**IN THE SUPREME COURT**
**STATE OF SOUTH DAKOTA**

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**APPEAL NO. 29875**

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**STATE OF SOUTH DAKOTA,**
Plaintiff and Appellee,
**v.**
**RAYMOND BANKS**
Defendant and Appellant.

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APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

# APPELLANT'S BRIEF


ATTORNEY FOR APPELLANT

KRISTI JONES
Dakota Law Firm, Prof. L.L.C.
4900 S. Minnesota Ave., Suite 103B
Sioux Falls, SD 57108
Telephone: 605-838-5873
kristi@dakotalawfirm.com

MANUEL J. DE CASTRO, JR.
De Castro Law Office, PLLC
927 E. 8th Street
Sioux Falls, SD 57103
Telephone: 605-251-6787
mdecastro1@yahoo.com

ATTORNEYS FOR APPELLEE

MARK VARGO
PAUL SWEDLUND
Office of the Attorney General
1302 E. Hwy. 1 Ste.1
Pierre, SD 57501
Telephone: 605-773-3215
atgservice@state.sd.us


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Notice of Appeal filed on the 17th day of January, 2022

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## JURISDICTIONAL STATEMENT

Raymond Banks ("Banks") requests a review of the following: (1) the trial court's Memorandum Opinion on Introduction of Polygraph Examination at Sentencing. Banks respectfully submits this Court has jurisdiction pursuant to S.D.C.L. § 15-26A-3(1)[1].

## STATEMENT OF LEGAL ISSUES

### I. THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING BANKS FROM INTRODUCING POLYGRAPH EXAMINATION RESULTS AT THE SENTENCING HEARING.

*State v. Stevenson*
*State v. Huettl*
*State v. Willson*
*State v. Mitchell*
S.D.C.L. § 19-19-1101

The trial court abused its discretion in prohibiting Banks from presenting a polygraph examination at sentencing because the rules of evidence do not apply at sentencing hearings, South Dakota case law supports admission of a polygraph examination by defendants at sentencing hearings, and failure to consider this evidence amounted to prejudicial error under this Court's recent precedent.

## STATEMENT OF THE CASE

On August 12, 2020, Raymond Banks ("Banks") was charged by superseding indictment on five criminal charges as follows: Murder (First Degree) – Commission of a Crime; Murder (First Degree) – Premeditated;

[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "APP." designates Appellant's Appendix.

Murder (Second Degree) – Depraved Mind; Manslaughter (First Degree) – Dangerous Weapon; Attempted Robbery First Degree. CR 1-2. These allegations stemmed from an incident that occurred on February 26, 2020 in Minnehaha County, South Dakota which resulted in the death of Casey Bonhorst ("Bonhorst"). Also listed in this superseding indictment was co-defendant, Jahennessy Bryant ("Bryant"). CR 1. Bryant was first indicted on these charges in March 19, 2020 just weeks after the murder, and almost five months before Banks was indicted as a co-defendant. CR 13. Banks was arraigned on the indictment on September 14, 2020, and this case was originally assigned to Judge Susan Sabers. CR 5.

Banks and Bryant both filed Motions to Sever, and a hearing before reassigned Judge Joni Clark was held on December 18, 2020. CR 49. On January 26, 2021, Judge Clark issued a memorandum decision granting the Motions to Sever. CR 55. Thereafter, this case was again reassigned to Judge Robin Houwman ("trial court"). CR 65.

On April 29, 2021, the trial court signed a Scheduling Order setting various pretrial motions deadlines and hearings, and setting jury trial for December 6-17, 2021. CR 96. A hearing on the State's Notice of Intent to Offer 404(b) Evidence was held on November 1, 2021. CR 138. On November 22, 2021, Banks plead guilty to Manslaughter (First Degree) in exchange for an agreement to cap the actual time in the South Dakota State Penitentiary to 60 years with more time suspended. CR 1124. A pre-sentence

investigation was ordered, and a joint sentencing hearing for Banks and co-defendant Bryant was set for December 16, 2021. CR 1139.

Banks was sentenced on December 16, 2021 to the South Dakota State Penitentiary for 80 years, with credit for 478 days previously served, and 20 of those years were suspended, leaving 60 years of actual time to serve. CR 198. The Judgment and Sentence was filed on December 20, 2021. CR 198. Banks timely filed an appeal of that Judgment and Sentence on January 17, 2022. CR 201.

**STATEMENT OF THE FACTS**

On February 26, 2020, Bonhorst was delivering pizza for Domino's Pizza to a house on the east side of Sioux Falls, Minnehaha County, South Dakota. CR 15. He had just completed his delivery and was walking back to his car when Bryant and Banks walked near the area. CR 15. Both co-defendants, Bryant and Banks, agree Bonhorst was approached with the intent to rob him. However, Bryant and Banks disagree on the details surrounding the robbery as well as who shot Bonhorst.

Prior to trial, co-defendant Bryant cut a cooperation deal with the State to plead guilty to First Degree Manslaughter with a cap of twenty-five (25) years actual time. CR 1192. Bryant testified at a motions hearing in Banks's case that he and Banks were together that night and were walking when they noticed a pizza delivery car near Banks's aunt's house. CR 139. Bryant claimed it was Banks's idea to rob the delivery driver, and Bryant

acted as the lookout. CR 139. Bryant stated Banks first approached the delivery driver, Bonhorst, and a short conversation ensued before Bryant started approaching the two men from behind. CR 139. Bryant testified he was planning to assist Banks in the robbery by holding Bonhorst from behind. CR 1008. Bryant testified he heard two gun shots as he was walking towards them. CR 138. Bryant said after the shots he ran and threw the holster of the gun he was holding on the ground. CR 138. Bryant also testified that about a week and a half later, he was in possession of the "murder weapon" for which the police were still searching. CR 991. He confirmed he made a video which depicted him wearing a ski mask and waiving a gun, and that gun was the same one used to kill Bonhorst. CR 991.

Conversely, Banks consistently stated Bryant shot Bonhorst. At the sentencing hearing, Banks told the trial court it was Bryant's idea to rob Bonhorst. CR1243. Banks stated he stayed back out of sight by the building while Bryant walked up to Bonhorst. CR 1243. He saw Bryant "put the gun up" in Bonhorst's face and demanded his money. CR 1244. Banks saw Bonhorst reach down and then come up with a bunch of change that he threw at Bryant at the same time Bonhorst lunged toward Bryant. CR 1244. Banks said Bryant then shot Bonhorst twice. CR 1244. Banks saw Bonhorst fall to the ground, and Bryant took off running. CR 1244. Banks also took off running. CR 1245.

The investigation led police to interview several people, including Banks. Banks immediately provided a statement to law enforcement as outlined above indicating Bryant shot Bonhorst. CR 19. Banks was consistent in stating Bryant was the shooter, and the State subpoenaed him to testify at grand jury to secure an indictment against Bryant. CR 1192. Five months later, Banks was also indicted on the same counts and was joined in the indictment. CR 1.

Ultimately, co-defendant Bryant plead guilty to First Degree Manslaughter with a cap of twenty-five (25) years actual penitentiary time (more time suspended) on various cooperation conditions, including testifying against Banks and submitting to a polygraph examination upon the state's request. CR 1192. No polygraph examination taken by Bryant was ever disclosed by the state. CR 1192.

Subsequently, Banks also came to an agreement with the State to plead guilty to First Degree Manslaughter with a cap of sixty (60) actual years in the penitentiary with more time suspended. CR 1192. In preparation for the sentencing hearing, Banks voluntarily submitted to a polygraph examination while in jail. CR 1189. On a single-issue examination regarding whether Banks shot Bonhorst, Banks "showed no significant reaction indicating deception" in denying shooting Bonhorst. CR 1189.

On December 14, 2021, Banks notified the trial court and the State of his intent to call the polygraph examiner, Mike Webb, to testify at the

sentencing hearing and submit his testing results. CR 1185. The State objected and outlined its legal rationale for the objection via email. CR 1185. Banks responded through a written, court-filed response. CR 1192. On December 15, 2021, the trial court issued a Memorandum Opinion of Introduction of Polygraph Examination at Sentencing and prohibited Banks from introducing evidence of the polygraph at the sentencing hearing. CR 190. At hearing, Banks was sentenced to the South Dakota State Penitentiary for 80 years with credit for 478 days previously served and with 20 years suspended, leaving 60 actual years to serve. CR 198.

## STANDARD OF REVIEW

"[A] circuit court's ruling on the admissibility of evidence is reviewed under the abuse of discretion standard." *State v. Loeschke*, 2022 S.D. 56, ¶17, 980 N.W.2d 266, 272 (citing *Johnson v. O'Farrell*, 2010 S.D. 68, ¶ 12, 787 N.W.2d 307, 311–12). "'An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices.'" *State v. Rice*, 2016 S.D. 18, ¶ 23, 877 N.W.2d 75, 83 (quoting *MacKaben v. Mackaben*, 0215 S.D. 86, ¶ 9, 871 N.W.2d 617, 622). This Court overturns a circuit court's ruling when there is prejudicial error. *State v. Klinetobe*, 2021 S.D. 24, ¶ 26, 958 N.W.2d 734, 740.

## ARGUMENT

### I. THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING BANKS FROM INTRODUCING POLYGRAPH EXAMINATION RESULTS AT THE SENTENCING HEARING.

The trial court abused its discretion in prohibiting Banks from introducing his polygraph examination results at his sentencing hearing because it denied him the ability to offer mitigating evidence demonstrating he was not the shooter. The trial court improperly excluded this evidence because the rules of evidence do not apply at a sentencing hearings, South Dakota case law supports admission of a polygraph examination by defendants at sentencing hearings, and failure to consider this evidence amounted to an abuse of discretion which caused prejudicial error under this Court's recent precedent.

#### a. THE RULES OF EVIDENCE DO NOT APPLY AT SENTENCING HEARINGS.

First, the trial court abused its discretion and committed prejudicial error in not allowing Banks to admit the polygraph results at his sentencing hearing because the rules of evidence do not apply at sentencing hearings. By statute,

> Except as otherwise provided in this section, this chapter applies to all actions and proceedings in the courts of this state. This chapter other than those sections with respect to privileges does not apply in the following situations:
> …
> (4) Sentencing, or granting or revoking probation.

SDCL § 19-19-1101. See also *State v. Berget*, 2013 S.D. 1, 826 N.W.2d 1 ("[c]apital sentencing proceedings were no exception to general rule that rules of evidence were inapplicable in sentencing proceedings"); *State v. Huettl*, 379 N.W.2d 298 (S.D. 1985)(preliminary breath tests were properly considered at sentencing though they were not admissible at trial).

In rejecting admission of Banks's polygraph, the trial court stated "South Dakota has consistently held that polygraph test results are not admissible." CR 199; APP 4. The trial court then went on to cite a series of South Dakota cases in which this Court did specifically prohibit the use of polygraph examinations <u>at trial</u>. *See State v. Bertram*, 2018 S.D. 4, 906 N.W.2d 418 (defense sought use of polygraph for impeachment purposes *at trial*); *In re Fuller*, 2011 S.D. 22, 798 N.W.2d 349 (judge admits it was improper to require a juvenile accused of rape to submit to a polygraph in order to determine *the merits* of the charge); *Sabag v. Cont'l S.D.*, 374 N.W.2d 349 (S.D. 1985)(trial court improperly permitted evidence *at trial* of a PSE test, a test with "intent and purpose" the same as a polygraph); *State v. Waff*, 373 N.W.2d 18 (S.D. 1985)(no error found where trial court refused to admit polygraph examination *at trial*); *State v. Muetze*, 368 N.W.2d 575 (S.D. 1985) (trial court did not error in not allowing failed polygraph examination to be use for impeachment purposes *at trial*).

However, the issue here is not admission of the polygraph *at trial*, the guilt phase, but instead *at sentencing*. Banks concedes he would be

prohibited from offering a polygraph examination at trial. Under the clear and unambiguous language of SDCL § 19-19-1101, Banks is permitted to submit the results of the polygraph at sentencing and present argument regarding the same.

