IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

UNITED STATES OF AMERICA vs. RICHARD ALEXANDER MURDAUGH Defendant.	Criminal No.: 9:23-cr-0396-RMG **DEFENDANT MURDAUGH'S SENTENCING MEMORANDUM**

INTRODUCTION

Defendant, Richard Alexander Murdaugh, through undersigned counsel, hereby submits his sentencing memorandum for the Court's consideration in advance of the hearing scheduled for April 1, 2024. We address Murdaugh's objections to the guideline calculations in the Presentence Investigative Report (PSR) and discuss the applicable guideline provisions imposing a concurrent sentence with the undischarged state sentence Murdaugh is currently serving for the same conduct.

In addition, we address the Government's late filed motion contending that Murdaugh breached his plea agreement by failing to pass a polygraph administered by the Federal Bureau of Investigation. The Government's motion is untimely and should not be considered at the currently scheduled sentencing hearing because a full evidentiary hearing, affording Murdaugh his Sixth Amendment right to confront the polygrapher examiner, will be necessary to address the Government's assertion that Murdaugh failed a polygraph examination. There are legitimate questions as to whether the Government intentionally manipulated the results to void the plea agreement and achieve the prosecutors' stated desire to "ensure that he's never a free man again."

Alex Murdaugh Pleads Guilty, AP News September 21, 2023. https://apnews.com/article/alex-murdaugh-financial-crimes-guilty-aa2a5b2d06113a213f0c8cec4475f302

The polygraph examiner engaged in what can only be described as odd conduct during the pre-test interview, first declaring his belief that Murdaugh is innocent of the murders of his wife and son, and then "secretly"[1] confiding in Murdaugh that he had just returned from performing a polygraph examination on Joran Van der sloop regarding the murder of Natalee Holloway. The polygraph examiner also argued with Murdaugh over the meaning of "hidden assets" which the examiner used in his test question. As explained herein, this alone could have caused Murdaugh to react to the question. The Government has also refused to produce the charts of the polygraph examination so we can have them examined by an expert to determine whether the Government has accurately scored the results. Instead, the Government asks the Court to credit its accusation that Murdaugh breached his plea agreement while denying him an opportunity to dispute the accusation in a meaningful manner.

I. Guideline Objections

A. Criminal History Calculation

We have objected to adding three (3) criminal history points for a tax plea and concurrent sentence with all other financial crimes to which Murdaugh plead guilty in the same state court proceeding. PSR ¶ 125 This conviction should not be included under Section 4A1.2 of the United States Sentencing Guidelines (USSG) because it involves conduct that is part of the instant offense.

Section 4A1.2 defines the term "prior sentence" as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part

[1] The FBI agent asked Murdaugh, if he could keep a secret, and then claimed he had just come from Alabama where he polygraphed Joran Van der sloop.

of the instant offense." The phrase "conduct not part of the instant offense" is to be determined with reference to Section 1B1.3, which defines relevant conduct. *United States v. Smith*, 187 F. App'x 330 (4th Cir. 2006) (unpublished); *United States v. Morgan*, 219 U.S. App. Lexis 37613 (6th Cir. 2019) *United States v. Yerena-Magana*, 478 F.3d 683 (5th Cir. 2007); *United States v. Charniak*, 607 F. App'x 936 (11th Cir. 2015).

"Relevant conduct" includes all acts and omissions committed by the defendant during the commission of the instant offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. Section 1B1.3 USSG. Section 1B1.3(a)(3) states "solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction."

Tax offenses are properly grouped with fraud offenses under §3D1.2(d) when the tax offenses are part of a continuous course of criminal conduct involving the same funds. *United States v. Petrillo*, 237 F.3d 119 (2d Cir. 2000); *United States v. Gordon*, 291 F.3d 181, 192–93 (2d Cir. 2002) (reaffirming *Petrillo* and requiring grouping of tax evasion and mail fraud counts under subsection (d) of § 3D1.2), *cert. denied*, 537 U.S. 1114 (2003). As a result, tax offenses are considered relevant conduct under Section 1B1.3(a)(3) pertaining to fraud offenses if the tax offense was part of the same course of conduct.

In *Petrillo*, the Court explained:

> [B]oth tax evasion and mail fraud follow offense level schedules that trigger substantially identical offense level increments based on the amount of loss. Moreover, the offenses here were both frauds, were part of a single continuous course of criminal activity and involved the same funds. It is true that the tax and fraud offenses involved different victims, an argument against grouping. However, this alone is not dispositive. Application Note 6 strongly suggests

> that "the mere fact that [defendant's] … counts harmed different victims is … insufficient to establish that these counts cannot be grouped under subsection (d)." *Napoli*, 179 F.3d at 9. Based on this reading of the Guidelines and *Napoli*, we agree with the parties that the mail fraud and tax evasion counts here should be grouped and Petrillo's sentence adjusted accordingly.

