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| DISTRICT COURTJEFFERSON COUNTY, COLORADO100 JEFFERSON COUNTY PARKWAY GOLDEN, COLORADO 80401 | DATE FILED: July 24, 2017 8:27 A FILING ID: 3B608C1E5D4B3 CASE NUMBER: 2016CR1463COURT USE ONLY  |
| **THE PEOPLE OF THE STATE OF COLORADO**,Plaintiff v.**GARY NICKAL,**Accused. |
| THE LAW OFFICE OF JENNIFER E. LONGTIN, LLCJennifer E. Longtin, #43509 2401 S. Downing St.Denver, CO 80210Ph. 303.747.6898Fax. 800.243.2691Jen@Jlongtinlaw.com | Case No. 16CR001463Division: 12 |
| **MOTION IN SUPPORT OF SUBPOENAS DUCES TECUM** |

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Gary Nickal, by and through undersigned counsel, respectfully requests this Honorable Court consider this Motion in Support of his Subpoena Duces Tecum, to be filed upon receipt of a SDT return date, seeking production of educational, DHS, and therapy treatment records for Alexandra and Kameryn Nickal. As grounds, Mr. Nickal states the following:

# FACTUAL BACKGROUND

1. On April 28, 2016, Mr. Nickal was charged with Murder I-After Deliberation, in violation of C.R.S. § 18-3-102(1)(a).
2. In addition to Mr. Nickal, there are three children that are involved in this matter: Alexandra Nickal, 08/31/07; Kameryn Nickal, 08/28/08; and Calvin Nickal, 02/05/16.
3. The Nickal children were present during the alleged events at issue in this case. The prosecution will attempt to introduce child hearsay, and testimony, from two of the children involved.
4. Here, the records requested in the subpoenas deal with these children, and the information sought relates to issues present in this case. Specifically, these records will provide relevant insight into the facts or this case, the mental health of the accused, as well as the competency and capacity of the child witnesses.
5. The records requested by counsel are controlled and kept by parties that are named in the subpoenas. Records of the nature requested are typically kept by these parties and held for future use both internally and by third parties. Some of the records requested, such as DHS and medical records, are required to be kept by law.
6. Defense Counsel has no knowledge of these aspects or the documents requested in the tendered *subpoenas duces tecum* nor does counsel have ready access to such information without compelled production by a third party.

# LEGAL ARGUMENT

1. “[N]o person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law.” *U.S. Const. Amnd. V.*

1. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury … and to have Assistance of Counsel for his defense.” *U.S. Const. Amnd. VI.*
2. Individuals accused of crimes have a right to due process of law which necessarily includes the right to prepare and present a defense, to confront adverse witnesses, and to exculpatory evidence. *Us. Const. Amnds. VI, XIV; Colo. Const. art. II,*

*§ 16, 25.*

1. “In every criminal case, the prosecuting attorneys and the defendant have the right to compel the attendance of witnesses and the production of tangible evidence by service upon them of a subpoena to appear for examination as a witness upon the trial or other hearing.” *Colo. Crim. P. 17*.
2. “A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein.” *Colo. Crim. P. 17(c).* Moreover,

The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys.

*Id.*

1. “Failure by any person without adequate excuse to obey a duly served subpoena may be deemed a contempt of the court from which the subpoena issued.” *Colo. Crim. P. 17(h)(1).*
2. Crim. P. 17(c) is the means by which the prosecution and defendant may compel third parties to produce evidence for use at trial. “It additionally permits pretrial inspection of that evidence under the supervision of the court in order to facilitate and expedite trials involving voluminous documents, not to grant additional discovery.” *People v. Spykstra*, 534 P.3d 662, 668 (Colo. 2010); *United States v. Carter*, 15F.R.D. 367, 369 (D.D.C. 1954).
3. “Crim. P. 17’s procedure for compliance thus requires a witness to produce the evidence at trial or other hearing in connection with examination.” *Id.* at 668. “With respect to subpoena duces tecum returnable before trial…Crim. P. 17(c) requires in-court production. This controlled method of disclosure protects the third party from unreasonable search and seizure.” *Id.*; See also *Tattered Cover*, *Inc. V. City of Thornton,* 44 P.3d 1044, 1060 N.27 (Colo. 2002).
4. Here, Mr. Nickal requests only limited disclosure of the documents and records directly relevant to the matter at hand and requested within the subpoenas. Mr. Nickal does not make a broad, all-encompassing request, rather, he is requesting focused pretrial disclosure in order to limit any unnecessary impact upon the record- holder’s privacy interest. Furthermore, Mr. Nickal is requesting an in camera review of

all of these documents in order to ensure further protections against unnecessary disclosure.