At a sentencing hearing, there is no "trier of fact" and the judge is required to consider all evidence presented by either side without any restraints of the rules of evidence. This is so the trial court gains the most information and largest picture of the defendant and the case to make the most informed decision when deciding the appropriate sentence.

Banks and co-defendant Bryant were sentenced at the same hearing. Both plead to Manslaughter in the First Degree, but co-defendant Bryant walked into the hearing facing a potential of twenty-five (25) actual years in the penitentiary per his plea agreement while Banks faced a potential of sixty (60) actual years. Throughout nearly the entire pendency of this case, approximately sixteen months, the State relied on the theory that co-defendant Bryant was the shooter. Then for reasons relatively unknown, and contrary to much of the evidence, the State flipped their theory and entered into a cooperation deal with Bryant, who gave a statement for the very first time that Banks was the shooter.

Co-defendant Bryant's statement closely mirrored the prior statement Banks provided, except it reversed the roles of the co-defendants. In fact, co-defendant Bryant admitted to even greater actions in furtherance of the

murder of Bonhorst than Banks admitted. Co-defendant Bryant testified he actually walked up behind Bonhorst to hold him while Banks robbed him, taking overt actions to restrain the victim. CR. Banks admitted to only being the "look-out," which, while still criminally culpable, was substantially less action in furtherance of the murder than Bryant admitted.

Accordingly, the main issue at sentencing was who actually shot Bonhorst. The State turned it's theory of the case upside-down at the last minute and rejected Banks's statements and prior grand jury testimony, calling into question his credibility. Given the expansive, and frankly arbitrary, penitentiary time disparity between the plea deals, Banks's entire sentencing argument relied upon the veracity of his statement versus his co-defendant. In order to rehabilitate his credibility, Banks voluntarily submitted to a polygraph examination, and passed.

Banks had every right to present evidence, which did not diminish his factual basis, but gave more information on who actually shot Bonhorst. Banks was denied a fair opportunity to offer this mitigating evidence on the primary issue of who shot Bonhorst and to effectively argue that he should get the same, or less, actual penitentiary time that Bryant received.

Trial courts are free to consider any evidence or argument presented and give it whatever weight the court deems appropriate, just like all other normally inadmissible evidence that is allowed at a sentencing hearing. The State in this case offered ample evidence in its argument at sentencing

against Banks which would have violated the rules of evidence had it been offered at trial. The State read victim impact letters, which would have been subject to hearsay challenges at trial. The State made forensic argument on the trajectory of bullets and provided unqualified opinions on whether the shooter was left or right-handed despite no foundation or expert testimony regarding the same. Banks did not object to any of this because it was permissible at sentencing. The State was allowed to put on otherwise inadmissible evidence, but the trial court barred Banks the same right.

It has been a long-standing tradition in South Dakota to admit otherwise inadmissible evidence at sentencings. In *State v. Huettl*, the Defendant argued that it was improper for the trial court to consider evidence of a Preliminary Breath Test (PBT) that was suppressed at trial, but then considered at sentencing. The *Huettl* Court held:

> Huettl then attacks the "other factors." He argues that the trial court improperly considered evidence regarding results of the PBT when the trial court had sustained his motion to keep such results out of evidence at the trial. Huettl attacks the foundation laid at the sentencing hearing where the officer, that the State called as a witness, was not the officer who had given the test. But this ignores the fact that the trial judge had earlier ruled on the oral suppression motion to keep out the results. The trial judge made a considerable record on his acquaintance with PBT's through pervious trials and testimony of the State Chemist and conversations with him. S.D.C.L. 19-19-14(4)[2] provides that the rules of evidence do not apply to sentencing hearings. In our opinion the results of the PBT were properly before the trial judge at the sentencing hearing.

*Huettl*, 379 N.W.2d 298, 304 (S.D. 1995).

[2] This statute has been transferred to S.D.C.L. § 19-19-1101.

Additionally, in *State v. Willson*, the Defendant argued that the trial court improperly awarded restitution to a victim because the court improperly admitted expert testimony at the restitution hearing without proper foundation. 702 N.W.2d, 828 (S.D. 2005). This Court noted, "the rules of evidence and civil burden of proof do not apply" at a restitution hearing. *Id*. at 833 (citing *State v. Ruttman*, 1999 S.D. 112, 598 N.W.2d 910, 911; *State v. Tuttle*, 460 N.W.2d 157, 159 (S.D. 1990)). "Thus, the evidentiary rules on expert testimony relied upon by Willson are inapplicable to restitution hearings." *Willson*, 702 N.W.2d at 833.

Here, the trial court considered these two cases, and dismissed them outright without any analysis. In footnote two of its decision regarding the polygraph examination, the trial court stated these "…cases do not involve evidence with the same reliability issues as polygraph examinations and have minimal application to this analysis." CR 1945; APP 8. However, the trial court failed to explain how a PBT is not analogous to a polygraph examination.

Reliability issues surrounding PBT's are well known and supported by ample case law. In *U.S. v. Iron Cloud*, the Eight Circuit plainly stated "the PBT has not been established as reliable." 171 F.3d 587, 590. The court cited a myriad of cases around the nation that reject the admission of PBT's at trial due to reliability issues:

> See also *Boyd v. City of Montgomery*, 472 So.2d 694, 697 (Ala.Crim.App.1985) (holding that preliminary breath

tests are only admissible to establish probable cause); *Patrick v. State*, 295 Ark. 473, 750 S.W.2d 391, 394 (1988) (stating that PBT's are admissible only on behalf of the defendant because they are unreliable); *Attix v. Voshell*, 579 A.2d 1125, 1129 (Del.Super.Ct.1989) (holding that the PBT can be admitted only for probable cause and not for substantial evidence because no court has established that it is reliable); *State v. Zell*, 491 N.W.2d 196, 197 (Iowa Ct.App.1992) (stating, "[t]he results of the preliminary screening test are inadmissible because the test is inherently unreliable and may register an inaccurate percentage of alcohol present in the breath, and may also be inaccurate as to the presence or absence of any alcohol at all"); *People v. Keskinen*, 177 Mich.App. 312, 441 N.W.2d 79, 82 (1989) (holding that court erred in admitting evidence of the defendant's preliminary breath test); *Justice v. Director of Revenue*, 890 S.W.2d 728, 731 (Mo.Ct.App.1995) (stating that PBTs are not admissible by statute); *State v. Strizich*, 286 Mont. 1, 952 P.2d 1365, 1371 (1997) (holding that the PBT is intended only for determining probable cause); *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366, 369-70 (1986) (holding that preliminary test is only relevant for limited purpose of establishing probable cause); *City of Fargo v. Ruether*, 490 N.W.2d 481, 482-83 (N.D.1992) (holding that an alcohol screening test cannot be admitted if a defendant admits probable cause); *Commonwealth v. Stanley*, 427 Pa.Super. 422, 629 A.2d 940, 942 (1993) (stating that PBT results are inadmissible); *Jones v. Town of Marion*, 28 Va.App. 791, 508 S.E.2d 921 (1999) (citing to state statute which provides that preliminary breath tests are only to be used in determining probable cause); *Thompson v. State Dept. of Licensing*, 91 Wash.App. 887, 960 P.2d 475, 477 (1998) (holding that "the results of a portable breath test are not admissible as evidence at trial or to establish probable cause for arrest"); *State v. Beaver*, 181 Wis.2d 959, 512 N.W.2d 254, 258-59 (1994) (PBT not admitted). Compare *State v. Huettl*, 379 N.W.2d 298, 305 (S.D.1985) (holding that PBT results were inadmissible because of state implied consent statutes); *State v. Anderson*, 359 N.W.2d 887 (S.D.1984) (holding that because the PBT is a field sobriety test for establishing probable cause, the results are not admissible against a defendant.)

*Iron Cloud*, footnote 5.

The *Iron Cloud* Court held "in the face of overwhelming caselaw as to the limited reliability of the PBT, we conclude, without further foundation being laid, that the PBT is not reliable as anything more than a screening test to be used for probable cause." *Id.* at 591.

The same reliability issues that demand exclusion of PBT results from admission at trial also plague polygraph examinations. The South Dakota Supreme Court has likewise stated,

> The rationale advanced for not admitting evidence of polygraph results, in civil or criminal cases, is that such evidence is irrelevant because of dubious scientific value, *deVries v. St. Paul Fire & Marine Ins. Co.*, 716 F.2d 939 (1st Cir.1983); it has no "general scientific acceptance as a reliable and accurate means of ascertaining truth or deception," *State v. Green*, 271 Or. 153, 165–66, 531 P.2d 245, 251, 92 A.L.R.3d 1301, 1309 (1975); it is not reliable, *M.N.D. v. B.M.D.*, 356 N.W.2d 813 (Minn.App.1984); it has no probative value, *Feltham v. Cofer*, 149 Ga.App. 379, 254 S.E.2d 499 (1979); and it is likely to be given significant, if not conclusive weight by the jury, so that "the jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is [thereby] preempted." *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir.1975).

*Sabag v. Cont'l S.D.*, 374 N.W.2d 349, 353. A polygraph examination is entirely analogous to a PBT in the context of inadmissibility at trial on the basis of reliability, and the trial court's footnote dismissing the application of *Huettl* to this case is contrary to well settled law.

South Dakota has long held that evidence, like a PBT, that would otherwise be inadmissible at trial, is admissible for sentencing purposes because the rules of evidence do not apply at sentencing

hearings. The same is true of polygraphs, which have equivalent reliability issues as PBT's, and the trial court abused its discretion in not allowing the polygraph examination into evidence at Banks's sentencing hearing.

**b. SOUTH DAKOTA CASE LAW SUPPORTS THE ADMISSION OF THE POLYGRAPH BY A DEFENDANT AT SENTENCING.**

A comprehensive analysis of the case law in South Dakota supports the general proposition that polygraph evidence is admissible at sentencing when offered by the defendant. Further, the trial court's reliance on federal law is improper as the federal sentencing system is drastically different, rendering those cases irrelevant to this case.

First, the trial court's analysis hinged on a couple of cases in South Dakota. The trial court reasoned polygraphs are admissible at sentencing <u>only</u> if agreed to by the parties. The first case cited by the trial court to support this contention is *State v. Stevenson*. 2002 S.D. 120, 652 N.W.2d 735. In *Stevenson*, the defendant was charged with one count of second-degree arson. *Id*. ¶2, 652 N.W.2d at 736. Stevenson entered into a four-page written plea agreement with the State which contained an agreed requirement for Stevenson to submit to a polygraph regarding her role in other fires that failure of the test "may result in a revocation of this agreement in the state's discretion." *Id.* ¶ 2. Stevenson entered a plea, and submitted to a polygraph. *Id.* ¶ 3-4, 652 N.W.2d at 737. The polygraph indicated Stevenson was untruthful regarding a pre-1993 fire. *Id.* ¶ 4, 652 N.W.2d at 738.

At sentencing, the State presented evidence against Stevenson showing she failed the polygraph examination, and therefore violated the plea agreement and opened the door for the State to argue for a higher sentence. *Id.* ¶ 5. The trial court ruled that Stevenson's failure to pass the polygraph test did violate the plea agreement, and sentenced her above the original plea agreement. *Id.* ¶ 6.

On appeal, Stevenson argued the trial court was "clearly erroneous in finding that she breached the plea agreement because it based its finding on polygraph results that are inadmissible as evidence in South Dakota." *Id.* ¶ 15, 652 N.W.2d at 740. The court's responded by affirming, "[h]owever, Stevenson ignores that this case arises out of a sentencing proceeding and that the rules of evidence are inapplicable in sentencing hearings." *Id.* (citing SDCL 19-9-14(4); *State v. Huettl*, 379 N.W.2d 298, 304 (S.D. 1985)). The court wrote, "[f]or many years, South Dakota, like the above jurisdictions, followed a general rule prohibiting the admission of polygraph results into evidence for any purpose. (Citations omitted)." *Id.* ¶18, 652 N.W.2d at 741. The *Stevenson* Court then went on to analyze *Satter v. Solem* and its progeny. 458 N.W.2d 762 (S.D. 1990).