Id. at 125

In *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997) the Court likewise ruled that a conviction for tax evasion should be grouped with a mail fraud conviction. The Court observed,

> Section 3D1.2 specifies the circumstances in which multiple counts must be grouped together. When counts are grouped, they are essentially treated as a single offense for sentencing purposes. The stated purpose of the grouping rules is to ensure that a defendant convicted of multiple offenses receives "incremental punishment for significant additional criminal conduct." U.S.S.G., Ch. 3, Pt. D, Introductory Commentary. The operative word is "significant."

Id. at 45.

Here, the tax offense to which Murdaugh pled guilty in state court was part of a single continuous course of criminal activity involving the same proceeds obtained through the fraud offense conduct. Moreover, the state tax charge does not involve "significant additional criminal conduct." As such, the state tax charge is "relevant conduct" as defined under Section 1B1.3(a)(3) and Murdaugh should not receive criminal history points for these convictions.

B. Loss Amount

The summary loss amount set forth in paragraph 106 is incorrect in the following respects. The PSR reports a loss amount of $792,000 for the Faris fees allegedly stolen from PMPED. The $792,000 in fees owed to PMPED from the Wilson Law Firm for Murdaugh's representation was originally diverted to Murdaugh personally. However, before the scheme was detected, Murdaugh

returned $600,000 to the Wilson Law Firm so that Wilson could pay PMPED. Ultimately, Wilson loaned Murdaugh $192,000 and paid the full amount owed to PMPED.

In addition, the remaining loss amount attributed to PMPED is overstated. Loss is defined under Application Note 3 to Section 2B1.1 USSG as "the reasonably foreseeable pecuniary harm that resulted from the offense." Pecuniary harm means "harm that is monetary or otherwise is readily measurable in money." Id. The total amount of PMPED fees that Murdaugh diverted to himself is not an accurate measure of pecuniary harm to the firm.

Under the partnership compensation formula, each partner was entitled to a year-end distribution of 92.5% of the total fees the partner earned through the firm, after payment of the partner's pro-rata share of the firm overhead. The remaining 7.5% was deposited into a fund that was then distributed to all partners on a pro-rata basis.

Murdaugh collected sufficient funds to cover his pro-rata share of the firm's overhead every year in which he diverted fees to himself personally. Thus, Murdaugh would have been entitled to receive at least 92.5% of the total amount of diverted funds.

The pecuniary loss to PMPED is therefore limited to 7.5% of the diverted amount. According to the summary table in paragraph 125, Murdaugh "stole" $1,481,935.49 by diverting attorneys' fees to himself. Murdaugh was entitled to receive at least 92.5%, or $1,370,790.33 according to the firm's compensation formula. The pecuniary harm, or loss to PMPED is therefore limited to $111,145.16 if the Faris fee is included. However, when the Faris fee of $792,000 is properly excluded from the loss amount calculation, the pecuniary harm to PMPED is reduced to $51,745.6. This reduces the total loss amount to $9,456,356.99, which in turn reduces the loss enhancement from 20 levels to 18 levels pursuant to 2B1.1(b)(1)(J).

II. Sentencing Guideline Section 5G1.3 Directs that Murdaugh Receive a Concurrent Sentence to His Undischarged State Sentences for All Financial and Tax Crimes

Section 5G1.3 USSG provides that the sentence for the instant offense "shall be imposed to run concurrently to the undischarged term of imprisonment" for another offense that is relevant conduct to the instant offense. § 5G1.3(b)(2). The Court is also directed to adjust the sentence for any period of imprisonment already served on the undischarged term of imprison. §5G1.3(b)(1). As discussed above, the tax charge as well as all other financial crimes[2] for which Murdaugh has been sentenced in state court, is relevant conduct to the instant offense.

However, the convictions relating to the murders of Maggie Murdaugh and Paul Murdaugh clearly are not relevant conduct. Therefore, the policy statement in Section 5G1.3(d) is applicable. Section 5G1.3(d) states:

> In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

Id.

Application note 4A states:

> Under subsection (d), the court may impose a sentence concurrently, partially concurrently, or consecutively to the undischarged term of imprisonment. In order to achieve a reasonable incremental punishment for the instant offense and avoid unwarranted disparity, the court should consider the following:
>
> (i) the factors set forth in 18 U.S.C. § 3584 (referencing 18 U.S.C. § 3553(a));
>
> (ii) the type (e.g., determinate, indeterminate/parolable) and length of the prior undischarged sentence;
>
> (iii) the time served on the undischarged sentence and the time likely to be served before release;

[2] The PSR finds that only the tax offense is not relevant conduct. See ¶ 125. Murdaugh received a five year concurrent sentence on the tax conviction.

(iv) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and

(v) any other circumstance relevant to the determination of an appropriate sentence for the instant offense.

Because Murdaugh is serving two life sentences without the possibility of parole for the murder convictions there is nothing to be gained by imposing a consecutive sentence. Murdaugh will die in state custody and never serve a day of consecutive time. If Murdaugh's murder and related convictions are vacated on appeal or through a federal habeas action, then there will not be any active sentence with which to run consecutively.

