

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

State of South Carolina,

v.

Richard Alexander Murdaugh,

Defendant.

COURT OF GENERAL SESSIONS
FOURTEENTH JUDICIAL CIRCUIT

Indictment Nos. 2022-GS-15-00592,
593, 594, and -595

**STATE'S MOTION AS TO
PRIVILEGE REVIEW OF
DEFENDANT'S PHONE AND MOTION
TO COMPEL DEFENSE TO TURN
OVER DIGITAL EVIDENCE**

A. Introduction

The State hereby notifies the Court that it intends to conduct by taint team a fresh privilege review of Alex Murdaugh's phone evidence and also moves to compel the defense to turn over certain digital evidence it collected in the course of its investigation. The defense has and has always had more of the phones than the investigators and prosecutors on the case do, including unredacted phone dumps with thousands of messages from the phones the State does not. While the State in the investigation ordered a broad exclusion by the privilege review, since that was done in 2021 there have been developments that permit a more careful review. Moreover, upon information and belief the defense has a phone extraction from Defendant taken near the murders for which the State seeks it to produce.

B. Background

With defendant's consent, law enforcement personnel with the Fourteenth Circuit Solicitor's office performed a logical extraction¹ on his phone three days after the murder

¹ An extraction is a forensic investigative tool that extracts complete sets of a data from a target device (a phone in this example). A logical extraction is a quicker version that only extracts "surface" aka user accessible data such as texts, call logs, pictures and video, etc.

of Maggie and Paul Murdaugh. Because he was still a practicing attorney at the time, the Fourteenth Circuit enlisted the help of the Ninth Judicial Circuit Solicitor's office to conduct a privilege review to screen out any communications between defendant and his then clients. The Ninth Circuit Solicitor subsequently provided redacted copies of this phone data to the SLED investigative team.

Three months later, after initial revelations regarding his financial crimes surfaced and he was initially arrested, SLED seized the same phone from defendant and performed a full extraction² pursuant to a search warrant. This time, the data was provided to SLED's Office of General Counsel (hereinafter "OGC") who performed a privilege review and then provided redacted copies of defendant's phone data to the investigative team. Privilege review falls within OGC's normal duties at SLED, and at all times, including up to the time of this filing, a firewall has been maintained between OGC's privilege review team and the investigation and prosecution teams. OGC redacted over 3000 text messages from defendant's phone during this process.

In the discovery process leading up to the first murder trial, SLED provided the defendant with full unredacted copies of the above phone extractions. To date, no member of SLED (other than the OGC privilege team) or the Attorney General's office has had access to these redacted communications.

During the course of the State's investigation of Defendant's numerous financial crimes and after the above initial privilege reviews were completed, the State obtained waivers of attorney client privilege from over 10 former clients of defendant. Additionally, Defendant would subsequently pled guilty to numerous crimes involving him defrauding

² A full extraction extracts the entire data footprint from the phone, which can find deleted files and non-user accessible data such as knowledge C databases.

and/or stealing from his clients. He would also plead guilty to participating in a criminal conspiracy with co-defendants banker and occasional conservator/personal representative Russell Laffite and attorney and occasional co-counsel Cory Fleming.

Both OGC and the Ninth Circuit review team used a very broad brush in redacting these phones, essentially removing any communication between any individual identified as a potential client and the defendant. However, as discussed below in more detail, not all communications between an attorney and his client can be considered privileged, and the State now intends have a new privilege review team conduct a more careful review of these redacted communications to take into account the attorney client waivers the State obtained and also to apply the existing law of privilege in South Carolina in order to determine what should be remain redacted and what should be provided to the investigation and prosecution teams. The State proposes that the new privilege review team provide the Court and the defendant with the communications it has now identified as not privileged in order to give defendant an opportunity to object prior to the investigation and prosecution teams reviewing them.

Additionally, the State requests an order from the Court requiring the defendant to turn over certain digital evidence defendant collected prior to his previous trial.

C. Law

In South Carolina, attorney-client privilege is established when a client communicates with an attorney and:

1. legal advice is sought;
2. From a professional legal adviser in his capacity as such;
3. The communications relating to that purpose are;
 - a. Made in confidence;

- b. By the client;
4. Are at [the client's] instance permanently protected;
 5. From disclosure by himself or the legal adviser;
 6. Except the protection may be waived.

State v. Doster, 276 SC 647, 651 (1981). However, not every communication within the attorney client relationship is privileged, including--for instance--communications in furtherance of and where the attorney is engaged in criminal, tortious or fraudulent conduct. Id.

