenges include addressing concerns about false admissions and ensuring fairness in determining which cases are brought forward. To effectively address these issues and any future challenges, it will be essential to implement firm oversight, transparency in procedures, detailed record-keeping, and continuous evaluation of the effects of leniency offers. By embracing proactive measures and fostering cooperation between all parties, the criminal legal system will not only rectify past injustices but will foster a future where wrongful convictions are minimized. Additionally, such a solution will confirm that creative solutions are appropriate and required in the post-conviction space.⁸¹

⁸¹ See Barry C. Scheck *supra* note 58.