*Satter v. Solem* (hereinafter "Satter IV") is a habeas appeal in which Satter was granted a new trial after almost two decades, and after a finding that admissions made by Satter were involuntary. 458 N.W.2d 762 (S.D. 1990). While Satter was in custody, he was questioned several times by law

enforcement. *Id.*, 458 N.W.2d at 769. During one interview, Satter admitted to killing two men in self-defense, and this statement was made upon the condition that he would be offered a polygraph at a future date and that the State will not contest or object to that polygraph being offered as evidence. *Id*. Satter was never offered another polygraph and stated the promise of a polygraph induced him into making his confession. *Id*. The habeas court agreeded and reversed and remanded for a new trial, advising the trial court could either suppress the involuntary statement, or the State could fulfill its promise by giving Satter a polygraph and rendering those statement voluntary and admissible. *Id.*, 458 N.W.2d at 770.

Subsequently, the State did offer Satter a polygraph on two separate occasions, but Satter declined to take the tests. *State v. Satter*, 1996 S.D. 9, ¶ 6, 543 N.W.2d 249, 251 (hereinafter "Satter V"). Satter then filed a motion to suppress the statement on the basis that the state's promise could not be fulfilled as it would be "impossible to administer a meaningful polygraph examination" given the length of time that passed. *Id*., ¶ 27, 543 N.W.2d at 254. Ultimately, the trial court ruled the statements admissible, and Satter again was convicted at trial. *Id*., ¶ 30-32.

On appeal in Satter V, the Court quoted the trial court's analysis of Satter IV. "The Supreme Court has adopted the rule that results of a polygraph examination taken upon stipulation are admissible [at retrial] . . . [t]he stipulation rule is not rooted in a finding that the polygraph is infallible.

To the contrary, the polygraph's shortcomings are widely known." *Id.*, ¶ 28. The Supreme Court then stated, "The trial court also considered that a defendant has the right to waive protection provided by *Miranda*, and should not be prevented from waiving the protection of the rule on inadmissibility of polygraph examination." *Id.*, ¶ 29.

Both *Satter* and *Stevenson* contained a factual basis where agreement by the parties was part of the factual scenario, but not a mandatory condition precedent to the admission of a polygraph at sentencing. In *Stevenson*, the court began by stating the rules of evidence do not apply at sentencing. That is the foundational principal. The *Stevenson* Court then went on to analyze *Satter IV*. The *Stevenson* Court stated "the *Satter* cases yield a conclusion that polygraph results may be admitted in legal proceedings in this state according to the agreement or stipulation of the parties." *Stevenson,* ¶ 19; 652 N.W.2d at 742.

However, *Satter* discussed use of a polygraph in the context of voluntariness of a statement to be used <u>*at trial*</u>. *Satter* did not require an agreement by the parties regarding polygraph examinations, but stated when promise of a polygraph was used to induce a defendant into making a statement, such inducement could render the statement involuntary and worthy of suppression for trial purposes. The agreement between the State and the defendant in *Satter* was incidental, not determinative, to the holding,

and is irrelevant to sentencing proceedings. Accordingly, *Stevenson's* application of *Satter* in the context of a sentencing proceeding was irrelevant.

However, the language in *Satter* V does strongly supports the argument that a defendant, who has the ability to waive *Miranda* protections, likewise "should not be prevented from waiving the protection of the rule on inadmissibility of polygraph examinations." *Satter* V, ¶ 29, 543 N.W.2d at 255. In *Stevenson*, the State sought to use a failed polygraph against the defendant, and was allowed to do so. Here, Banks sought to use a passed polygraph as mitigation evidence for his benefit, and *Satter V* appears to support Banks's waiver of this protection.

Finally, the trial court's reliance on federal case law to bar Banks from admitting the polygraph examination was misplaced due to the vast differences between federal and state courts sentencings. Additionally, the trial court cited cases both allowing admission of polygraphs at sentencing and barring the admission, demonstrating a lack of consensus on this issue even in the federal courts.

The federal court system is immensely different compared to the South Dakota state system because of the federal mandatory sentencing guidelines that are born of statute and meticulously dictate how a federal judge should sentence. Federal sentencing is not discretionary as in the state court system. Instead, is a points system and a defendant can receive enhancements, upward/downward variances, or departures for things like

cooperation, major or minor participation, extent of role, etc. Accordingly, evidence obtained through a polygraph will have a direct numerical impact on how a judge is *required* to sentence pursuant to the guidelines. In the federal system, the reliability issues inherent in a polygraph examination cannot be accounted for the same as in state court where the judge is required to several weigh factors.

This is displayed in *Ortega v. United States*. 270 F.3d 540. Co-defendant Sonya Polmanteer was convicted at trial for possession of methamphetamine, and at sentencing requested a reduction of her sentence under U.S.S.G § 3B1.2., a role-in-the-offense reduction. *Id*. at 543. The court considered the request but stated it would not take her word for it and offered if she wanted the reduction, she "should take a polygraph test on it." *Id*. The government indicated questions of reliability of polygraphs, but stated if she took the polygraph and failed, the government would come back "and ask for a two-point enhancement for obstruction of justice under" the guidelines. *Id*. at 543-44. Polmanteer decided to take the polygraph, and the court entered an order that she was to take the test and the evidence would be taken into account at sentencing. *Id*. 544.

Polmanteer failed the test on the issue of her role, and the government moved for an obstruction of justice enhancement, requesting two additional points be added to her guideline range. Id. 544. The court granted the government's motion and gave Polmanteer a two-point enhancement on her

sentence, increasing her actual prison time. *Id.* On appeal, the Eight Circuit remanded for resentencing and ordered the lower court to sentence without the two-point enhancement based on the failed polygraph. *Id.*

*Ortega* demonstrates how a polygraph can affect a federal sentence given the strict, statutory considerations a federal judge must consider under the sentencing guidelines. The reliability of a polygraph cannot be weighed in federal court the same as in state court, and reliance on federal cases is unpersuasive and irrelevant.

Under South Dakota law, Banks should have been permitted to admit his polygraph examination at sentencing, and the trial court's prohibition was an abuse of discretion.

#### c. THE TRIAL COURT'S FAILURE TO CONSIDER BANKS'S MITIGATING EVIDENCE IN THE FORM OF A PASSED POLYGRAPH EXAMINATION AMOUNTED TO AN ABUSE OF DISCRETION UNDER RECENT PRECEDENT.

The South Dakota Supreme Court recently considered several cases analyzing what a trial court should consider at sentencing. "In the exercise of its solemn sentencing role, circuit courts must look at both the person before them and the nature and impact of the offense. As to the former, we have frequently held that 'the sentencing court should acquire a thorough acquaintance with the character and history of the [person] before it.'" *State v. Mitchell*, 2022 S.D. 46, ¶ 29, 963 N.W.2d 326, 333 (quoting *State v. Ceplecha*, 2020 S.D. 11, ¶ 64, 940 N.W.2d 682, 699 (additional quotations omitted)). "This requires studying 'a defendant's general moral character,

mentality, habits, social environment, tendencies, age, aversion or inclination to commit crime, life, family, occupation, and previous criminal record.'" *Ceplecha*, at ¶ 64 (quoting *State v. Bonner*, 1998 S.D. 30, ¶ 19, 577 N.W.2d 575, 580).

"In additional, court ***must*** consider sentencing evidence tending to mitigate or aggravate the severity of a defendant's conduct and its impact on others. Sentencing courts are often required, in this regard, to accurately asses the 'true nature of the offense.'" *Mitchell*, at ¶ 30 (citing *Klinetobe*, 2021 S.D. 24, ¶ 36, 958 N.W.2d at 742)(emphasis added). "Whether evaluating a defendant's general inclination to commit crimes or the extent of his specific offense, sentencing courts can consider a wide range of information from a variety of sources. *See State v. Arabie*, 2003 S.D. 57, ¶ 21, 663 N.W.2d 250, 257 ("[T]he range of evidence that may be considered at sentencing is extremely broad.")." *Mitchell*, ¶ 31.

Here, the trial court abused its discretion in not considering Banks's polygraph examination which supported his consistent statement that he was not the shooter. At sentencing, Banks faced more than double the sentence of his co-defendant. Over and over, Banks stated co-defendant Bryant shot Bonhorst, and the state, up until the last minute, operated on the theory that Bryant was the shooter. Banks's polygraph showed he was non-deceptive in confirming he was not the shooter.

This mitigation evidence goes directly to the heart of who Banks is, his conduct, inclination to commit crime, tendencies, and the "true nature of the offense." One of the co-defendant's lied, and who shot the gun was a vital consideration at sentencing, especially where the plea deals between the co-defendants were so drastically different.

Banks was barred from putting forth this mitigation that he was not lying, and the trial court abused its discretion in not considering this evidence. Banks received 60 actual years of prison time, while his co-defendant, who everyone agreed was the shooter until the final months of the case, received 25 years of actual prison time. Failure to consider is mitigation evidence was an abuse of the trial court's discretion and did cause a prejudicial error.

## CONCLUSION

The trial court abused is discretion and caused prejudicial error in barring Banks from admitting mitigating evidence in the form of a polygraph examination at his sentencing hearing. Accordingly, Banks respectfully requests this Court reverse the trial court and remand this case for further proceedings.

Dated this 1st day of November 2022.

Respectfully submitted,
**DAKOTA LAW FIRM, PROF. L.L.C.**
**KRISTI L. JONES**

/s/Kristi Jones
4900 S. Minnesota Ave., Suite 103B
Sioux Falls, SD 57108
Telephone: 605-838-5873
kristi@dakotalawfirm.com

## CERTIFICATE OF COMPLIANCE

1. I certify that appellant's brief is within the typeface and volume limitations provided for in S.D.C.L. § 15-26A-66(b) using Century Schoolbook typeface in proportional 12-point type. Appellant's brief contains 5,599 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

/s/Kristi Jones
Kristi Jones
Attorney for Appellant

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of November, 2022 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us

/s/Kristi Jones
Kristi Jones
Attorney for Appellant

1cc-ac-SAO
APP001 Jail
Scan to Pen

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA ) : SS | | IN CIRCUIT COURT |
| COUNTY OF MINNEHAHA ) | | SECOND JUDICIAL CIRCUIT |
| | | PD20-003924 |
| STATE OF SOUTH DAKOTA, Plaintiff, | + | 49CRI20005930 |
| vs. | + | JUDGMENT & SENTENCE |
| RAYMOND CHARLES BANKS, Defendant. | + | |

A Superseding Indictment was returned by the Minnehaha County Grand Jury on August 12, 2020, charging the defendant with the crimes of Count 1 Murder (First Degree)-Commission of a Crime on or about February 26, 2020; Count 2 Murder (First Degree)-Premeditated on or about February 26, 2020; Count 3 Murder (Second Degree)-Depraved Mind on or about February 26, 2020; Count 4 Manslaughter (First Degree)-Dangerous Weapon on or about February 26, 2020; and Count 5 Attempted Robbery First Degree (Dangerous Weapon) (Inj/Fear Vic) on or about February 26, 2020.

The defendant was arraigned upon the Superseding Indictment on September 14, 2020, Lyndee Kamrath appeared as counsel for Defendant; and, at the arraignment the defendant entered his plea of not guilty of the charges in the Superseding Indictment.

Defendant with co-counsel, Manny De Castro and Kristi Jones, returned to Court on November 22, 2021, the State appeared by Crystal Johnson, Deputy State's Attorney. The defendant thereafter changed his plea to guilty to Count 4 Manslaughter (First Degree)-Dangerous Weapon (SDCL 22-16-15(3)) with sentencing continued to December 16, 2021, after the completion of a presentence report.