There are many other instances in which communications between an attorney and a putative client may not be privileged. For instance, business advice is not privileged, even when given by an attorney. See Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367, 376 (Sup.Ct.2003) citing Fine v. Facet Aerospace Prod. Co., 133 F.R.D. 439, 444 (S.D.N.Y.1990). Nor are other business communications between an attorney and client see Hyatt v. State Franchise Tax Bd., 962 N.Y.S.2d 282, 296 (2d.Div. 2013). Communications of a personal nature are not privileged, Rossi v. Blue Cross and Blue Shield of Greater New York, 73 N.Y.2d. 588 (Ct. Ap.NY 1989) also see Jones.v U.S. 828 A.2d 169, 175 (D.C.Ct.Ap.2003).

Although citations in the above paragraph are from outside South Carolina, it is easy to see that their import is contemplated under Doster and its progeny, as the first two elements of privilege rule adopted under Doster require the client to be seeking legal advice from a legal professional in his capacity as a legal counsel. It is not a leap of logic to say that necessarily communications that do not involve a client seeking legal advice from a legal professional in that capacity are not protected under South Carolina's version of attorney-client privilege (personal communications, business communications, etc.)

Ultimately, making case specific determinations of what is a privileged communication and what is not is a responsibility of this Court, to be made in light of an inquiry into all the facts and circumstances. Doster at 652.

Finally, the State has reason to believe that the defense has a cell phone extraction from Defendant Murdaugh's phone that was extracted sometime between the State's initial logical extraction and later full extraction discussed above in section B. This phone extraction could contain valuable data artifacts that were not captured during the State's initial logical extraction and would have been long overwritten by the time of State's full extraction³. The defendant has a Fifth Amendment right from being compelled to turn over certain communications, however this amendment does not "independently proscribe the compelled production of every sort of incriminating evidence but only applies when the accused is compelled to make a testimonial communication that is incriminating" Fisher v. U.S., 425 U.S. 391, 408 (1976). Because defendant's preparation of this extract was voluntary it cannot be said to contain "compelled testimonial evidence". Id. at 409-410 (stating "the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else." The existence of the records sought must be a "forgone conclusion" as in some circumstances admitting to their existence can be an incriminating act. Id. at 411. However, the State meets this forgone conclusion threshold as the defendant, through his attorneys, has admitted to this phone extraction's existence.

³ Most SQLite databases (such as Knowledge C) used by IOS at the time of the murders occupy only a small discrete portion of the phone's memory. These databases continuously overwrite themselves, sometimes in a matter of days.

For an instructive application of this Fisher rule, see In re Bernstein 425 F.Supp. 37, (S.D.FL. 1977). The Bernstein Court makes it clear that the defendant can only be required to turn over documents in the defendant's possession when the "tripartite unity" of defendant's ownership, possession, and self incriminating nature of the documents cannot be established. Bernstein at 39. Fisher failed this test because the tax documents sought were prepared by defendant's accountant and were in his attorney's possession Bernstein at 38-39. In this instance, the State is not seeking anything from Alex Murdaugh himself. The phone extraction in question is in either his attorney's or expert's possession (or both), not his. The State has other avenues to authenticate the phone extraction in question (other than compelling defendant to authenticate), either by using the defendant's expert who performed the extraction or even using the State's own experts who can compare the "bookend" extracts in the State's possession to the defendant's extraction. Id. Bernstein's enunciation of this "tripartite" rule against compelled production is found in South Carolina law as well. See First Union Nat. Bank v. First Citizens Bank and Trust Co. of South Carolina 346 S.C. 462, 470 (Ct.App.2001) "The privilege protects against production of documents when by producing the documents, the witness [1]would be admitting the papers existed, [2]were in his possession, or control, or [3]were authentic." [emphasis added]. Here, the defendant fails under all three prongs: the defendant has already admitted the extraction exists, they are in his expert or attorney's control, and the State has an independent method of authenticating the extraction.

D. Conclusion

For the forgoing reasons, the State intends to conduct a fresh privilege review with a

new privilege review team, who will identify any previously redacted communications that are no longer believed to be privileged to the Court and defendant for further argument. Additionally, the State requests an order from this Court compelling defendant to turn over any phone extract performed by defense experts prior to the defendant being arrested by SLED.

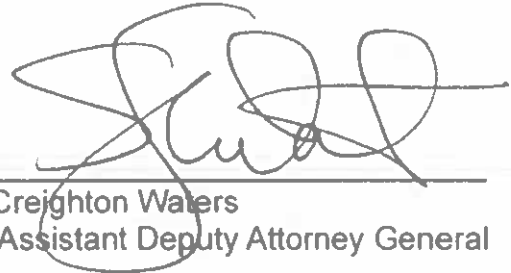
Respectfully submitted,

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Columbia, South Carolina
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