III. This Court Should Deny the Government's Motion Declaring Murdaugh in Breach of his Plea Agreement, or Delay Ruling on the Motion Until the Government Provides Murdaugh with the Polygraph Charts

The Government's conduct leading up to the polygraph examination and the agent's conduct during the examination raises significant concerns as to whether the Government has acted in good faith. Immediately following Murdaugh's guilty plea, prosecutors declared to the press that the reason Murdaugh was federally prosecuted was to "ensure he's never a free man again."[3] This statement was made even though pursuant to the plea agreement, the prosecutors agreed to recommend to the court, consistent with the federal sentencing guidelines, that the federal sentence run concurrently with his state sentence. In a follow-up conversation about this seemingly contradictory statement, the undersigned counsel was advised that Murdaugh must pass a polygraph examination to obtain the benefit under the plea agreement.

Then, after conducting four interviews with Murdaugh over a six-month period, prosecutors demanded that Murdaugh submit to a polygraph examination regarding his assets. This

[3] Alex Murdaugh Pleads Guilty to Financial Crimes, AP News, Sept. 21, 2023, *available at* https://apnews.com/article/alex-murdaugh-financial-crimes-guilty-aa2a5b2d06113a213f0c8cec4475f302

struck the undersigned as very curious since Murdaugh had never been requested to identify any of his assets in prior interviews. During the pre-test interview, Murdaugh expressed confusion and uncertainty regarding the agent's use of the term "hidden assets," primarily because Murdaugh had never been requested to identify his assets and he was unsure which assets the investigators and the State appointed receiver had identified. Yet, the polygraph examiner used this exact term during the test,

The polygraph examiner's questions run afoul of the following standards for designing polygraph questions issued by the Global Polygraph Network (GPN):

- Questions cannot be subjective or ambiguous. Each question must be interpreted the same way by any person who hears it. For example, if there is a question about having "sex" with someone, the term "sex" must be defined (vaginal, oral, anal, manual, virtual, etc.) When in doubt, specific words or phrases can be defined and agreed-upon before the exam.
- Questions must be about what the examinee has disclosed to the examiner, not to someone else. For example, "Did you tell your boss about everything you stole from him?" is not a proper questions, although the question "Besides what you told me, did you steal anything else from your boss?" would be valid. All relevant disclosures must be made to the examiner first so the examiner can verify those disclosures.
- Questions about lying are not generally used.[4] Polygraph questions are asked in the most direct way possible. For example, we would prefer to ask "Did you steal the missing wallet?" rather than "Are you lying about stealing the missing wallet?"

Polygraph Question Design Rules, GPN https://www.polytest.org/polygraph-question-rules/

Even the Department of Justice acknowledges that the design of the relevant question is a significant variable, causing examinees to react to the question. DOJ, Crim. Resource Manual Section 261 (https://www.justice.gov/archives/jm/criminal-resource-manual-261-polygraphs-

[4] The polygraph examiner also tested Murdaugh on whether he was "lying" about his statement regarding "hidden assets."

examination-variables) Here, it appears that the polygrapher designed the relevant question in such a way to ensure that Murdaugh would fail the exam, in an effort to accomplish the prosecutor's stated goal of ensuring "that he will never be a free man again."

In addition, the polygraph examiner's conduct during the pre-interview process was odd at best. The examiner upon meeting Murdaugh exclaimed that he did not believe Murdaugh murdered his wife and son. The examiner also inquired who Murdaugh thought killed his wife and son. In response to this inquiry Murdaugh asked the examiner to polygraph him on his wife and son's murders. The examiner refused. The examiner also purported to secretly confide in Murdaugh that he had just come from Alabama where he conducted a polygraph examination of Joran Van de sloop about the murder of Natalee Holloway.

Upon learning that the Government contends Murdaugh failed the polygraph, the undersigned requested charts of the tests so that we could have an independent expert review them. The Government refused our request. Without these charts, Murdaugh cannot effectively cross examine the polygrapher who contends Murdaugh failed the test. To be clear, Murdaugh objects to the Government's reliance upon a written report where an examiner simply checks a box to establish that Murdaugh breached the plea agreement. Murdaugh has a Sixth Amendment right to cross exam the polygrapher regarding his administration of the polygraph exam and the scoring of the same. *See, Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009) (applying *Crawford v. Washington* to forensic lab reports); *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716-17 (2011) (Blood alcohol analysis report). Murdaugh will also be deprived of his opportunity to present expert testimony regarding the validity of the polygraph examiner's scoring of the test if the charts are not provided.

Murdaugh therefore objects to the Court addressing the Government's motion until after the Government has produced the polygraph charts in advance of a hearing, giving counsel a sufficient opportunity to review and analyze the same, in consultation with a polygraph expert. If the Government is unwilling to provide the underlying charts to the defense, then this Court should deny the motion.