Thereupon on December 16, 2021, the defendant was asked by the Court whether he had any legal cause why Judgment should not be pronounced against him. There being no cause, the Court pronounced the following Judgment and

## SENTENCE

AS TO COUNT 4 MANSLAUGHTER (FIRST DEGREE)-DANGEROUS WEAPON : RAYMOND CHARLES BANKS shall be imprisoned in the South Dakota State Penitentiary, located in Sioux Falls, County of Minnehaha, State of South Dakota for 80 years with credit for 478 days previously served and with 20 years suspended.

The defendant shall pay $106.50 court costs through the Minnehaha County Clerk of Courts; to be collected by the Board of Pardons and Paroles. Attorney fees in this matter shall be converted to a civil lien in favor of Minnehaha County.

The defendant shall enter into and comply with all terms and conditions of Parole Agreement through the Department of Corrections.

It is ordered that the defendant shall provide a DNA sample upon intake into the South Dakota State Penitentiary, pursuant to SDCL 23 – 5A – 5, provided the defendant has not previously done so at the time of arrest and booking for this matter.

It is ordered that Counts 1, 2, 3, and 5 charging RAYMOND CHARLES BANK with Murder (First Degree)-Commission of a Crime; Murder (First Degree)-Premeditated; Murder (Second Degree)-Depraved Mind; and Attempted Robbery First Degree (Dangerous Weapon) (Inj/Fear Vic) be and hereby are dismissed.

The defendant shall be returned to the Minnehaha County Jail following court on the date hereof, to then be transported to the South Dakota State Penitentiary; there to be kept, fed and clothed according to the rules and discipline governing the South Dakota State Penitentiary.

Dated at Sioux Falls, Minnehaha County, South Dakota, this 20th day of December, 2021.

BY THE COURT:

JUDGE ROBIN J. HOUWMAN
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES, Clerk
By: _____
Deputy

FILED
DEC 21 2021
Minnehaha County, S.D.
Clerk Circuit Court

| | |
|---|---|
| STATE OF SOUTH DAKOTA) :SS<br>COUNTY OF MINNEHAHA ) | IN CIRCUIT COURT<br>SECOND JUDICIAL CIRCUIT |
| **STATE OF SOUTH DAKOTA,**<br>Plaintiff,<br><br>vs.<br><br>**RAYMOND CHARLES BANKS,**<br>Defendant. | CR. 20-5930<br><br>**MEMORANDUM OPINION ON INTRODUCTION OF POLYGRAPH EXAMINATION AT SENTENCING** |

Defendant Raymond Banks (Banks) plead guilty to First Degree Manslaughter on November 22, 2021. On December 14, 2021, two days prior to sentencing, Counsel for the Defendant informed the Court and Counsel for the State that they intended to introduce testimony regarding and the results of a polygraph examination performed by Banks. The State objected and due to the close proximity to the scheduled sentencing hearing, the parties submitted argument via email over the issue. The Court will file those emails for record purposes. The Court has considered the arguments of the parties and issues the following decision.

## FACTUAL CIRCUMSTANCES

Banks voluntarily underwent a polygraph examination conducted at his counsel's arrangement and wishes to use the results of the polygraph examination at sentencing to support his claim that Co-Defendant Jahennessy Bryant (Bryant) was the shooter during the robbery.

## LAW AND ANALYSIS

South Dakota has consistently held that polygraph test results are not admissible. *See State v. Bertram*, 2018 S.D. 4, ¶ 14, 906 N.W.2d 418, 423-24; *In re Fuller*, 2011 S.D. 22, ¶ 25, n.4, 798 N.W.2d 408, 414, n.4; *Sabag v. Cont'l S.D.*, 374 N.W.2d 349, 352 (S.D. 1985); *State v. Waff*, 373 N.W.2d 18 (S.D. 1985); *State v. Muetze*, 368 N.W.2d 575, 587-88 (S.D. 1985). The South Dakota Supreme Court has explained that the *per se* rule is based on evidentiary rules of relevancy (Rule 402), probative value (Rule 403), and expert-witness testimony (Rule 702). *Bertram*, 2018 S.D. 4, ¶ 14, 906 N.W.2d at 423-24.

> The rationale advanced for not admitting evidence of polygraph results, in civil or criminal cases, is that such evidence is irrelevant because of dubious scientific value [ (Rule 402) ], it has no "general scientific acceptance as a reliable and accurate means of ascertaining truth or deception," it is not reliable [ (Rule 702) ], it has no probative value, and it is likely to be given significant, if not conclusive weight by the jury, so that "the jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is thereby preempted" [ (Rule 403) ].

*Id.* (other citations omitted).

Banks acknowledges that polygraph examinations are not admissible at trial. However, he argues that the rules of evidence do not apply at the sentencing phase of a case. He cites to SDCL § 19-19-1101, which states:

> Except as otherwise provided in this section, this chapter applies to all actions and proceedings in the courts of this state. This chapter other than those sections with respect to privileges does not apply in the following situations:
> . . .
> (4) Sentencing, or granting or revoking probation.

The State agrees that the rules of evidence generally do not apply at sentencing; however, it argues that the South Dakota Supreme Court has held that polygraphs are only admissible at sentencing if agreed to by the parties. Both Banks and the State cite to *State v. Stevenson*, 2002 S.D. 120, 652 N.W.2d 735 in support of their positions.

In *Stevenson*, the defendant entered into a plea agreement that required her to take a polygraph. *Id.* at ¶ 2, 652 N.W.2d at 737. She took the polygraph, and it indicated she was untruthful as to her involvement in other forest fires in previous years. *Id.* at ¶ 4, 652 N.W.2d at 738. At sentencing, the trial court based its finding that she breached the plea agreement on the polygraph results. On appeal, the defendant argued that the trial court was clearly erroneous in finding a breach because polygraph results are inadmissible as evidence in South Dakota. *Id.* at ¶ 15, 652 N.W.2d at 740. Banks relies on the following language:

> However, Stevenson ignores that this case arises out of a sentencing proceeding and that the rules of evidence are inapplicable in sentencing hearings. S.D.C.L. 19-9-14(4). See also *State v. Huettl*, 379 N.W.2d 298, 304 (S.D. 1985).

*Stevenson*, 2002 S.D. 120, ¶ 15, 652 N.W.2d at 740-41.

However, the South Dakota Supreme Court's analysis did not end with the observation that the rules of evidence are inapplicable in sentencing hearings. It considered and distinguished cases from other jurisdictions cited by the defendant in *Stevenson*. *Id.* at ¶ 17, 652 N.W.2d at 741. Ultimately, the South Dakota Supreme Court stated that, "[f]or many years, South Dakota, like the above jurisdictions, followed a general rule prohibiting the admission of polygraph results into evidence for any purpose." *Id.* at ¶ 18.

The South Dakota Supreme Court then examined *Satter v. Solem*, 458 N.W.2d 762 (S.D. 1990) and acknowledged that the *Satter* case yielded a conclusion that "polygraph results may be admitted in legal proceedings in this state according to the agreement or stipulation of the parties." *Id.* at ¶ 19, 652 N.W.2d at 742. The Supreme Court found that the parties in *Stevenson* reached an agreement or stipulation via the plea

agreement and found no clear error in the trial court's finding of a breach based on the introduction of the polygraph evidence. *Id.*

The Eighth Circuit Court of Appeals has noted that most courts of appeal that have considered whether polygraph evidence is admissible at sentencing have upheld the refusal to admit such evidence. *Ortega v. United States*, 270 F.3d 540, 548 (8th Cir. 2001). *See e.g. United States v. Thomas*, 167 F.3d 299, 307-08 (6th Cir. 1996) (affirming exclusion of defendant's polygraph evidence in support of role reduction); *United States v. Messina*, 131 F.3d 36, 42 (2d Cir. 1997) (defendant's "polygraph evidence ... was unworthy of credit"), cert. denied, 523 U.S. 1088, 118 S.Ct. 1546, 140 L.Ed.2d 694 (1998); *United States v. Stein*, 127 F.3d 777, 781 (9th Cir. 1997) (defendant's polygraph evidence was "too conclusory to be probative"); cf. *United States v. Weekly*, 118 F.3d 576, 581 (8th Cir.) (upholding denial of § 5C1.2(5) safety-valve exception because evidence of defendant's deceitfulness other than refusal to take polygraph examination), cert. denied, 522 U.S. 1020, 118 S.Ct. 611, 139 L.Ed.2d 497 (1997); *United States v. Pitz*, 2 F.3d 723, 729 (7th Cir. 1993) (no plain error in sentencing court's reliance on witness's polygraph because it was only one factor in court's credibility assessment and court "recognized that polygraph tests are not an entirely reliable indication of veracity"), cert. denied, 511 U.S. 1130, 114 S.Ct. 2141, 128 L.Ed.2d 869 (1994).[1]

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[1] § 5169.5 Lie Detectors—Use of Lie Detectors: Legitimate or Otherwise, 22 Fed. Prac. & Proc. Evid. § 5169.5 (2d ed.) examined the issue as to state court rulings:

> Admit in sentencing
> U.S. v. Ruhe, 191 F.3d 376, 388 (4th Cir. 1999) (ducking the issue); U.S. v. Givens, 767 F.2d 574, 585 (9th Cir. 1985) (sentencing; dictum); Rupe v. Wood, 93 F.3d 1434, 1441 (9th Cir. 1996) (due process right in capital sentencing); U.S. v. Francis, 487 F.2d 968 (5th Cir. 1973) (not error for trial judge to refuse to consider results of polygraph examination appearing in probation report where government had no notice of test and qualifications of examiner did not appear); State v. Jones, 110 Ariz. 546, 521 P.2d 978 (1974) (since rules of evidence do not apply to sentencing, courts are free to consider the results of a polygraph examination in reaching their decision); State

In *Ortega*, the Eighth Circuit reminded that "although at sentencing a district court may consider information that would be inadmissible at trial, the information must have 'sufficient indicia of reliability to support its probable accuracy.'" 270 F.3d at 548. "As the Supreme Court noted in upholding a per se exclusion of polygraph evidence at court martial proceedings, 'there is simply no consensus that polygraph evidence is reliable.'" *Ortega*, 270 F.3d at 548 (citing *United States v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). This concern regarding the reliability of polygraph results is echoed by the South Dakota Supreme Court in *Bertram,* in the most recent South Dakota precedent addressing polygraphs:

> We do not foreclose the possibility of reconsidering this per se rule in the future if presented with an appropriate case. However, abandoning the per se rule against admitting polygraph-test results would require, at a minimum, strong evidence that the technology of polygraphs has advanced to such a degree that they are generally accepted as reliable in the scientific community.

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v. Watson, 115 N.J. Super. 213, 278 A.2d 543 (County Ct. 1971) (same); State v. Stevenson, 2002 SD 120, 652 N.W.2d 735, 742 (S.D. 2002) (admissible to show defendant breached plea agreement).

Oppose in sentencing
U.S. v. Dacre, 187 Fed. Appx. 674, 675 (8th Cir. 2006) (not abuse of discretion to refuse to consider); Hendrickson v. State, 285 Ark. 462, 688 S.W.2d 295, 298 (1985) (though rules of evidence do not apply to the penalty phase of a capital case, evidence of polygraph result must be excluded for lack of any probative value); People v. Ayala, 23 Cal. 4th 225, 96 Cal. Rptr. 2d 682, 703, 1 P.3d 3 (2000) (bars polygraph of attempted murder victim); Johnson v. State, 845 N.E.2d 147, 150 (Ind. Ct. App. 2006) (ducking issue); State v. Anderson, 1999 MT 58, 293 Mont. 472, 977 P.2d 315 (1999) (not admissible); Buschauer v. State, 106 Nev. 890, 804 P.2d 1046 (1990) (only admissible on stipulation); State v. Pierce, 138 S.W.3d 820 (Tenn. 2004) (cannot use results or opinion based on them to deny probation); State v. Hartman, 42 S.W.3d 44, 60 (Tenn. 2001) (not admissible at capital sentencing; collecting other state cases); State v. Vigil, 840 P.2d 788, 794 (Utah Ct. App. 1992) (not abuse of discretion to exclude at sentencing); State v. Tillman, 750 P.2d 546, 557 (Utah 1987) (while admissible at capital sentencing hearing, but not where facts found truthful do not mitigate the offense).

