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1803

S.C. SUPREME COURT THE COURT: GENTLEMEN. SINCE THE LADY SAYS
 2 SHE IS OUT OF IT. WE ARE ON THE DEFENDANT -- IS HE
 3 HERE?

4 OFFICER: YES, SIR, HE IS HERE, COMING OUT
 5 NOW.

6 (WHEREUPON, THE DEFENDANT WAS PRESENT FOR THE
 7 FOLLOWING MOTION.)

8 THE COURT: ARE WE READY TO PROCEED?

9 MR. ALLEN: YES, SIR, YOUR HONOR.

10 MS. STROM: STATE IS READY, YOUR HONOR.

11 THE COURT: ALSO LET THE RECORD REFLECT THAT
 12 THE FORMER CO-DEFENDANT STEVEN ANDRA GOLDEN'S ATTORNEY
 13 MR. VIETH AND MR. MEGLIC ARE ALSO IN THE COURTROOM.
 14 MR. ALLEN, YOU MADE A MOTION AFTER MR. GOLDEN
 15 TESTIFIED -- EXCUSE ME PLED AND THAT WOULD HAVE BEEN
 16 TWO NIGHTS AGO.

17 MR. MEGLIC: YES, SIR.

18 THE COURT: FOR THE PRODUCTION OF A DOCUMENT
 19 THAT HAS BEEN -- WELL, WHY DON'T YOU JUST EXPLAIN TO
 20 US FOR THE RECORD SO I WILL HAVE IT CORRECT.

21 MR. ALLEN: YES, SIR, YOUR HONOR, IF IT
 22 PLEASE THE COURT. THE MOTION WAS MADE IN TWO PARTS
 23 TO HAVE THE PLEA AGREEMENT AND ALL PROMISES THAT WERE
 24 MADE TO THE CO-DEFENDANT GOLDEN, STEVEN ANDRA GOLDEN,
 25 MADE AVAILABLE IMMEDIATELY TO THE DEFENSE IN THIS CASE

1 FOR PREPARATION OF ITS TRIAL.

2 ASSOCIATED WITH THE -- IN TIMING OF THE PLEA
3 AGREEMENT IT WAS NOTICED THAT THERE WAS AN ADDITIONAL
4 DOCUMENT ENTITLED STATE OF SOUTH CAROLINA VERSUS
5 STEVEN ANDRA GOLDEN AND APPEARS TO USE WORDS AND
6 LETTERS USED AT THE SAME TIME. THESE DOCUMENTS,
7 JUDGE, THAT WE ARE SEEKING WERE IN THE POSSESSION OF
8 THE SOLICITOR.

9 BASED UPON THAT, HAVING PREVIOUSLY FILED A
10 RULE FIVE DISCOVERY MOTION AND CONSIDERING BRADY
11 VERSUS MARYLAND, IT APPEARS THAT RULE FIVE WOULD
12 ALLOW US TO HAVE DOCUMENTS TO COPY OR INSPECT,
13 REASONABLY INSPECT PAPERS OR DOCUMENTS WHICH ARE IN
14 THE POSSESSION, CUSTODY, OR CONTROL OF THE PROSECUTION
15 AND WHICH ARE MATERIAL TO THE PREPARATION OF THE
16 DEFENDANT'S DEFENSE.

17 IN THIS CASE THAT DOCUMENT WOULD SERVE TWO
18 PURPOSES. AS THE COURT NOTED WE MADE A PRIOR MOTION
19 REGARDING THESE INDIVIDUALS BEING TRIED TOGETHER AND
20 WE ALLEGED THAT PERHAPS THERE IS AN APPARENTLY
21 SOMEWHAT OF A CONSPIRACY OR SOMEWHAT OF A
22 COMMUNICATION GOING ON BACK AND FORTH BETWEEN THE
23 COUNSEL FOR THE DEFENDANT GOLDEN AND THE SOLICITOR AND
24 THAT IN FACT WHEN THE SOLICITOR STOOD UP FOR THE PLEA
25 HE INDICATED EARLIER ON WE WERE ADVISED THAT THE