IV. This Court should not rely upon Polygraph Results as Evidence of Truthfulness

The United States Department of Justice's Criminal Resource Manual says it best:

> In light of present scientific evidence the Department of Justice continues to agree with the conclusion of the Committee on Governmental Operations of the House of Representatives, which held after extensive hearings in 1965:
>
> > **There is no "lie detector." The polygraph machine is not a "lie detector," nor does the operator who interprets the graphs detect "lies."** The machine records physical responses which may or may not be connected with an emotional reaction--and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.
>
> H.R.Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Following further hearings and study, the same conclusions were reached in 1976. The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings on H.R. 795 Before the House Comm. on Government Operations, 94 Cong., 2d Sess. (1976). And in 1988, as a result of continuing doubts about the usefulness and accuracy of polygraphs as a means of detecting deceit, Congress restricted the use of polygraphs in employment decisions. 29 U.S.C. §§ 2001 et seq.

Crim. Resource Manual §259 (https://www.justice.gov/archives/jm/criminal-resource-manual-259-polygraphs-general) (emphasis added)

The South Carolina Attorney General takes the same view as the Department of Justice, rejecting the idea that a polygraph detects lies. In a pre-trial filing in the murder case, Murdaugh disclosed that Curtis Eddie Smith failed a polygraph exam administered by SLED regarding his knowledge and/or involvement in the murders of Maggie and Paul. In response, the Attorney General stated,

> A polygraph examination is a procedure in which a subject is measured for certain physiological and psychological reactions while responding to questions in a controlled environment. **The polygraph machine is not a "lie detector," nor does the operator who interprets the test "detect lies;"** rather the machine records physical responses from which an examiner may draw somewhat subjective inferences about whether the examinee is being deceptive or otherwise motivated by a sense of guilt or some other emotion.

State's Response in Opposition to Motion to Compel, Exhibit A (emphasis added).

Assuming Murdaugh did in fact "flunk" the polygraph as reported in the press, the only conclusion that can be drawn is that he had a physiological and/or psychological reaction to the relevant questions. Nothing more. The Department of Justice's own policy manual precludes the federal prosecutors from claiming that Murdaugh was lying or being deceptive. Simply put, a polygraph machine does not detect lies.

Finally, the Government's motion is untimely. The polygraph examination took place on October 18, 2023, and the final review of the results was completed by October 26, 2023. The Government knew no later than October 26, 2023, that it would move for a finding that Murdaugh breached his plea agreement (and, as explained above, it decided to do so even earlier). Yet the Government waited five months before filing its motion barely more than two business days (the filing was made in the late afternoon) before sentencing. The unavoidable inference is that the Government engaged in deliberate delay to impede careful judicial scrutiny of its position.

V. A Sentence within the Guidelines is an Appropriate Disposition

Defendant Murdaugh has fully accepted responsibility for his own actions. He pled guilty to all the charges brought against him in this Court. He has also pled guilty and been sentenced to 27 years in State court for the same conduct. He will have to serve 85% of the state court sentence. Murdaugh is 55 years old and therefore won't be eligible for release on the State financial charges until he is at least 77 years old. Furthermore, during the last five years, defendants sentenced in

federal court with the same guideline offense level and criminal history as Murdaugh received on average a sentence of 168 months. PSR ¶ 209, and a median sentence of 210 months.[5]

There is no basis for an upward to the sentencing guideline range. In Section 5K USSG, the United States Sentencing Commission identifies the following grounds for an upward departure: Death (§5K2.1), Extreme Physical Injury (§5K2.2), Extreme Psychological Injury (§5K2.3), Abduction or Unlawful Restraint (§5K2.4), Extreme Conduct (§5K2.8) ("the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct."), Weapons and Dangerous Instrumentalities (§5K2.6), Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (§5K2.17), Violent Street Gangs (§5K2.18), Property Damage or Loss (§5K2.5), Disruption of Governmental Function (§5K2.7), Public Welfare (§5K2.14), Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (§5K2.24), Criminal Purpose (§5K2.9)(the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.) and Dismissed and Uncharged Conduct (§5K2.21). None of these grounds are present here.

As egregious as Murdaugh's criminal conduct was, his misconduct must be viewed along with his 20-year severe opioid addiction. PSR ¶ 180. He began abusing and became addicted to hydrocodone in the early 2000s, initially obtaining them through prescriptions and later began purchasing the drugs on the black market. Subsequently, he switched to oxycodone. Murdaugh reports that he attempted to quit on his own, "countless times, 60-100." *Id*. He was treated at a

[5] The Probation Office calculated Murdaugh's sentencing guideline sentencing range at 210 to 262 months. PSR ¶ 187.

detox facility on three separate occasions, December 2017, October 2018, and September 2021. After the completion of detox in September 2021, he was then admitted to a long-term rehab facility in Orlando, Florida. *Id.* He was arrested on the day of his discharge and has been in custody ever since.