*Bertram*, 2018 S.D. 4, ¶15, n.6, 906 N.W.2d 418, 424, n.6. Even if the rules of evidence are not applicable at sentencing, the evidence used at sentencing must meet a sufficient level of reliability.[2]

**CONCLUSION**

South Dakota precedent generally precludes the use of polygraph examinations for any proceeding. An exception has been made in cases of stipulation or agreement by the defendant and the State. *Satter,* 1996 S.D. 9, ¶ 29, 543 N.W.2d at 255; *Stevenson*, 2002 S.D. 120, ¶ 19, 652 N.W.2d at 742. In this case, there is no agreement for the polygraph to be used at sentencing as existed in *Stevenson.* Rather, the State objects to its use. In the absence of a stipulation or agreement, South Dakota precedent would preclude the use of a polygraph due to its unreliability. As a result, evidence concerning any polygraph examination will not be permitted at the sentencing hearing scheduled for December 16, 2021.

DATED this 15th day of December, 2021.

Robin J. Houwman
Circuit Court Judge

ATTEST: Angelia Gries,
Clerk of Courts
ANGELIA M. GRIES
By: Deputy

[2] Banks cites to *State v. Huettl*, 379 N.W.2d 298 (S.D. 1985) (holding that the trial court properly considered PBT results at the sentencing hearing despite such evidence having been suppressed for trial) and *State v. Wilson*, 2005 S.D. 90, 702 N.W.2d 828 (upholding the victim's testimony concerning her injuries, medical expenses, and lost wages at a restitution hearing over expert witness foundation objections). Banks argues that these cases support the argument that the rules of evidence do not apply at sentencing. However, those cases do not involve evidence with the same reliability issues as polygraph examinations and have minimal application to this analysis.

Gmail

Kristi Jones <kristi@dakotalawfirm.com>

# State v. Banks, Cr. 20-5930

7 messages

**Manny de Castro** <mdecastro1@yahoo.com> Tue, Dec 14, 2021 at 3:23 PM
To: Judge Robin Houwman <robin.houwman@ujs.state.sd.us>, Crystal Johnson <cjohnson@minnehahacounty.org>, Melinda Folkens <mfolkens@minnehahacounty.org>, Jones Kristi <kristi@dakotalawfirm.com>
Cc: Bethany Stokka <bethany.stokka@ujs.state.sd.us>

Court and counsel - we are planning on having Mike Webb testify as well as Jodi Hoffman. We also will have a couple of family members say something on Ray's behalf. Attached is the report of Mr. Webb that we will be referencing in his testimony on Thursday. If there are any questions, please let me know. Thank you.

Manny

**Raymond Banks (Single Issue exam) 12-10-21 .pdf**
767K

**Johnson, Crystal** <cjohnson@minnehahacounty.org> Tue, Dec 14, 2021 at 5:35 PM
To: Manny de Castro <mdecastro1@yahoo.com>, "Houwman, Robin (Judge)" <Robin.Houwman@ujs.state.sd.us>, "Folkens, Melinda" <mfolkens@minnehahacounty.org>, Jones Kristi <kristi@dakotalawfirm.com>
Cc: Bethany Stokka <bethany.stokka@ujs.state.sd.us>

The State is going to object to any reference made regarding a polygraph, results or testimony from Mike Webb in giving the defendant a polygraph and those results. While the rules of evidence doesn't generally apply at sentencing our Supreme Court has held that polygraphs are not admissible even at sentencing unless agreed to by the parties. I'm assuming the defense is going to rely on the results of that polygraph as evidence that their client wasn't the shooter. The State was not aware of the polygraph being given until today or the results. The State is not agreeing to admission of the polygraph. Please see *State v. Stevenson*, 652 NW2d 735 (SD 2002):

¶ 18. For many years, South Dakota, like the above jurisdictions, followed a general rule prohibiting the admission of polygraph results into evidence **for any purpose**. *See State v. Waff*, 373 N.W.2d 18, 24-25 (S.D.1985); *Watson, supra; Muetze, supra; O'Connor, supra.* In *Satter v. Solem,* 458 N.W.2d 762 (S.D.1990), however, this Court held that the trial court erred in admitting the defendant's confession into evidence on the basis that it was coerced by the State's unfulfilled promise to administer a polygraph and its promise not to object to introduction of the results into evidence at trial. This Court further held that, on retrial, the State could cure the inadmissibility of the confession by fulfilling its promises with regard to the polygraph. In his special writing in *Satter,* Justice Henderson observed that the holding was an implicit recognition of the admissibility of polygraph results into evidence by agreement. *See Satter,* 458 N.W.2d at 771 (Henderson, J., concurring in part and dissenting in part). On the retrial of Satter, the trial court followed this observation and ruled that a defendant "should not be prevented from waiving the protection of the rule on inadmissibility of polygraph examinations." *See State v. Satter,* 1996 SD 9, ¶ 29, 543 N.W.2d 249, 255. On appeal after the retrial, this Court registered no criticism of that interpretation of its earlier ruling. *See id.*

¶ 19. The *Satter* cases yield a conclusion that polygraph results may be admitted in legal proceedings in this state according to the agreement or stipulation of the parties. *See also State v. Watson,* 248 N.W.2d 398, 399 (S.D.1976) (with only few exceptions, jurisdictions that have considered the matter have reaffirmed the rule that polygraph results are inadmissible *in the absence of a stipulation by the defendant and the prosecution* ).

In South Dakota criminal cases, polygraph results are not admissible evidence. *See State v. Watson*, 248 N.W.2d 398, 399 (S.D.1976); and *State v. O'Connor*, 86 S.D. 294, 301, 194 N.W.2d 246, 250-51 (1972). This position has been recently reaffirmed in *State v. Muetze*, 368 N.W.2d

575, 588 (S.D.1985), wherein this Court stated: "Polygraph results are not admissible as evidence in South Dakota Courts."

Crystal

Crystal Johnson

Deputy State's Attorney

Minnehaha County

415 N. Dakota Avenue

Sioux Falls, SD 57104

(605)367-4226

[Quoted text hidden]



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**Houwman, Judge Robin** <Robin.Houwman@ujs.state.sd.us> Wed, Dec 15, 2021 at 7:31 AM
To: "Johnson, Crystal" <cjohnson@minnehahacounty.org>
Cc: Manny de Castro <mdecastro1@yahoo.com>, "Folkens, Melinda" <mfolkens@minnehahacounty.org>, Jones Kristi <kristi@dakotalawfirm.com>, "Stokka, Bethany" <Bethany.Stokka@ujs.state.sd.us>

Does the Defense have any authority to the contrary?

Sent from my iPad

> On Dec 14, 2021, at 5:35 PM, Johnson, Crystal <cjohnson@minnehahacounty.org> wrote:
>
> [Quoted text hidden]

---

**Manny de Castro** <mdecastro1@yahoo.com> Wed, Dec 15, 2021 at 8:04 AM
To: "Johnson, Crystal" <cjohnson@minnehahacounty.org>, "Houwman, Judge Robin" <Robin.Houwman@ujs.state.sd.us>
Cc: "Folkens, Melinda" <mfolkens@minnehahacounty.org>, Jones Kristi <kristi@dakotalawfirm.com>, "Stokka, Bethany" <bethany.stokka@ujs.state.sd.us>

Judge, we will have a reply brief filed this morning.

Manny

[Quoted text hidden]

---

**Manny de Castro** <mdecastro1@yahoo.com> Wed, Dec 15, 2021 at 8:18 AM

To: "Johnson, Crystal" <cjohnson@minnehahacounty.org>, "Houwman, Judge Robin" <robin.houwman@ujs.state.sd.us>
Cc: "Folkens, Melinda" <mfolkens@minnehahacounty.org>, Jones Kristi <kristi@dakotalawfirm.com>, "Stokka, Bethany" <bethany.stokka@ujs.state.sd.us>

Court and counsel - please find attached our brief with respect to the polygraph at sentencing. The same has been filed in Odyssey. If there are any questions, please let me know. Thank you.

Manny

[Quoted text hidden]

**Banks Brief Polygraph at Sentencing .pdf**
138K

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**Kristi Jones** <kristi@dakotalawfirm.com> Wed, Dec 15, 2021 at 4:15 PM
To: Manny de Castro <mdecastro1@yahoo.com>
Cc: Judge Robin Houwman <robin.houwman@ujs.state.sd.us>, Crystal Johnson <cjohnson@minnehahacounty.org>, Melinda Folkens <mfolkens@minnehahacounty.org>, Bethany Stokka <bethany.stokka@ujs.state.sd.us>

Judge,

By way of update, we are no longer planning on calling Jodi Hoffman for sentencing tomorrow.

Thank you,

**Kristi Jones**
Dakota Law Firm, Prof. L.L.C.
505 W. 9th Street, Suite 103
Sioux Falls, SD 57104
605-838-5873
kristi@dakotalawfirm.com



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DAKOTA LAW FIRM, PROF. L.L.C. **Dakota Law Firm-RGB.png**
11K

---

**Manuel de Castro** <mdecastro1@yahoo.com> Thu, Dec 16, 2021 at 7:19 AM
To: Kristi Jones <kristi@dakotalawfirm.com>
Cc: Judge Robin Houwman <robin.houwman@ujs.state.sd.us>, Crystal Johnson <cjohnson@minnehahacounty.org>, Melinda Folkens <mfolkens@minnehahacounty.org>, Bethany Stokka <bethany.stokka@ujs.state.sd.us>

Judge, we will have no witnesses today, just some statements from family members and we are taking steps to instruct them not to mention the polygraph exam per the Court's decision regarding the same. Thank you.

Manny

Sent from my iPhone

On Dec 15, 2021, at 4:16 PM, Kristi Jones <kristi@dakotalawfirm.com> wrote:

[Quoted text hidden]
<Dakota Law Firm-RGB.png>

11

**Midwest Credibility**
*POLYGRAPH SERVICES*
*315 N Main Avenue Suite 205*
*SIOUX FALLS, SOUTH DAKOTA 57104-2435*
*PH: (605)-595-8293*
*mike@midwestcredibility.com*

***POLYGRAPH EXAMINATION REPORT***

| | |
|---|---|
| Submitted to: | Attorney Kristi Jones |
| Re: | Single Issue polygraph examination regarding: |
| Subject: | **Raymond Charles Banks DOB 06/18/2001** |
| Arrangements: | Raymond was examined at the request of his attorney regarding the above-mentioned polygraph exam |
| Date & Place of Examination: | Raymond voluntarily submitted to the examination which was given on 12-10-21 at the Minnehaha County Jail, Sioux Falls, SD |
| Background Information: | From attorney and examinee |
| Procedures: | This examination utilized equipment that records visually, permanently, and simultaneously on a moving chart, changes in Raymond's heart rate, breathing pattern, and galvanic skin response. |
| Results: | The following relevant questions were asked during the examination and were reviewed and approved by Raymond before the examination began. After scoring the exam, it is this examiner's opinion that he showed **no significant reaction indicating deception** in answering these questions: |

Relevant Questions:

| | | |
|---|---|---|
| *R5* | *On that night in February 2020, did you shoot that man?* | *Response: NO* |
| *R7* | *Are you the person who shot that man, on February 26th, 2020?* | *Response: NO* |

*Pre-Test Interview:*

*On 12-10-21 at 1030 hours I met with Raymond Banks at the Minnehaha County jail for a scheduled polygraph examination regarding a single-issue exam. Background documents were provided to me prior to the exam which were reviewed in their entirety.*

*Raymond reviewed and signed the polygraph consent form, and we then discussed his physical and mental health. He said his health is good, received 4 to 4 1/2 hours of sleep, ate breakfast, and took his prescription medication. We discussed the lack of sleep and he said that is normal for him in the jail and he said he felt focused and did not think anything would affect the test.*

*We went through an overview of what we would do this morning and thorough informational steps to ensure he completely understands all the explanations and process that is going to occur. We went over the polygraph and components that would be used as well as the physiology and psychology behind the polygraph and the focus I needed from him today. He said he understood*