1 DEFENDANT GOLDEN WOULD PLEA. THAT DISTURBED US
2 GREATLY SIMPLY BECAUSE DURING THAT SAME VOIR DIRE
3 PATTERN A WITNESS OR JUROR 138 TERESA JENKINS WAS
4 DISQUALIFIED SIMPLY AND SOLELY BECAUSE SHE KNEW A
5 KEOWSHA GOLDEN. WE FELT VERY STRONGLY THAT WHEN A
6 PLEA WAS NEGOTIATED THAT AT THAT TIME THAT SHOULD HAVE
7 BEEN COMMUNICATED TO THIS COURT AND THE DEFENDANT
8 GOLDEN SHOULD HAVE REMOVED HIMSELF FROM THE PROCESS OF
9 VOIR DIRING THE JURY SO PEOPLE LIKE TERESA JENKINS WE
10 WOULD HAVE A FAIR SHOT AT DECIDING WHETHER SHE WOULD
11 BE A FAIR JUROR, QUALIFIED JUROR IN THIS DEATH PENALTY
12 CASE.

13 THE SUM AND SUBSTANCE IS THAT THAT DOCUMENT,
14 JUDGE, WHICH WE SUBMIT WILL BE -- CONTAINS FACTS AND
15 CIRCUMSTANCES VERY SIMILAR TO THE STATEMENT GIVEN BY
16 STEVEN ANDRA GOLDEN ON NOVEMBER 11, 1997 IS IN FACT A
17 DOCUMENT WHICH WOULD BE MATERIAL TO THE DEFENSE IN
18 USING TO CROSS-EXAMINE MR. GOLDEN BECAUSE WE FEEL IT
19 IS A DOCUMENT UTILIZED BY THE STATE HAVING HAD IT IN
20 THEIR POSSESSION, HAVING SEEN IT TO BENEFIT THEM IN
21 DECIDING THAT MR. GOLDEN WOULD BE A WITNESS. AND
22 THEY HAVE IN FACT ADDED HIM TO THIS WITNESS LIST. IF
23 HE COMES IN THIS COURTROOM AND HE TESTIFIES ACCORDING
24 TO THE FACTS AS SET FORTH IN THE DOCUMENT THAT THE
25 COURT HAS THAT WAS IN POSSESSION OF THE STATE THEY

1 HAVE HAD BENEFIT OF THAT DOCUMENT. THEY HAVE HAD THE
2 BENEFIT OF THE DOCUMENT TO BE ABLE TO PREPARE THEIR
3 CASE-IN-CHIEF. AND IT IS MATERIAL FOR US TO CROSS-
4 EXAMINE MR. GOLDEN WITH -- AS IT RELATES TO HIS PLEA
5 AGREEMENT THAT HE ENTERED INTO WITH THE STATE. AND SO
6 BASED UPON THAT IN RULE FIVE, JUDGE, WE WOULD ASK
7 THE COURT HAVING RECEIVED A COPY OF THE PLEA AGREEMENT
8 TO RECEIVE THE DOCUMENT THAT IS SET FORTH IN THE FACTS
9 THAT MR. GOLDEN WE ANTICIPATE WILL TESTIFY TO AND WE
10 WOULD SUBMIT TO THE COURT THAT IN REALITY PROBABLY GO
11 DOWN SOMEWHAT LINE BY LINE IF IN FACT HE DOES THAT,
12 JUDGE, WE OUGHT TO BE ABLE TO ALLEGE WHATEVER WE NEED
13 TO IMPEACH HIM. THANK YOU.