Murdaugh has cooperated with the federal government in their ongoing investigation. He has been interviewed on four separate occasions over a six-month period. In addition, the clients from whom he stole, who are vulnerable victims, have been fully reimbursed for their financial losses. Many have even recovered more money through threats of litigation than they ever would have received if Murdaugh had not stolen from them. These reimbursements were made by Murdaugh's former law partners, who obviously cannot be considered vulnerable, the law firm's insurance carrier, Palmetto State Bank and other third parties.

CONCLUSION

We respectfully request that the Court impose a sentence within the guidelines to run concurrently with Murdaugh's undischarged State sentence imposed for the same conduct. A guideline sentence will be sufficient, but not greater than necessary to comply with the purposes set forth in Title 18 United States Code, Section 3553(a)(2).

Respectfully submitted,

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March 28, 2024
Columbia, South Carolina

Exhibit A

State's Response in Opposition to Motion to Compel,
October 19, 2022

STATE OF SOUTH CAROLINA COUNTY OF COLLETON	IN THE COURT OF GENERAL SESSIONS FOURTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA v. RICHARD ALEXANDER MURDAUGH, Defendant.	Case No. 2021-GS-15-00592 to –595 **RESPONSE IN OPPOSITION TO MOTION TO COMPEL AND MOTION TO STRIKE NOTICE OF ALIBI**

The State of South Carolina, through the undersigned, hereby responds as follows to a motion to compel filed by the defense on Friday, October 14, 2022, a second motion to compel filed by the defense on October 17, 2021, and a Motion to Strike Notice of Alibi filed by the defense on Tuesday, October 18, 2022. The motions are without merit.

A. BACKGROUND

As always, the State is willing to work to ensure the defense has discovery to which it is entitled, and even has provided discovery far in excess of what is technically required by rule. To this end, just on the murder case alone, the State has, as of October 19, 2022, turned over 206 GB of information, incorporating hundreds of individual files and documents representing thousands of pages. That does not even include an additional 470 GB of information provided to the defense on an external hard drive. The State began to provide discovery only relevant to the murders of Maggie and Paul by 11:24am on Wednesday, August 31, 2022, which was the first morning after Judge Newman's clerk sent the signed Protective Order to us at 5:47 p.m. on Tuesday, August 30, 2022. All of

this was in addition to extensive and related State Grand Jury discovery, which the State began to provide on January 13, 2022, and was then supplemented over the following months as the State Grand Jury indicted Alex Murdaugh with additional charges. Collectively the discovery provided is over three quarters of a *terabyte*.

Indeed, on multiple occasions the State has quickly responded to defense counsel and identified where certain evidence was in the extensive discovery provided that the defense thought it had not received but in fact had. Moreover, even though Rule 5(a)(2) does not require the State to turn over "statements made by prosecution witnesses or prospective prosecution witnesses" until after the witness has testified on direct examination in a trial, the State has been turning over statements in its possession, many of which were recorded.

Interestingly, the undersigned had a long conversation with defense counsel on Thursday, October 13, 2022, discussing discovery issues in which there was no disagreement, including about some issues raised in the current motions. This was a pleasant and reasonable conversation, but – of course, as usual -- at no time during this conversation did counsel mention the defense was going to file an aggressive and misleading motion to compel just one day later. And, as usual, the undersigned first found out about the defense's October 14, 2022 motion from inquiries to the Office from press who had it well before defense counsel bothered to send a professional courtesy copy to this Court and the State. Again, this manner of conducting litigation says a lot about the defense's true motives here, and the Court should not be moved by such tactics.

B. MOTION TO COMPEL FROM OCTOBER 14, 2022

There are no issues with the requested information that need compulsion, and Defendant's motion is unnecessary and premature. First, however, it is necessary to address the misleading contentions and impression the defense makes about the Curtis Eddie Smith's polygraph.

1. Eddie Smith and the Polygraph

Of course, a big part of the current motion is related to Curtis Eddie Smith, and seems more designed to attempt to attempt to color the public view of the case by highlighting a previously provided polygraph result – which Defendant and his counsel certainly have to know is generally inadmissible in evidence because polygraphs do not meet the standard for reliability for a criminal trial. Defendant Alex Murdaugh also seems to pursue the same aim of prejudicing the public by quoting in a public filing some scuttlebutt story Eddie Smith related he heard about a groundskeeper having an affair with Maggie -- a story which defense counsel knows has no basis in anyone's personal knowledge or evidentiary fact and frankly is insulting to her memory. It says a lot about Defendant's true motives here with these motions that he would prominently feature such salacious content which adds nothing to a pretrial motion supposedly on legal issues.

As usual, Defendant Alex Murdaugh and his counsel here are attempting to make a mountain out of something they know is inadmissible, and incorrectly imply that the State was hiding something – **when it was the State that provided the defense with the polygraph results as well as polygraph interview of Eddie Smith on the first day murder discovery was authorized, August 31, 2022.** The State has also previously provided the defense with Curtis Eddie Smith's proffer, as well as another statement of

Smith's and multiple records involving him. No one -- on the State side at least -- is hiding anything here.