*and said he has not taken a polygraph exam before.*

***Current:***

*Raymond is currently housed at the MCJ and is awaiting sentencing on December 17th. He said he wanted to take a polygraph exam to prove he was not the person who shot the pizza delivery driver that night. I told him I had read the background documents and it showed the night was February 26th, 2020, and he said he understood that. He also said he understood today's question would cover only the incident from that night on February 26th, 2020.*

*Raymond admits to having the gun prior to that night and walking with his co-defendant Jahennessey Bryant when they saw the delivery driver. He said Bryant is the one who shot the gun twice killing the man during a robbery attempt. Raymond said he wants to prove that he did not shoot the delivery driver that night.*

*After discussing the incident and ensuring he was focused and ready for the exam, I administered an acquaintance (practice) exam, and the polygraph instrument was functioning properly, and he followed all instructions on this practice test.*

*We then reviewed all the questions on the single-issue exam today. He said the topic is clear to him, he had no other information, and was ready for the exam.*

*Conclusions:*

*After careful evaluation, it is my opinion that the charts resulting from this examination revealed no criteria that would indicate significant reaction on the part of Raymond James in answering the above-mentioned questions. It should be noted that additional charts were administered to ensure enough clear data was present. The room in the jail did have quite a few distractions of doors slamming and at times during the test, people yelling outside.*

*Post-Test Interview:*

*After the exam we discussed the test and Raymond said he has wanted to take a polygraph test for a long time regarding this issue, ever since his co-defendant said he is the one who shot him. Raymond said he felt good during the test and answered honestly to the question if he is the one who shot that man.*

*The exam was reviewed, and Raymond was informed he passed, and that his attorney would be notified today of the results.*

*Submitted by,*

*Michael Webb*

*Michael Webb*
*Polygraph Examiner*

- *South Dakota Polygraph License #029*
- *Member #3497; American Association of Police Polygraphists*

- *Associate Member #9593, American Polygraph Association*

| | | |
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| STATE OF SOUTH DAKOTA | ) | IN CIRCUIT COURT |
| | :SS | |
| COUNTY OF MINNEHAHA | ) | SECOND JUDICIAL CIRCUIT |

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA<br><br>Plaintiff,<br><br>vs.<br><br>RAYMOND BANKS,<br><br>Defendant. | ) | CR. 20-5930<br><br>DEFENDANT'S RESPONSE TO STATE'S OBJECTION TO MENTION OF POLYGRAPH RESULTS AT SENTENCING |

COMES NOW, the Defendant, Raymond Banks, by and through his attorneys, Manuel J. de Castro, Jr. and Kristi Jones, respectfully submits the following Defendant's Response to State's Objection to Mention of Polygraph Results at Sentencing.

**Facts**

The State initially used Raymond Banks' ("Banks") Grand Jury testimony to Indict co-defendant Jahennessy Bryant ("Bryant") on a number of charges, including First Degree Murder. Approximately five (5) months later, the State filed a Superseding Indictment charging both Banks and Bryant with a number of charges, including First Degree Murder.

The State came to an agreement with Bryant to plead guilty to First Degree Manslaughter with a cap of twenty-five (25) years actual penitentiary time (more time suspended) on various conditions, including testifying against Banks in the event he went to trial and submitting to a polygraph examination in the event the State requested one. The undersigned counsel requested the polygraph examination results from Bryant's exam and was told that the State never asked him to submit to one, so there were no results to disclose.

The State and Banks ultimately came to an agreement with Banks pleading guilty to First Degree Manslaughter with a cap of sixty (60) actual years in the penitentiary with more time suspended. Counsel for Banks asked if the State would consider a lower cap in the event that Banks passed a polygraph examination but was told "no". Both Bryant and Banks claimed that the other was the actual shooter but they both participated in a robbery that resulted in the death of another, thus committing Felony Murder.

Defense counsel sought a polygraph examiner for the purposes of sentencing. Counsel hired an experienced polygraph examiner who conducted the examination on December 10, 2021.

**Legal Analysis**

The State first argues that "the rules of evidence doesn't (sic) generally apply at sentencing our Supreme Court has held that polygraphs are not admissible even at sentencing unless agreed to by the parties." This, however, is not the case.

SDCL § 19-19-1101 provides in part:

> Except as otherwise provided in this section, this chapter applies to all actions and proceedings in the courts of this state. This chapter other than those sections with respect to privileges does not apply in the following situations:
>
> (4) Sentencing, or granting or revoking probation.

In *State v. Stevenson, 652 NW2d 735 (S.D. 2002),* Stevenson argued that the trial court erred in considering she failed a polygraph examination regarding forest fires she set in South Dakota and Wyoming when ruling that she had breached her plea agreement, thus imposing the maximum sentence. The South Dakota Supreme Court affirmed the trial court's decision noting:

> "[a]s her last argument, Stevenson asserts that the trial court was clearly erroneous in finding that she breached the plea agreement because it based its' finding on polygraph results that are inadmissible as evidence in South Dakota. However, Stevenson ignores that this case arises out of a *sentencing proceeding* and that the rules of evidence are inapplicable in sentencing hearings.

*Id.* at 741-42 (citing SDCL 19-9-14(4), *State v Huettl, 379 N.W.2d 298, 304 (S.D. 1985)* (emphasis added). Stevenson went on to cite a number of cases she argued supported her position, however, the Supreme Court consistently noted: "was not even a sentencing case". *Id at 741.*

In *State v. Huettl,* the Defendant argued that it was improper for the trial court to consider evidence that it suppressed at trial, but then considered at sentencing. The Supreme Court held:

> Huettl then attacks the "other factors." He argues that the trial court improperly considered evidence regarding results of the PBT when the trial court had sustained his motion to keep such results out of evidence at the trial. Huettl attacks the foundation laid at the sentencing hearing where the officer, that the State called as a witness, was not the officer who had given the test. But this ignores the fact that the trial judge had earlier ruled on the oral suppression motion to keep out the results. The trial judge made a considerable record on his acquaintance with PBT's through previous trials and testimony of the State Chemist and conversations with him. SDCL 19-9-14(4) provides that the rules of evidence do not apply to sentencing hearings. In our opinion the results of the PBT were properly before the trial court at the sentencing hearing.

*Id.* at 304.

In *State v. Willson,* 702 N.W.2d, 828 (S.D. 2005), Defendant argued that the trial court improperly awarded restitution to a victim as the court improperly admitted expert testimony at the restitution hearing without proper foundation. The South Dakota Supreme Court noted, "the rules of evidence and civil burden of proof do not apply" at a restitution hearing. *Id.* at 833 (citing *State v. Ruttman,* 1999 S.D. 112, 598 N.W.2d 910, 911; *State v. Tuttle,* 460 N.W.2d 157, 159 (S.D. 1990)). "Thus, the evidentiary rules on expert testimony relied upon by Willson are inapplicable to restitution hearings." *Willson,* 702 N.W.2d at 833.

The State cites a number of cases that they indicate preclude the Court from considering the results of a polygraph examination in South Dakota. However, the cases they cite are all cases that were in the trial phase of the case. Each will be handled in turn.

The State contends that a polygraph is not admissible for any purpose according to *State v. Waff.* 373. N.W.2d 18 (S.D. 1985). However, Waff's analysis dealt with the admission of a failed polygraph from the State's star witness *at trial* for impeachment purposes. This case does not support the State's contention that results from a polygraph cannot be considered by a sentencing court.

Next, the State cites *Satter v. Solem*, 458 N.W.2d 762. Again, this case analyzed the admission of polygraph results *at trial*, and whether or not the polygraph statements were involuntary as induced by a plea agreement. *Id.* at 769. No opinion was issued in this case regarding a trial court considering polygraph results at sentencing.

In S*tate v. Waston,* a trial court directed a defendant and a victim to be given polygraphs and for the results to be admissible *at trial.* 248 N.W.2d 398 (S.D. 1976). The South Dakota Supreme Court held that this evidence was not admissible.

Counsel is certainly aware the for the most part polygraph examination results are not admissible at trial under SDCL 19-19-401 through 19-19-403. However, this case is not at the trial phase, either before the Court or before a jury. Mr. Banks entered a guilty plea to First Degree Manslaughter and gave a factual basis for the same, albeit different from the State's factual basis as the State now argues Banks is the shooter. (Banks has always maintained Bryant was the shooter.) In other words, the protections of 19-19-401 through 19-19-403, a): are not required pursuant to SDCL 19-19-1101, and b): because there is not "trier of fact" so to speak as Banks has admitted his guilt to the satisfaction of the Court in accepting his guilty plea.

The Court is free to consider all evidence presented at sentencing pursuant to SDCL 19-19-1101 without any restraints of the rules of evidence. This rule is in place so the trial court gains the most information and "largest picture" of the defendant and the case to make the most informed decision when deciding what the appropriate sentence should be. One factor in the case at hand is who the actual shooter was. The State on one hand said it was Bryant for some sixteen (16) months and then, for reasons relatively unknown, entered into a plea agreement with Bryant for a cap of twenty-five (25) years actual penitentiary time and pointed the finger at Banks as the shooter.

(Bryant admitted in no uncertain terms to felony murder at the 404(b) hearing, but pointed to Banks as the shooter).

Banks at his change of plea hearing admitted to his part, but stated the "roles were reversed, and he was the lookout and Bryant was the shooter." Banks has every right to present evidence, which does not dimmish his factual basis, but sheds light on who the actual shooter was and allows him a fair opportunity to argue that he should get the same, or less, sentence from the Court that Bryant will receive. The Court is free to consider all the evidence presented at the Sentencing Hearing and "give it the weight to the Court deems appropriate".

**Conclusion**

Pursuant to SDCL 19-19-1101, the rules of evidence do not apply at a Sentencing Hearing so the polygraph examination testimony and results should be allowed and the Court can consider the same and give it the weight the Court deems proper just like all the other normally inadmissible items that are allowed in during a sentencing hearing. The Court deserves to hear all the arguments and consider all the statements and consider all the evidence at a Sentencing Hearing so the Court has all the information necessary to determine what the appropriate sentence.

Respectfully submitted this 15th day of December, 2021.

*/s/ Manuel J. de Castro, Jr.*

Manuel J. de Castro, Jr.
Attorney for Defendant
927 East 8th Street, Suite 104
Sioux Falls, South Dakota 57103
(605) 251-6787

*/s/ Kristi L. Jones*

Kristi L. Jones
Attorney for Defendant
505 W. 9th Street, Suite 103
Sioux Falls, South Dakota 57104
(605) 838-5873

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the *15th* day of December, 2021, a copy of the DEFENDANT'S RESPONSE TO STATE'S OBJECTION TO MENTION OF POLYGRAPH RESULTS AT SENTENCING was served upon Melinda Folkens and Crystal Johnson, through Odyssey E-File and Serve.

*/s/ Kristi L. Jones*

Kristi L. Jones

# IN THE SUPREME COURT
# STATE OF SOUTH DAKOTA

No. 29875

STATE OF SOUTH DAKOTA,

*Plaintiff and Appellee,*

v.

RAYMOND BANKS,

*Defendant and Appellant.*

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

## APPELLEE'S BRIEF


MARK A. VARGO
ATTORNEY GENERAL
Paul S. Swedlund
Solicitor General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
E-Mail: atgservice@state.sd.us
ATTORNEYS FOR APPELLEE

KRISTI JONES
Dakota Law Office, LLC
4900 S. Minnesota Avenue
Sioux Falls, SD 57108
Telephone: 605-838-5873
E-Mail: kristi@dakotalawfirm.com
ATTORNEY FOR APPELLANT



Notice of Appeal Filed January 17, 2022

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## TABLE OF AUTHORITIES

## JURISDICTIONAL STATEMENT

This court has jurisdiction pursuant to SDCL 15-26A-3(1).

## STATEMENT OF LEGAL ISSUES AND AUTHORITIES

DID THE SENTENCING COURT ABUSE ITS DISCRETION BY EXCLUDING THE RESULTS OF BANKS' POLYGRAPH TEST?