14 THE COURT: THANK YOU, MR. ALLEN. FIRST OF
15 ALL THE STATE IS STILL IN IT.

16 MS. STROM: FIRST OF ALL AS TO THIS DOCUMENT
17 BEING SOMETHING THEY COULD USE TO IMPEACH THE
18 DEFENDANT WITH IS MY UNDERSTANDING THAT THIS DOCUMENT
19 IS SOMETHING THAT WAS PREPARED BY THE DEFENDANT'S
20 ATTORNEY AND NOT PREPARED BY THE DEFENDANT. AND IT
21 IS FURTHER MY UNDERSTANDING THAT IT IS SOMETHING THAT
22 THE DEFENDANT HAS NOT ADOPTED BY SIGNING IT OR ANY
23 OTHER MATTER ADOPTING THE CONTENTS OF THAT WRITING SO
24 THERE IS NO WAY IT CAN BE USED TO IMPEACH HIM WITH IT.
25 IN THAT SENSE, YOUR HONOR, WE DON'T FEEL IT

1 IS MATERIAL AND AS STATED EARLIER BY SOLICITOR ARIAIL
2 IT BEING THE PRODUCT OF THE DEFENDANT GOLDEN'S
3 ATTORNEY AND A COMMUNICATION BETWEEN THEM.

4 THE COURT: WAIT A MINUTE. I AM GOING IN
5 ORDER, I NEED TO NOW HEAR FROM THE ATTORNEYS FOR MR.
6 GOLDEN, AN ATTORNEY FOR MR. GOLDEN.

7 MR. VIETH: PLEASE THE COURT, AS WE HAD
8 MENTIONED THE OTHER DAY WHEN IT WAS BROUGHT TO THE
9 ATTENTION OF THE COURT THAT THE DOCUMENT EXISTED --
10 THIS DOCUMENT, TO GIVE YOU THE FACTUAL BACKGROUND OF
11 THIS DOCUMENT, PUT IT ON THE RECORD AS TRUTHFULLY AS I
12 KNOW HOW TO DO IT, OUR CLIENT WALKED INTO COURT EITHER
13 MONDAY AFTERNOON OR TUESDAY AFTERNOON I CAN'T REMEMBER
14 WHICH DAY IT WAS AND INFORMED MR. MEGLIC WHO WAS
15 SITTING BESIDE HIM AT THAT TIME THAT HE WANTED TO
16 TENDER A PLEA. WE STOPPED THE COURT AT THAT TIME AND
17 SAID WE HAVE A MATTER TO TAKE UP WITH THE COURT AND
18 YOU RECESSED THE COURT TO GIVE US A CHANCE TO TALK
19 WITH OUR CLIENT.

20 WE WENT INTO THE CONFERENCE ROOM, SPOKE WITH
21 OUR CLIENT TO MAKE SURE THAT HE KNEW WHAT HE WAS
22 DOING, THAT HE KNEW THAT HE WOULD HAVE TO ANSWER YOUR
23 QUESTIONS TRUTHFULLY. HE QUITE FRANKLY BACK PEDALED
24 ON WHAT HE HAD TOLD MARK AND SAID IN EFFECT THAT HE
25 DID NOT WANT TO ENTER THE PLEA AND CHANGED HIS MIND

1 WHICH WAS NOT AN UNUSUAL PROCEDURE THROUGH ANY TALKS
2 THAT WE HAVE HAD WITH OUR CLIENT TO CONSIDER PLEAS OR
3 NOT TO PLEA.

4 AS A RESULT THAT WAS RIGHT AROUND LUNCH TIME
5 AND WE TOOK ABOUT A 30 OR 45 MINUTE BREAK AND I
6 IMMEDIATELY WENT TO MARK'S OFFICE AND DICTATED A
7 LETTER FOR PURPOSES OF TALKING TO THE COURT. IT WAS
8 MORE OF A COVER OUR REAR-END TYPE LETTER THAT MIGHT BE
9 USED OR MIGHT NOT BE USED TWO OR THREE YEARS DOWN THE
10 ROAD IF HE EVER WAS CONVICTED OF THIS CRIME AND WAS
11 SENTENCED TO DEATH AND TOLD ANY TRIBUNAL THAT WE DID
12 NOT ADVISE HIM OF THE EVIDENCE THAT COULD BE USED
13 AGAINST HIM. SO I WANTED HIM TO UNDERSTAND WHAT I
14 THOUGHT WAS POTENTIAL EVIDENCE THAT COULD BE USED
15 AGAINST HIM IN THIS TRIAL, UNDERSTANDING THAT THERE
16 HAD BEEN NEGOTIATIONS WITH THE SOLICITOR'S OFFICE THAT
17 OFFERED NO GUARANTEES EXCEPT THAT AS THE PLEA
18 AGREEMENT INDICATED IF HE COOPERATED, TESTIFIED
19 TRUTHFULLY THAT THE SOLICITOR WOULD CONSIDER LENIENCY
20 IN THIS CASE.

