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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