*State v. Bertram,* 2018 SD 4, 906 N.W.2d 418

*Sabag v. Continental South Dakota,* 374 N.W.2d 349 (S.D. 1985)

*State v. Muetze,* 368 N.W.2d 575 (S.D. 1985)

*State v. Stevenson,* 2002 SD 120, 652 N.W.2d 735

The trial court denied Banks' motion to introduce evidence that he passed a polygraph in which he denied shooting the victim.

## PRELIMINARY STATEMENT

Banks' pretrial motion and sentencing transcripts will be referenced as MOTION and SENTENCING followed by citation to the pertinent page/line. References to appendix documents attached to appellant's brief will be cited as APPENDIX followed by citation to the pertinent page.

## STATEMENT OF THE CASE AND FACTS

Casey Bonhorst was shot and killed in a botched robbery in Sioux Falls. Raymond Banks and Jahenessy Bryant approached Bonhorst as he walked to his car after delivering a pizza, one from the front and the other from behind. The one who approached from the front confronted Bonhorst with a gun and demanded his money, the other stood behind Bonhorst near the street acting as backup/lookout. Bonhorst, a former offensive lineman on his high school football team, handed over his

wallet, then threw his change and lunged forward attempting to distract and disarm his assailant. Bonhorst was shot through the neck and died at the scene.

Afterward, Banks and Bryant returned home and had a "laugh" about the incident. MOTION at 59/5. Unfazed by having just murdered a man, Banks and Bryant went out again that night to perform a drug "rip," robbing one pound of marijuana from a dealer. MOTION at 22/12, 39/23, 44/1-21; SENTENCING at 91/4.

Banks and Bryant were eventually apprehended for the Bonhorst shooting and charged with felony murder and other charges. Both pled guilty to first-degree manslaughter.

Prior to sentencing, Banks moved to admit evidence that he passed a polygraph concerning the question of whether he shot Bonhorst. The polygraph was commissioned by Banks' lawyer and conducted without any participation from law enforcement. The trial court denied Banks' motion. APPENDIX at 003. He was sentenced to 80 years/20 suspended in accordance with Bank's plea agreement. Banks now appeals.

**ARGUMENT**

Banks argues that the sentencing court erred in excluding his polygraph testing results. This court reviews a sentencing court's evidentiary rulings for abuse of discretion. *State v. Mitchell*, 2021 SD 46, ¶ 27, 963 N.W.2d 326, 332. "An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices."

*Mitchell*, 2021 SD 46 at ¶ 27, 963 N.W.2d at 332. "This Court … will not overturn a circuit court's abuse of discretion unless that 'error is demonstrated and shown to be prejudicial error.'" *State v. Klinetobe*, 2021 SD 24, ¶ 26, 958 N.W.2d 734, 740.

The matter of "the weight of the evidence . . . is largely a matter of the trial court's determination." *State v. Lemler*, 2009 SD 86, ¶ 44, 774 N.W.2d 272, 287. This court does not disturb a sentencing court's assessment of the weight of evidence "unless [it is] left with a definite and firm conviction that an error was made." *Lemler*, 2009 SD 86 at ¶ 41, 774 N.W.2d at 284.

Certainly, sentencing courts must consider evidence tending to mitigate or aggravate the severity of a defendant's conduct and its impact on others in order to assess the "true nature of the offense." *Klinetobe*, 2021 SD 24 at ¶ 36, 958 N.W.2d at 742. Just as certainly, evidence of the "true nature of the offense" must be relevant to sentencing considerations and have probative value to be admitted at sentencing. This court has consistently found polygraph evidence to be neither relevant nor probative.

Recently in *State v. Bertram*, 2018 SD 4, ¶¶ 13, 14, 906 N.W.2d 418, 423, this court affirmed South Dakota's *per se* rule against the admission of polygraph evidence. *Sabag v. Continental South Dakota*, 374 N.W.2d 349, 352 (S.D. 1985)("polygraph results are not admissible evidence" in criminal cases); *State v. Muetze*, 368 N.W.2d 575, 588 (S.D.

1985)(polygraph results not admissible to impeach witness). As explained in *Sabag:*

> The rationale advanced for admitting evidence of polygraph results, in civil or criminal cases, is that such evidence is irrelevant because of dubious scientific value; it has no "general scientific acceptance as a reliable and accurate means of ascertaining truth or deception;" it is not reliable; it has no probative value.

*Sabag,* 374 N.W.2d at 353 (citations omitted). The only recognized exception to South Dakota's *per se* exclusionary rule is when the parties stipulate to admit polygraph evidence, as when polygraph testing results are a feature of a plea agreement. *State v. Stevenson,* 2002 SD 120, ¶ 19, 652 N.W.2d 735, 742; *State v. Satter,* 1996 SD 9, ¶ 6, 543 N.W.2d 249, 251 (confession admitted subject to condition that defendant would be permitted to take a polygraph).

Otherwise, South Dakota has "strictly adhered" to the inadmissibility of polygraph evidence. *Bertram,* 2018 SD 4, ¶ 14, 906 N.W.2d at 424. *Bertram* singled out privately commissioned polygraph test[s]" such as Banks' as being "of *extremely* dubious probative value." *Bertram,* 2018 SD 4, ¶ 18, 906 N.W.2d at 425 (italic emphasis in original), citing *United States v. Montgomery,* 635 F.3d 1074, 1093-94 (8th Cir. 2011). Privately commissioned polygraphs are especially suspect because they are administered "without the possibility that [a defendant] might suffer negative consequences from a failed examination." *Montgomery,* 635 F.3d at 1094. Banks has proffered no evidence that "the technology of polygraphs has [since *Bertram*] advanced to such a

degree that they are generally accepted as reliable in the scientific community." *Bertram,* 2018 SD 4 at ¶ 15 n. 6, 906 N.W.2d at 424 n. 6.

While South Dakota has not directly addressed the question of the admissibility of polygraph evidence in a criminal *sentencing,* other states with similar reservations about polygraph evidence have and have found that the grounds for not "admit[ting] polygraph evidence as an indicator of honesty" in criminal trials apply with no less force at sentencing.[1] *Muetze,* 368 N.W.2d at 588. Indeed, if there is any legal proceeding which would seem to compel the admission of polygraph evidence in mitigation of a defendant's sentence it would be a capital sentencing. But courts have consistently found that the inherent unreliability of polygraph "science" outweighs its probative value even in capital cases.

In *State v. Hartman,* 42 S.W.2d 44 (Tenn. 2001), the defendant was convicted of capital murder in connection with the abduction and rape of a 16-year-old girl. In his defense, defendant offered witnesses who saw the victim or her car prior to her going missing under circumstances that conflicted with the prosecution's theory of the case. Defendant was convicted and sentenced to death. He appealed the trial court's exclusion of polygraph evidence claiming to show his innocence.

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[1] *State v. Anderson,* 977 P.2d 315 (Mont. 1999)(defendant's psychosexual evaluation improperly prepared using polygraph); *United States v. Dacre,* 187 Fed.Appx. 674 (8th Cir. 2006)(sentencing court did not abuse its discretion excluding results of defense-generated polygraph examination); *State v. Vigil,* 840 P.2d 788 (Ct.App.Ut. 1992)(no abuse of discretion to exclude results of polygraph examination in conviction for unlawful sale of alcohol to minor); *State v. Pierce,* 138 S.W.2d 820 (Tenn. 2004)(trial court erred considering results of polygraph examination of sex offender when imposing sentence).

*Hartman,* 42 S.W.2d at 60. The defendant argued that "the rules of evidence cannot be applied in a mechanistic manner so as to infringe on a defendant's constitutional right to present mitigating evidence at a capital sentencing." *Hartman,* 42 S.W.2d at 60.

*Hartman* agreed that "the rules of evidence should not be strictly applied in capital sentencing hearings to preclude the admission of relevant evidence," but ruled that "there is longstanding precedent . . . holding that polygraph results are inherently unreliable, and consequently, such results are irrelevant and inadmissible." *Hartman,* 42 S.W.2d at 60.[2] *Hartman* determined that it would not offend the general imperative of permitting a capital defendant to freely present mitigating evidence to exclude "polygraph test results to establish residual doubt. Since such results are inherently unreliable and not admissible to establish the defendant's guilt, it follows that such results are not admissible to establish residual doubt about the defendant's guilt." *Hartman,* 42 S.W.2d at 60.

In *Hinton v. State,* 548 So.2d 547 (Ct.App.Ala. 1988), the defendant was convicted of two capital murders committed during the course of robbing two restaurants. In both cases, the defendant approached the

[2] Citing other states holding that polygraph evidence is not admissible at a capital sentencing hearing: *Ex parte Hinton,* 548 So.2d 562, 569 (Ala. 1989); *People v. Dunlap,* 975 P.2d 723, 755–757 (Colo. 1999); *State v. Hall,* 955 S.W.2d 198, 207 (Mo. 1997). See also *Hendrickson v. State,* 688 S.W.2d 295 (Ark. 1985); *United States v. Fulks,* 454 F.3d 410 (4th Cir. 2006) (affirming exclusion of privately-administered polygraph examinations from capital sentencing).

night managers as they were leaving the restaurants for the night, forced them back inside, had them open the safe, then ordered them into the walk-in coolers where they were killed. At his sentencing, defendant sought to introduce polygraph evidence which allegedly supported his claim to have had no involvement in the murders. The *Hinton* court found that the polygraph evidence was "neither probative nor relevant" to the issues at the defendant's sentencing. *Hinton,* 548 So.2d at 559.

*Hinton* found the polygraph evidence not probative because "polygraph examinations cannot reliably prove what they are supposed to prove," namely the truth. *Hinton,* 548 So.2d at 559. *Hinton* found the polygraph evidence irrelevant because it was being offered simply to argue that "that the defendant did not commit the crimes for which he had already been convicted." *Hinton,* 548 So.2d at 560. *Hinton* reasoned that "[i]n a sentencing hearing . . . [the court] considers only evidence of aggravating and mitigating circumstances, and not questions of guilt or innocence." *Hinton,* 548 So.2d at 560. *Hinton* determined that "polygraph results which indicate that the defendant is not guilty of the crime for which he is being sentenced are not relevant to either aggravating or mitigating circumstances and thus are inadmissible in a sentencing proceeding." *Hinton,* 548 So.2d at 560-561.

In *Garza v. Shinn,* 2021 WL 5850883 (D.Ct.Ariz.), a defendant was convicted of two capital murders. The defendant sought to minimize his culpability by introducing polygraph evidence that implicated another

individual in the murders. *Garza,* 2021 WL 5850883 at *27. The state sentencing court's exclusion of the polygraph evidence was affirmed by the federal *habeas corpus* court. Citing the unreliability of polygraph evidence, the *Garza* court noted that a "defendant's right to present relevant evidence is subject to reasonable restrictions." *Garza,* 2021 WL 5850883 at *25, citing *United States v. Scheffer,* 523 U.S. 303 (1998)(*per se* evidentiary rule excluding polygraph evidence did not violate a defendant's constitutional right to present a defense). *Garza* found no error, in part, on the ground that the defendant had been able to present his third-party-perpetrator defense by means of other evidence. *Garza,* 2021 WL 5850883 at *27.