21 OBVIOUSLY THE COURT IS AWARE THAT THE PLEA
22 GUILTY TO DEATH PENALTY CAPITAL MURDER THE BEST YOU
23 COULD GET IS LIFE WITHOUT PAROLE, THE BEST YOU COULD
24 GET IN A MURDER CASE WITHOUT CAPITAL WOULD BE THIRTY
25 YEARS MINIMUM BEFORE YOU ARE EVEN ELIGIBLE FOR PAROLE.

1 ANY PAROLE ELIGIBILITY, IF ANY, IF THE SOLICITOR WERE
2 EVER INCLINED TO EVER GO BELOW LIFE IN PRISON WITHOUT
3 PAROLE WOULD BE PURELY IN THE SOLICITOR'S DISCRETION,
4 NEVER ANY OVERTURES TO THE CONTRARY. I TYPED UP A
5 PROPOSAL INDICATING THAT KNOWING ALL THIS YOU REFUSED
6 TO COOPERATE, IT WAS SIMPLY TO COVER US FOR LATER
7 DATE IF IT EVER CAME. AS A MATTER OF FACT, THE
8 ORIGINAL OF THAT DOCUMENT, WHICH I WOULD INTRODUCE TO
9 THE COURT I WROTE ON THE DOCUMENT REFUSED TO SIGN AT
10 COUNTY COURTHOUSE 2-15- -- 2-8-99 I WENT IMMEDIATELY
11 TO THE COURT'S OFFICE SO IT WOULD BE FOREVER IN MY
12 FILE IF WORSE CASE SCENARIO TOOK PLACE GOT ELECTRIC
13 CHAIR, FILED PCR INDICATED HE HAD INEFFECTIVE
14 ASSISTANCE OF COUNSEL, DIDN'T ADVISE HIM THAT JACKSON
15 V DENNO EVIDENCE COULD BE ADMITTED, THAT HIS
16 STATEMENT WOULD BE READ TO THE JURY. ONE OF THOSE
17 LETTERS THAT ANY LAWYER THAT DOES THE JOB ADVISED HIS
18 CLIENT FULLY IS AWARE OF IT AND PROTECT YOUR FILE.
19 THAT IS ALL IT WAS.

20 THE WAY IT GOT TO THE SOLICITOR MY CLIENT
21 NEVER SAID I COULD SHOW IT TO THE SOLICITOR, NEVER
22 SAID I COULD SHOW IT TO ANYBODY ELSE, IT WAS NOT EVEN
23 MENTIONED THAT WE WERE GOING TO DO IT FOR ANY REASON
24 EXCEPT US TALKING BEFORE COURT STARTED AGAIN. I CAME
25 UPSTAIRS I THINK AND COMMENT WAS MADE I WAS OUT IN THE

1 CORRIDOR I SAW BETTY AND SHE SAID ANYTHING GOING ON
2 WITH YOUR CLIENT? I THINK IT IS SO FRUSTRATING I
3 DON'T THINK THE EVIDENCE IS GOOD AGAINST HIM, I
4 PREPARED A DOCUMENT SHOWING HIM HOW BAD THE EVIDENCE
5 IS I SHOWED IT TO HER.