1. “[P]retrial production and inspection expedites criminal proceedings by allowing the parties in advance of trial to obtain and evaluate certain documentary evidence with a view toward determining its possible utility at trial.” *Id.* at 670.
2. Here, such disclosure is necessary prior to trial. Allowing disclosure prior to trial expedites not only inspection by defense counsel, but also the trial process by avoiding unnecessary delay cause by later disclosure. Here, later disclosure would result in unnecessary delay, as these records would need to be reviewed by defense counsel prior to any proceedings on this matter.
3. To withstand challenge to criminal pretrial third-party subpoena, the defendant must demonstrate: (1) A reasonable likelihood that the subpoenaed materials exists, by setting forth a specific factual basis; (2) that the materials are evidentiary and relevant; (3) that the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (4) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (5) that the application is made in good faith and is not intended as a general fishing expedition. *Id* at 669.
4. Addressing the factors from *Spykestra* individually, it can be seen that this

analysis weighs in favor of disclosure prior to trial. First, there is a reasonable

likelihood that this material exists as much if it is required by law to be held by these parties. Additionally, the materials requested in this matter are kept as a general course of practice by each of these respective record holders. Specifically, DHS and educational institutions keep and maintain the type of records sought here. Additionally, with regard to the records sought from therapy sessions, these types of records are regularly maintained by therapists and practitioners in order to document patient progress as well as for future use and review if necessary.

1. Second, these materials are evidentiary in nature and relevant to the matter at hand as they are informative upon the competency factors the Court and counsel will be faced with during the analysis of child hearsay. Additionally, these records are relevant and necessary to evaluate and assess the nature of the testimony of the child witnesses in this case.
2. Third, these materials are not otherwise procurable through reasonable efforts prior to trial as they are maintained and controlled by third-party agencies and involve various levels of privilege. These records could not be obtained without the use of a subpoena.
3. Fourth, without this information, defense counsel cannot adequately or effectively prepare for trial and Mr. Nickal’s defense. The inability of defense counsel to acquire and inspect these records prior to trial will cause unnecessary delay. Providing defense counsel with these records prior to trial allows for pretrial review

and inspection necessary for effective representation of Mr. Nickal in this matter.

1. Finally, this request is made in good faith and is not a fishing expedition.

Counsel is requesting these records because of their specific link to this case. Specifically, counsel in good faith believes that the impact of trauma on young minds can be a very mind-altering experience, which can impact the retention and validity of memories. Furthermore, there is ample social science research showing that children’s memories, especially young children’s memories, can be altered through persuasion. Because of this, it is essential that the defense have access to any communications, with school, DHS, or medical professionals, which directly relate to what these witnesses perceived on the date in question.

1. In addition to this basic test, for subpoenas issued for materials that may be protected by privilege or a right to confidentiality, a balancing of interests is necessary and the defendant must make a greater showing of need. *Id.*
2. The court found in *Walker* that the expectation of privacy may be overridden by the state’s compelling interest in the determination of the truth and safeguarding the defendant’s right to exculpatory evidence. *Walker*, P.2d at 122. The court found that an *in camera* review and balancing test was proper for determining what documents should be given to defense counsel as this process protects the competing interests of the defendant, the government, and the public. *Id.*
3. When the right to confidentiality is invoked to prevent disclosure of

personal materials or information, a three-part balancing test must be undertaken by the court, as follows:

* 1. Does the party seeking the right of confidentiality have a legitimate expectation that the material or information will not be disclosed?
	2. Is disclosure required to serve a compelling state interest?
	3. Will the necessary disclosure occur in a manner that is least intrusive with respect to the right of confidentiality?

*Martinelli*, 612 P.2d at 174.

1. First, the party seeking protection must show that they have a legitimate expectation of privacy, such as they divulged information with an understanding that it would be held in confidence or that the state would disclose the information for stated purposes only. *Id at 174.* In this case, the while the parties seeking protection do have a privacy interest, those interests are outweighed here by the interests of Mr. Nickal, who has been charged with a capital offense.
2. While there are significant confidentiality concerns, those concerns may be remedies through the use of an *in camera* review.
3. Secondly, the party seeking protection must show that the disclosure is highly personal and sensitive in that disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities. *Id.* at 175. In this case, the defense seeks documents specifically related to the facts and circumstances of this case. DHS, educational, and therapy records, while confidential, are highly relevant upon the competency of the children witnesses in this case.
4. Further, the party’s interest in confidentiality is outweighed by the

compelling state interest in the ascertainment of truth and Mr. Nickal’s right to exculpatory material. *See generally Lichtenstein*, F.2d at 436. The children are eye and ear

witnesses who were present at the time of the alleged offense. Furthermore, these children have direct knowledge of the family situation and events leading up to the alleged crime.

1. Third, the disclosure must only be made in a manner consistent with the state interest to be served, which intrudes least on the claimant’s right to confidentiality. *Id.* An *in camera* review is a nonintrusive method of determining which documents will ultimately be disclosed after balancing the requested documents’ relevance, confidentiality, public, and private interests.

# CONCLUSION

WHEREFORE, Gary Nickal, through undersigned, respectfully requests that this Honorable Court consider this Motion in Support, in connection with the corresponding Rule 17(c) motion filed by the defense, when evaluating SDTs to be filed in this case and setting an SDT return date. Mr. Nickal makes this request pursuant to his rights to a fair trial, due process, and effective assistance of counsel as guaranteed by the United States and Colorado Constitutions.

Dated: July 22, 2017 Respectfully Submitted,



Jennifer E. Longtin, Esq #43509

The Law Office of Jennifer E. Longtin, LLC

# Certificate of Service

The undersigned does hereby certify that on July 22, 2017, s/he did serve the foregoing MOTION via ICCES to opposing counsel.



Maxwell Boltinghouse