In light of these principles and authorities, the trial court did not abuse its discretion excluding polygraph evidence that allegedly supported Banks' defense that he was not the shooter:

- The polygraph evidence was unreliable and, therefore, not probative, which alone warrants exclusion. *Bertram,* 2018 SD 4, ¶ 14, 906 N.W.2d at 424; *Hartman,* 42 S.W.2d at 60; *Hinton,* 548 So.2d at 560-561.
- The polygraph evidence was irrelevant because it was offered to cast residual doubt on Banks' role as the shooter. *Hinton,* 548 So.2d at 560-561. But one who aids and abets a felony murder or first-degree manslaughter by means of a dangerous weapon but without intent to kill is legally accountable the same as the

principal to the crime. SDCL 23-3-3; SDCL 23-3-3.1; SENTENCING at 41/25 (Banks aware of gun at the robbery), 70/23. Neither SDCL 22-16-4(2) nor SDCL 22-16-15(3) prescribe a state of mind which differentiates an aider/abettor from a principal. *State v. Jucht,* 2012 SD 55, ¶ 26, 821 N.W.2d 629, 635. Thus, legally speaking Banks' role in the offense was the same whether he was the shooter or not under the circumstances of this case. Which is not to say that joint culpability between an aider/abettor and a principal *precludes* a court from taking into account one defendant's passive role compared to another defendant's active role in felony murder, but the law does not *require* such leniency in all cases. Thus, exclusion of Banks' proffered polygraph evidence for purposes of minimizing his role in the offense was not "outside the range of [the sentencing court's] permissible choices." *Mitchell,* 2021 SD 46 at ¶ 27, 963 N.W.2d at 332.

Banks' polygraph evidence offered nothing more regarding Bryant's alleged role as the shooter than what Banks' attorney and Banks himself were able to argue to the court. *Garza,* 2021 WL 5850883 at *27; *United States v. Gary,* 2010 WL 1375411, *4 (S.D.Fla.). Banks and his counsel argued evidence of cell phone videos showing Bryant in gangster rapper poses holding the gun and statements of mutual acquaintances who claimed that Bryant admitted to the shooting. MOTION at 15/2, 17/7, 35/13-25, 36/14; SENTENCING at 36-38, 42/25, 42/2. Banks made

his alternate shooter argument with competent evidence, even if the sentencing court assigned little weight to it in light of more convincing evidence that Banks was the shooter. *Lemler*, 2009 SD 86 at ¶ 41, 774 N.W.2d at 287; SENTENCING at 74/8-76/13, 90/15.

Banks' evidence that he was not the shooter was outweighed by the evidence that:

- The gun was given to Banks, not Bryant, by a friend to use in a scheme to retrieve the friend's car from someone who had taken but not returned it (MOTION at 6/19, 8/23, 9/2, 22/18, 23/11, 27/22, 28/8; SENTENCING at 59/3);
- Several cell phone photos and videos show Banks posing with and firing the murder weapon and talking about robbing people (MOTION at 8/13, 18/20, 19/4, 39/10, 85/15, 86/16, 88/10, 92/7, 93/11, 94/12, 95/18, 96/3; SENTENCING 59/18, 89/5-11);
- One video shows Banks in a Wal-Mart parking lot holding a gun and talking to Bryant about robbing someone named Jermaine who the two encountered as they walked toward the store (MOTION at 10/1-11/16; SENTENCING 90/4, 90/21);
- Banks is seen on a video from a Scheel's store shoplifting ammunition that was the same as used in the murder (MOTION at 12/14, 33/4, 34/19, 73/15, 78/13, 97/25; SENTENCING at 59/7);
- Two days before the murder, Banks fired the murder weapon into the house of a gang rival (SENTENCING at 59/11);

- The day after the murder, Banks went to Lewis Drug and bought rubbing alcohol and gloves that he used to wipe fingerprints from the gun before hiding it in a tree (MOTION at 60/18);
- When asked by a girlfriend if he had been involved in the shooting of the pizza delivery man, Banks responded not that he had not shot Bonhorst but that it had been in self-defense (SENTENCING at 23/9, 59/23);
- During a visit with a girlfriend while incarcerated, Banks described how certain prisoners get a tattoo of a teardrop to signify that they killed someone. Banks joked about instead getting a tattoo of a pizza slice to signify he had killed Bonhorst (SENTENCING at 25/12);
- Forensic evidence established that the person who shot Bonhorst was holding the gun in his right hand. Banks is right-handed but Bryant is left-handed (SENTENCING at 22/24, 86/5).

It is not as if Banks' polygraph evidence was the only available evidence of who was the shooter. *Garza,* 2021 WL 5850883 at *27; *Gary,* 2010 WL 1375411 at *4. Thus, whatever minimal probative value the polygraph evidence might have had was further diminished by convincing evidence that Banks was the shooter.

## CONCLUSION

Exclusion of the polygraph evidence is but a reflection of the sentencing court's estimation that such evidence is entitled to no weight.

Whether excluded or admitted but given no weight, the effect is the same. The fact that it was excluded does not turn the polygraph evidence into a bigger issue than it is. Polygraph evidence is no more reliable in a sentencing hearing than it is in a criminal trial, so there is no reason why exclusion from the former should be subject to any different rule or analysis than exclusion from the latter. Being within the range of the court's permissible choices, this court can comfortably affirm the trial court's exclusion of Banks' proffered polygraph evidence from his sentencing.

Dated this 22nd day of November 2022.

Respectfully submitted,

**MARK A. VARGO**
**ATTORNEY GENERAL**

*Paul S. Swedlund*

Paul S. Swedlund
Solicitor General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: 605-773-3215
E-Mail: atgservice@state.sd.us

## CERTIFICATE OF COMPLIANCE

1. I certify that Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 2,683 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 22nd day of November 2022.

*Paul S. Swedlund*
Paul S. Swedlund
Solicitor General

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Appellee's Brief was served was served via electronic mail upon Kristi Jones, counsel for Appellant, at kristi@dakotalawfirm.com.

Dated this 22nd day of November 2022.

*Paul S. Swedlund*
Paul S. Swedlund
Solicitor General

**IN THE SUPREME COURT**
**STATE OF SOUTH DAKOTA**

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**APPEAL NO. 29875**

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**STATE OF SOUTH DAKOTA,**
Plaintiff and Appellee,
**v.**
**RAYMOND BANKS**
Defendant and Appellant.

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APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE ROBIN HOUWMAN
Circuit Court Judge

# APPELLANT'S REPLY BRIEF


ATTORNEY FOR APPELLANT

KRISTI JONES
Dakota Law Firm, Prof. L.L.C.
4900 S. Minnesota Ave., Suite 103B
Sioux Falls, SD 57108
Telephone: 605-838-5873
kristi@dakotalawfirm.com

MANUEL J. DE CASTRO, JR.
De Castro Law Office, PLLC
927 E. 8th Street
Sioux Falls, SD 57103
Telephone: 605-251-6787
mdecastro1@yahoo.com

ATTORNEYS FOR APPELLEE

MARK VARGO
PAUL SWEDLUND
Office of the Attorney General
1302 E. Hwy. 1 Ste.1
Pierre, SD 57501
Telephone: 605-773-3215
atgservice@state.sd.us


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## ARGUMENT

### I. THE TRIAL COURT ABUSED ITS DISCRETION IN PROHIBITING BANKS FROM INTRODUCING POLYGRAPH EXAMINATION RESULTS AT THE SENTENCING HEARING.

In review of the State's brief, the State ignores several key arguments proffered by Banks in support of his contention that the trial court abused its discretion in prohibiting the introduction of his polygraph examination at sentencing. Much like the trial court in this case, the State cites to irrelevant case law, or simply ignores case law that supports the admission of the polygraph test at sentencing.

The State also cherry picks statements in the record from the co-defendant, Bryant, and adopts them as the truth of the case. The context of this case is two co-defendant's pointing the finger at each other, one of which, Bryant, who cut a cooperation deal with the State. There was no trial, and no trier of fact, only pleas with each defendant blaming the other. From the inception, Banks consistently stated Bryant was the shooter. Only after more than a year and a half and with a cooperation deal on the table, Bryant stated Banks was the shooter. Yet the State relies only Bryant's statements.

On this record, the veracity of both co-defendants is at play. The State makes a sweeping statement that "Banks' evidence that he was not the shooter was outweighed . . ." by a list of other statements made at the Motions Hearing or at Sentencing. This list of statements is one-sided, State-serving, and limited to statements made only against Banks. The full record contains ample evidence the shooter was the co-defendant, who received the

first indictment and remained the loan defendant for a significant period of time. Additionally, many of these statements were made *only* by Bryant who has abundant motivation to pin the shooting on Banks. A fair and objective reading of the record indicates there is evidence against BOTH co-defendants being the shooter, so credibility of each is a vital consideration for sentencing.

The State also cited case law affirming the trial court has discretion to assess the weight of evidence. (State's Brief 3). Banks agrees and asked the trial court to weigh the polygraph evidence. However, that never happened. The trial court completely precluded Banks from offering this evidence in the first place, so it was never received to weigh. Had the evidence been received, cross-examined, argued, and considered, but the trial court determined such evidence carried little weight, there would be no abuse of discretion. The abuse of discretion occurred when the trial court declared the polygraph inadmissible, and therefore never weighed the evidence.

The State goes on to cite other South Dakota cases in which polygraphs have been prohibited at trial, all of which are irrelevant to this case. As stated in the opening brief, Banks concedes he would be precluded from admitting polygraph results at trial. The relevant question here is admission at a sentencing hearing.

Finally, the State tries to analogize this sentencing hearing to a capital sentencing by citing non-mandatory cases from different states and claiming "if there is any legal proceeding which would seem to compel the admission of

polygraph evidence in mitigation. . . it would be a capital sentencing." (State's Brief 5). This is an illogical argument because a capital sentencing is entirely different than a regular sentencing. The death phase mandates factual determinations made by a trier of fact, either a judge or jury. Capital cases involve a bifurcated process and a defendant facing the death penalty has a right to a trial where the rules of evidence apply.

In this argument, the State relies on *State v. Hartman*, 42 N.W.3d 44 (Tenn. 2001)[1]. However, the opinion starts by recognizing "[t]he jury imposed a sentence of death for the murder conviction." *Id*. at 46. A separate, penalty phase, jury trial was held at which the parties were required to adhere to the rules of evidence. The *Hartman* decision itself confirms this in section two where the court discusses the defendant making an offer of proof regarding evidence the court was not going to admit. *Id*. at 54. While it may be called a capital sentencing, it is a trial and a phase in which the parties are constrained to the rules of law. This is not the procedural posture Banks faced when the trial court denied him the ability to submit mitigating evidence of a passed polygraph at sentencing.

The State made no attempt to address the case law surrounding analogous PBTs or the recent caselaw requiring a sentencing court to consider all mitigating evidence. Neither did the State address Satter V in

[1] The State's brief cited this case as *State v. Hartman*, 42 S.W.2d 44 (Tenn. 2001), but this case is cited in the S.W.3d reporter.

which the court indicated a defendant himself can waive this protection. *State v. Satter*, 1996 S.D. 9, 543 N.W.2d 249 (Satter V). Much like the trial court, the State simply disregards the case law that supports the admission of the polygraph.

Additionally, the State was allowed to have its cake and eat it too. The State made a cooperation deal with co-defendant Bryant on the condition that Bryant be subject to a polygraph test upon the State's request. The State then turned around and argued against Banks' polygraph, claiming the same to be unreliable. These are inconsistent positions.

Admitting otherwise inadmissible evidence at sentencings has been a long-standing tradition in South Dakota. Polygraphs, much like PBT's, are not allowed at trial, but under current case law, are permitted at sentencing, and the trial court abused its discretion in barring Banks from admitting this evidence.

## CONCLUSION

The trial court abused its discretion and caused prejudicial error in prohibiting Banks from admitting mitigating evidence in the form of a polygraph examination at his sentencing hearing. Accordingly, Banks respectfully requests this Court reverse the trial court and remand this case for further proceedings.

Dated this 20th day of December 2022.

Respectfully submitted,
**DAKOTA LAW FIRM, PROF. L.L.C.**
**KRISTI L. JONES**

/s/Kristi Jones

4900 S. Minnesota Ave., Suite 103B
Sioux Falls, SD 57108
Telephone: 605-838-5873
kristi@dakotalawfirm.com

## CERTIFICATE OF COMPLIANCE

1. I certify that appellant's reply brief is within the typeface and volume limitations provided for in S.D.C.L. § 15-26A-66(b) using Century Schoolbook typeface in proportional 12-point type. Appellant's reply brief contains 1,005 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

/s/Kristi Jones
Kristi Jones
Attorney for Appellant

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of December, 2022 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us

/s/Kristi Jones
Kristi Jones
Attorney for Appellant