6 THE COURT: THIS IS MS. STROM?

7 MR. VIETH: SHE NEVER READ IT, THE SOLICITOR
8 NEVER READ IT, IT WAS OUT OF FRUSTRATION TYPE THING.
9 I SAID, "GEES WHIZ, I THINK THIS EVIDENCE IS SO
10 COMPELLING THIS IS YOU" -- WHAT I TRIED TO DO TO SHOW
11 HIM HOW COMPELLING THAT IS THE SUM AND SUBSTANCE OF
12 THIS DOCUMENT. I WISH I HAD NEVER TYPED THIS STUPID
13 THING TO CAUSE ALL THIS PROBLEM, SIMPLY ATTORNEY
14 CLIENT COMMUNICATION INTENDED TO ADVISE HIM OF HIS
15 CASE THAT WAS ABOUT TO UNFOLD BEFORE HIM AND I WANTED
16 TO MAKE SURE HE UNDERSTOOD THE FACTUAL SITUATION AS I
17 SAW IT. HE CHOSE NOT TO COOPERATE BECAUSE HE HAD TOLD
18 US HE DID NOT WANT TO PLEAD. I WANTED HIM TO SIGN
19 SOMETHING SAYING HE WOULD NOT PLEA. HE REFUSED TO
20 SIGN IT SIMPLY BECAUSE FOR WHATEVER REASON HE DIDN'T
21 GO INTO IT HE SAID I WILL NOT SIGN THAT THING. I
22 SAID FINE I WENT UP AND CLOCKED IT IN.

23 I DON'T SEE WHY THAT SHOULD BE DISCOVERABLE
24 UNDER ANY STRETCH OF THE IMAGINATION.

25 THE COURT: NOW, MR. ALLEN, REPLY.

1 MR. ALLEN: JUDGE, IN REFERENCE TO THE RULE
2 FIVE IT DOES NOT INDICATE IT HAS TO BE ADOPTED OR
3 SIGNED BY THE CLIENT. IT DOES ALSO APPEAR TO BE A
4 WAIVER OF THE ATTORNEY CLIENT PRIVILEGE ONCE IT GOT
5 INTO THE HANDS OF THE SOLICITOR, IT WAS IN THE
6 POSSESSION OF THE SOLICITOR. I CERTAINLY CANNOT IN MY
7 WISDOM SEE WAIVING THE OPPORTUNITY TO READ THE SAME
8 DOCUMENT THAT THE SOLICITOR HAS READ WHEN IT WAS
9 OBVIOUS THAT IT WAS PART OR CAME ON THE HEELS OF THIS
10 PLEA AGREEMENT THIS EXHIBIT COURT NUMBER 3. IF THAT
11 GUY GETS ON THE STAND AND TESTIFIES ACCORDING TO THAT
12 SCRIPT THEY LAID OUT FOR HIM IT IS -- IT IS A
13 SITUATION WHERE WE SHOULD BE ALLOWED TO UTILIZE IT AND
14 IMPEACH HIM AND CROSS-EXAMINE HIM ON IT. IT WAS IN
15 THEIR POSSESSION, IT WAS IN NO ONE ELSE'S POSSESSION,
16 IT WAS NOT IN THE ATTORNEY'S POSSESSION AT THE TIME.
17 AND USED FOR THAT LIMITED PURPOSE, JUDGE.

18 HIS CREDIBILITY, JUDGE, WE WOULD ASSERT
19 HAVING ENTERED INTO THIS PLEA AGREEMENT WOULD BE
20 MATERIAL TO THE DEFENSE. NOT HAVING READ THE CASE,
21 JUDGE, BUT LOOKING IN WHAT IS REFERRED TO AS THE
22 TRIAL HANDBOOK OF SOUTH CAROLINA LAWYERS IT SAYS,
23 "INADVERTENT OR NONVIOLENT PRODUCTION OF PRIVILEGED
24 ATTORNEY CLIENT COMMUNICATION CONSTITUTES A WAIVER AS
25 TO ALL COMMUNICATIONS BETWEEN THE SAME ATTORNEY AND

1 THE SAME CLIENT ON THE SAME SUBJECT DESPITE ORAL
2 ASSERTION OF LIMITATION," THAT IS MARSHALL VERSUS
3 MARSHALL 1984 CASE 320 SOUTHEAST SECOND 44. WE
4 ASSERT IF IT WAS JUST MR. SMITH, JUST BETWEEN HIM AND
5 HIS CLIENT, BEEN IN HIS HAND THEN WE WOULD UNDERSTAND
6 THEIR POSITION. THIS IS SOMETHING THAT WAS IN THE
7 PROSECUTION'S HANDS. THIS IS A PAPER AND DOCUMENT IN
8 THEIR HANDS. TO SAY THEY DIDN'T READ IT I CAN'T TAKE
9 THAT CHANCE.