Secondly, since the defense has decided to spend a few pages on it, it is important to point out that Murdaugh's defense motion is misleading how polygraphs actually work. Maybe Defendant Murdaugh and his experienced defense counsel are unaware of how polygraphs really work when they put pictures in the motion with the idea that a supposed spike means someone was lying about a certain question. A polygraph examination is a procedure in which a subject is measured for certain physiological and psychological reactions while responding to questions in a controlled environment. The polygraph machine is not a "lie detector," nor does the operator who interprets the graphs detect "lies;" rather, the machine records physical responses from which an examiner may draw somewhat subjective inferences about whether the examinee is being deceptive or otherwise motivated by a sense of guilt or some other emotion. See Adam B. Shniderman, You Can't Handle the Truth: Lies, Damn Lies, and the Exclusion of Polygraph Evidence, 22 ALBLJST 433, 449-50 ("The machine does not directly detect lies. . . . Instead, the polygraph works on the assumption that certain physiological responses occur in an individual when he or she lies."); see also U.S. Department of Justice, Criminal Resource Manual § 259 ("The machine records physical responses which may or may not be connected with an emotional reaction—and that reaction may or may not be related to guilt or innocence.").

Almost universally throughout the nation, polygraphs generally are not admissible in courts because of their inherent subjectivity and reliability issues. See State v. Palmer, 415 S.C. 502, 517-18, 783 S.E.2d 823, 831 (Ct. App. 2016) ("[T]he general rule is that no

mention of a polygraph test should be placed before the jury.", quoting State v. Johnson, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007)); State v. Wright, 322 S.C. 253, 255, 471 S.E.2d 700, 701 (1996) (("Generally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable.", quoting State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982)); State v. McHoney, 344 S.C. 85, 96-97, 544 S.E.2d 30, 35-36 (2001) (citing State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)) (noting that polygraph related evidence should be analyzed under Rules 702 and 403, SCRE., and stating "[t]o this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.")).[1] Polygraphs remain at best a tool to be

[1] For example, in 2008 our state supreme court reversed a granting of PCR relief for counsel's failure to have a polygraph performed of the defendant, in part by reiterating the statement from Council that the court "has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable". Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008). See also State v. Johnson, 376 S.C. 8, 654 S.E.2d 835 (2007) (general rule is that no mention of a polygraph test should be placed before the jury); Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006) (mere mention of a polygraph during testimony is not prejudicial where no results are put into evidence); State v. Jackson, 364 S.C. 329, 613 S.E.2d 374 (2005) (defense waived motion to admit polygraph results when it ultimately declined trial court's offer for a Council hearing). See also See also United States v. Cordoba, 194 F.3d 1053, 1059-60 (9th Cir. 1999) (testimony regarding results of polygraph held to be inadmissible due to unreliability of the technique); United States v. Neuhard, 770 F. App'x 251, 255 (6th Cir. 2019) ("[p]olygraph results are usually inadmissible"); Commonwealth v. Watkins, 750 A.2d 308, 315 (Pa. Super. 2000) (Polygraph evidence is inadmissible at trial as evidence of guilt); State v. Dressel, 765 N.W.2d 419, 425 (Minn. App. 2009) (polygraph results are not admissible in criminal trials to prove guilt or innocence); Commonwealth v. Hetzel, 822 A.2d 747, 767 (Pa. Super. 2003) (clinical polygraph tests, because of their unreliability, are inadmissible as evidence at trial); United States v. Duverge Perez, 295 F.3d 249, 253-54 (2d Cir.2002) (finding no abuse of discretion from the district court's refusal to admit polygraph evidence in connection with the defendant's sentencing); United States v. Ruggiero, 100 F.3d 284, 292 (2d Cir.1996) (dismissing the significance of polygraph results that might corroborate a defendant's testimony because of their "questionable accuracy"); Monsanto v. United States, Nos. 97 Civ. 4700, S 87 Cr. 555, 2000 WL 1206744, *4 (S.D.N.Y. Aug.24, 2000) ("[P]olygraph examinations are considered unreliable and are inadmissible in court."); United States v. Bellomo, 944 F.Supp. 1160, 1164 (S.D.N.Y.1996) ("[P]olygraph evidence never has been admitted in a federal trial in this Circuit, even in the three years since Daubert ...."); United States v. Black, 831 F.Supp. 120, 123 (E.D.N.Y.1993) (holding that, even after Daubert, "[t]he polygraph test is simply not sufficiently reliable to be admissible"); United States v. Ramirez, 386 F.3d 1234 (9th Cir. 2004) (prejudicial effect of polygraph outweighed probative value); United States v. Prince-Oyibo, 320 F.3d 494 (4th Cir. 2003) (refusing to abandon per se rule of exclusion even after Daubert); United States v. Canter, 338 F.Supp.2d 460 (S.D.N.Y. 2004) (discussing vast weight of authority excluding polygraphy under Rule 702); Ross v. State, 133 S.W.3d 618 (Tex. Crim App. 2004) (finding no abuse of discretion in exclusion given the lack of a consensus as to reliability).

assessed only in the context of other evidence, and only for investigative purposes, not trial purposes.