10 THE COURT: LET ME ASK YOU ON THAT LAST POINT
11 THAT YOU MADE, IT IS CORRECT AT LEAST IT IS THE
12 COURT'S UNDERSTANDING, PLEASE CORRECT ME IF I AM
13 WRONG, THAT IT WAS NOT THE DEFENDANT GOLDEN THAT PUT
14 THE DOCUMENT INTO THE HANDS OF SOMEONE ELSE; IS THAT
15 CORRECT, IT WOULD BE HIS ATTORNEY?

16 MR. ALLEN: FROM THE EVIDENCE STATED HERE,
17 JUDGE, IT WOULD BE THE ATTORNEY -- IT WOULD BE THE
18 ATTORNEY AND THE DEFENDANT GOLDEN. THEY WERE THE
19 ONES NEGOTIATING THIS PLEA AGREEMENT. DEFENDANT
20 GOLDEN IN FACT SIGNED THE PLEA AGREEMENT HIMSELF.

21 THE COURT: HE WOULD HAVE TO EVENTUALLY.
22 BUT AS FAR AS WHAT WE HAVE HEARD THIS AFTERNOON IT
23 SEEMS THAT THE DOCUMENT THE WAY IT FOUND ITS WAY IN
24 -- IT DID TROUBLE THE COURT BECAUSE IT DID SEEM TO BE
25 A WAIVER OR AT LEAST THE FACT THAT IT WAS OUT OF THE

1 PROTECTION, THE PHYSICAL PROTECTION OF THE ATTORNEY
2 THAT PERHAPS WHATEVER PRIVILEGE HAD BEEN THERE HAD
3 BEEN LOST.

4 YOU DO AGREE, THOUGH, IT WAS ATTORNEY. YOU
5 SAY DEFENDANT GOLDEN ULTIMATELY SIGNED THE PLEA
6 AGREEMENT, YOU DON'T HAVE ANYTHING TO SUGGEST AND THE
7 DOCUMENT THAT I HAVE AND BEEN CONSIDERING HERE IS
8 UNSIGNED. IT IS UNSIGNED, UNWITNESSED AND
9 EVERYTHING ELSE, IT IS JUST A BLANK AFFIDAVIT IS HOW
10 IT IS TITLED.

11 MR. ALLEN: YES, SIR, JUDGE. IN
12 OBSERVATION WE WOULD SUBMIT THE DEFENDANT GOLDEN
13 RETURNED THIS DOCUMENT OR A DOCUMENT THAT WITHOUT
14 GETTING INTO -- WE WOULD SAY THEY JOINTLY GAVE IT TO
15 THE PROSECUTION AND THEY JOINTLY CONSUMMATED THIS PLEA
16 AGREEMENT.

17 THE COURT: ALL RIGHT. WELL, I THINK WE
18 ARE FAMILIAR WITH THE LAW IN SOUTH CAROLINA THAT WE DO
19 UNDERSTAND AND APPRECIATE THE PUBLIC POLICY IN
20 PROTECTING CONFIDENTIAL COMMUNICATIONS BETWEEN A
21 CLIENT BE HE A DEFENDANT AND HIS ATTORNEY, BUT WE
22 ALSO SHOULD BALANCE AGAINST PUBLIC POLICY TO HAVE A
23 PROPER ADMINISTRATION OF JUSTICE.

24 HOWEVER, THE THRESHOLD TO DETERMINE WHETHER A
25 COMMUNICATION IS PRIVILEGED IN THE FIRST INSTANCE IS

1 FOR THE TRIAL JUDGE TO DECIDE. AND THE COURT MUST
2 DETERMINE THAT QUESTION OF PRIVILEGE WITHOUT FIRST
3 REQUIRING DISCLOSURE OF THE SUBSTANCE OF THE
4 COMMUNICATION AND THAT IS STATE VERSUS DOSTER 284
5 SOUTHEAST SECOND 218. AND THE COURT IS SATISFIED
6 THAT THIS DOCUMENT WAS GENERATED BY THE ATTORNEY IN
7 CONNECTION WITH HIS REPRESENTATION OF HIS CLIENT, THE
8 DEFENDANT GOLDEN.