Further, the pictures of the polygraph Defendant puts in his motion, while they may make for interesting content, simply do not mean what the defense tries to convince the reader they mean. The highlighted view of the screen appears to be a movement spike, not an answer. Regardless, polygraphs are not scored like people think from the movies where the needle goes crazy on a specific question and that somehow means the person lied about the content of that specific question. Polygraphs are scored in their entirety, between control and relevant questions, and even a failure does not mean that a person is lying about the content of their answers, but merely– if the result is even reliable for a particular person – that the person is motivating some sort of feeling or emotion about the situation as a whole. This result could easily happen from one who merely has not disclosed everything they know about the situation or feels guilty about circumstances leading up to it, without necessarily having any involvement in a specific crime whatsoever.

It appears that Defendant's experienced team of defense lawyers do not understand how polygraphs work, or they are vastly overstating their point to this Court and for public consumption. Those are the only two choices. Even if the polygraph did mean what Defendant tries to mislead the reader into believing, nothing about that would *exclude* Defendant as the perpetrator of the crime. The overwhelming weight of the evidence to be put forth at trial will show Defendant Alex Murdaugh he murdered his wife in son with malice aforethought.

The State has nothing to hide and is not hiding anything as it relates to Curtis Eddie Smith. It says a lot about Alex Murdaugh's defense that he (1) makes such a huge deal out of a generally inadmissible polygraph that defense counsel must know does not meet the standards for reliability to be evidence in a trial, and (2) freely recounts a scuttlebutt story Eddie Smith "heard" which has no actual evidence to support it, and which disparages the very victims Defendant murdered in this case – his wife Maggie and son Paul.

2. Request for all polygraph data and notes

Here, Defendant goes straight to a motion to compel without any prior communication even though the State was the one to provide him with the polygraph results as soon as it was authorized back on August 31, 2022. The underlying data and notes were received yesterday and there will be no problem providing them as soon as they are processed and uploaded. No issue.

3. Evidence collected pursuant to search of Smith's home on 9/7/21

Any information not previously turned over was turned over on October 18, 2022, consistent with what had generally been discussed with defense counsel without any indicated problem during the call on Thursday, October 13, 2022.

4. Evidence collected pursuant to search warrant of Smith's phone in September 2021

Evidence related to this search warrant was provided to the defense on the first day murder discovery was authorized, 4:03 p.m. on August 31, 2022. The file was entitled "0061 – Curtis Smith Cell Phone Records". Yet again a non-issue which puts into perspective the real motives behind overcooked nature of the defense's motion. Moreover, the defense has had for months the external hard drive with the phone dump

that includes Smith's phone. If they need help finding it the State will be glad to help. There is no issue.

5. Any records, notes, or reports of any interview with Donna Eason

Information on a Donna Eason interview was initially provided on January 28, 2022. The defense was authorized to review Donna Eason transcripts as early as August 10, 2022 – but it is on them to actually take advantage of that authorization. Any additional discoverable Donna Eason interview recordings or memorandums of interview have been provided as of October 19, 2022. There is no issue.

6. Disclosure of all DNA test results regarding Eddie Smith

All DNA evidence to date has been turned over. Some analysis remains pending and will be provided as soon as forensic analysis is completed. There is no issue.

7. All cooperation or non-prosecution agreements between the State and Smith

The State turned over the proffer agreement with Curtis Eddie Smith on September 20, 2022. A proffer agreement is just an interview agreement and is **NOT** a cooperation agreement nor a non-prosecution agreement. The State has no cooperation or non-prosecution agreement with Curtis Eddie Smith. Indeed, the State has currently charged Smith with 19 crimes encompassing a possible sentence of over 180 years, and Smith is currently in pre-trial lockup based on the State's motion to revoke his bond. There is no issue here either.

The defense has or is getting as soon as available the any relevant, discoverable, and material information requested. Despite yet another inflammatory defense motion, there is no need for compulsion, and Defendant Alex Murdaugh's motion is clearly just

meant to try to prejudice the reader with a recounting of inadmissible polygraphs and salacious scuttlebutt that is offensive to the memory of his victims.

C. MOTION TO COMPEL FROM OCTOBER 17, 2022

There is also no need for compulsion as to Defendant's second motion from October 17, 2022. As noted before, defense counsel would have to concede there was no problem during undersigned's discussion with defense counsel on Thursday, October 13, 2022, but also no mention they would be filing a motion to compel the next day. Again, these appear to be non-issues and the motion more for public consumption than actual legal necessity.

Rule 5, SCRCrimP has limitations on what is required to be turned over to the defense – subject always to the mandates of Brady. The materiality standard of Rule 5(a)(1)(C) discussed above is one such limitation. That being said, the undersigned's practice is to turn over more than required by the Rule, and has been applying that practice to defense requests within the realm of reasonableness.