9 BUT THE COURT IS ALSO AWARE THAT ALTHOUGH THAT
10 MR. GOLDEN DIDN'T SIGN THE DOCUMENT HE WAS AWARE OF
11 IT, HAD READ IT, AND -- BUT THE ATTORNEY WAS THE ONE
12 THAT PUBLISHED IT IN THE SENSE THAT MADE IT AVAILABLE
13 TO THE SOLICITOR. HOWEVER, THE PRIVILEGE BELONGS TO
14 THE CLIENT AND NOT THE ATTORNEY AND MAY ONLY BE WAIVED
15 BY THE CLIENT. IN FACT AS I UNDERSTAND IT EVEN
16 SURVIVES HIS DEATH SO I DON'T SEE HOW IT COULD EVER BE
17 WAIVED AGAIN UNLESS IT IS HIS ESTATE.

18 MY LAW CLERK JUST REMINDED ME THAT THE WAY
19 THAT HAPPENS IS THE ATTORNEY CAN WAIVE IT AFTER THE
20 CLIENT IS DEAD, NOT THE CASE HERE LET'S NOT WORRY
21 ABOUT IT.

22 HERE THE CLIENT IN THE LIGHT OF THAT
23 INFORMATION WAS VERY MUCH ALIVE AND WELL AND OBVIOUSLY
24 HE DID NOT OR NOTHING TO SUGGEST THAT HE AUTHORIZED
25 THE WAIVER OF THE PRIVILEGE AND EVEN FURTHER PROBABLY

1 THERE IS NOTHING TO SUGGEST THAT HE EVEN ENDORSED IT.

2 IF IT IS ANY COMFORT, I AM FINDING, ONE, THAT
3 IT IS PRIVILEGED COMMUNICATION AND, TWO, THAT IT WAS
4 NOT WAIVED. I THINK THE WAIVER MUST BE DISTINCT AND
5 UNEQUIVOCAL. I DON'T FIND THAT THE DEFENDANT DID THAT
6 HERE. THAT GOES EVEN SO FAR AS IF THE DEFENDANT
7 WOULD TAKE THE STAND AND TESTIFY IT STILL WOULD NOT BE
8 A WAIVER OF IT OF THE PRIVILEGE UNLESS HE INTENDED IT
9 TO DO SO.

10 IF IT IS ANY COMFORT TO THE PARTIES, THE
11 COURT HAS REVIEWED THE DOCUMENT AND IT IS MUCH LIKE
12 -- NOT EXACTLY LIKE THE ATTORNEY MR. VIETH SAID THAT
13 IT IS MORE OF THE ATTORNEY'S DEVELOPMENT OF THE FACTS
14 AS HE UNDERSTOOD THE STATE WOULD PRODUCE IN ADVISING
15 HIS CLIENT AND WHAT LITTLE I HAVE READ AND HEARD
16 MEANING IN THE OTHER STATEMENTS THAT HAVE BEEN MADE
17 AVAILABLE TO THE COURT UNDER VARIOUS MOTIONS THAT
18 THERE IS NOTHING NEW IN IT, IT IS NOT A NARRATIVE OR
19 THE TYPE OF THING THAT WOULD LEND IT TO IMPEACHMENT.

20 SO, THEREFORE, I FIND THREE THINGS. ONE,
21 IT IS PRIVILEGED UNDER ATTORNEY CLIENT RELATIONSHIP;
22 TWO, THAT IT WAS NOT WAIVED; AND, THREE, IN THE
23 COURT'S OPINION IT WOULD NOT -- IT COULD NOT SERVE
24 ANY BENEFIT, WOULD THEREFORE NOT BE PREJUDICIAL TO THE
25 DEFENDANT. I WOULD NOTE IN THAT REGARD I AM NOT SURE