Rule 5(a)(2) of the Rules of Criminal Procedure also does not "authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case".

1. Testing results on Paul and Maggie's clothing

Any DNA or GSR results in existence have been provided. In the event additional forensic results are generated, that analysis will be provided as soon as it is done. No issue.

2. **GSR lab results and bench notes**

GSR results have been provided. Defendant concedes in his motion that the State has already indicated the underlying data would be produced. Later, under section 8, the defense concedes the State has provided underlying bench notes and data whenever requested. The request was made during the collegial call on October 13, 2022, and accordingly the information will be provided. No issue yet again as the request itself concedes.

3. **Cell phone forensic analysis**

As noted before, the State has provided the defense with extensive cell phone records which they can analyze. Once any further analysis is completed that is discoverable, it will be timely provided. There is no issue.

4. **Complete autopsy file**

The autopsy report and photos were provided on August 31, 2022. The defense during the October 13, 2022 call asked for the underlying notes and the State agreed. The notes have been requested from MUSC and will be timely provided upon receipt. There is no issue.

5. **Documents and information related to State's retained crime scene expert**

The State has been providing and will timely provide all material and discoverable information regarding its crime scene expert. There is no issue.

6. **Documents and information related to blood stain analysis**

The State has been providing and will timely provide all material and discoverable information regarding its crime scene expert. There is no issue.

7. **Photos of Maggie's phone taken by CCSO and Solicitor's Office**

Photos taken by the Fourteenth Circuit Solicitor's Office were requested during the call on October 13, 2022, and were obtained and provided as of October 18, 2022. There is no issue.

8. **All SLED bench notes relating to all forensic evidence conducted**

The defense concedes the State has provided underlying bench notes and data whenever requested. The request for additional notes was made during the collegial call on October 13, 2022, and accordingly the information has been sought and will be provided. No issue yet again.

9. **All of Defendant's jail calls, which the State intends to offer into evidence**

Of course, Defendant should know what he said, and of course there have been no real calls since the bond hearing in which jail calls were discussed – just a number of long calls to defense counsel's office which the State has not reviewed. The State will provide jail calls that it has reviewed, but it has been exceptionally restrictive not to review calls, even though third parties were present, and thus will not provide those. It may be necessary for the Court to do a privilege review.

10. **Polygraph stim test and chart recordings**

As noted before, the request was made and these will be timely provided. Now that the request has been made for the other three, they will be obtained and provided as well. There is no issue.

11. **Audio and Video Recordings of Curtis Eddie Smith's interviews**

They have been provided. There is no issue.

12. Return for Google Search Warrant 105

This Office does not have this data yet but once received will be timely provided.

13. SLED Interoffice Emails

At the call on October 13, 2022, defense counsel and the State agreed that while it is not required to provide all interoffice emails, a Brady review will occur.

14. CCSO and 14th Circuit Files

As noted before, CCSO and 14th Circuit information has bee provided, but a review with those agencies will occur and any information will be timely provided.

15. Body worn camera data of Debbie McMillian and Grant Condor

The body camera for Debbie McMillian was turned over August 31, 2022. To help the defense find the file name in the discovery they have had for months, it is entitled – "0061-Deborah McMillian 6-14-21 interview" (Bates label SGJ 43). The Grant Condor audio of the interview was turned over on June 9, 2022. The Condor body camera has been turned over as of October 19, 2022.

The second motion to compel is unnecessary and compulsion is not warranted. Additionally, not one shred of reciprocal discovery has been provided by the defense.

III. MOTION TO STRIKE NOTICE OF ALIBI DEFENSE

Finally, Defendant seeks to strike the notice of alibi defense. The motion has no merit.

The defense incorrectly asserts the State has not provided any information about the time of the murders. This is not true. As noted before the defense has already received three quarters of a terabyte of information. In State v. Benton, 435 S.C. 250, 865 S.E.2d 919 (Ct. App. 2021), the court noted that the State there had provided ample

discovery for the defense to review, and the defense clearly knew the date, time, and place of the crime. The court concluded that "finding the failure to include an exact time automatically renders an alibi request ineffective would be an overly technical application of Rule 5(e)." Id.

The indictments in this case clearly allege that Maggie and Paul were killed on June 7, 2021 in Colleton County. Defendant Alex Murdaugh made the 911 call at 10:06 p.m. and was at the kennels at the Moeselle property where the victims were lying when the law enforcement arrived. The fact that Maggie and Paul were killed at Moeselle on June 7, 2021 might be one of the most well-known facts in the State. Moreover, the State orally told defense counsel the parameters of time during the phone call.

However, if the defense needs further help for a start time, there is evidence of which the defense is well aware showing Defendant's presence along with the victims at the crime scene at 8:44 p.m.

The motion is without merit and should be denied.

Respectfully submitted,

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