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| DISTRICT COURT  JEFFERSON COUNTY, COLORADO 100 JEFFERSON COUNTY PARKWAY  GOLDEN, COLORADO 80401 | DATE FILED: July 27, 2017 11:27 AM FILING ID: B66D91699A5C1  CASE NUMBER: 2016CR1463  COURT USE ONLY |
| **THE PEOPLE OF THE STATE OF COLORADO**  Plaintiff, v.  **GARY NICKAL**,  Accused. |
| MULLIGAN BRIET, LLC  Patrick Mulligan, #16981  1801 Broadway, Suite 1203  Denver, CO 80202  PH. 303-295-1500 FAX:  EMAIL: [Patrick@MulliganBriet.com](mailto:Patrick@MulliganBriet.com)  THE LAW OFFICE OF JENNIFER E. LONGTIN, LLC  Jennifer E. Longtin, #43509 2401 S. Downing St.  Denver, CO 80201  Ph. 303.747.6898  Fax. 800.243.2691  [Jen@jlongtinlaw.com](mailto:Jen@jlongtinlaw.com) | Case No. 16CR001463  Division: 12 |
| **MOTION REGARDING RULE 17 DISCLOSURES** | |

Gary Nickal, through counsel, respectfully requests that this Court allow counsel to suspend the disclosure requirement of Rule 17(c). In support of this motion, Mr. Nickal states the following:

1. Mr. Nikal has been charged with Murder 1-After Deliberation, in violation of C.R.S. § 18-3-102(1)(a). As such, the scope of required defense investigation broadens significantly. During the course of the investigation, oftentimes mitigation is required; some of this “mitigation” evidence is a double-edged sword and counsel must exercise their judgement vis-à-vis whether it should be introduced at any penalty phase and, and thus, disclosed to the prosecution.
2. However, defense counsel has a duty to explore all possible mitigating evidence and then determine whether the defense wishes to introduce such evidence. Absent the inherent authority of law enforcement, it is often necessary for the defense to use its subpoena power to obtain documents which may provide mitigating or exculpatory information.
3. If the defense is required to disclose all SDTs to the prosecution, before counsel has seen the documentary evidence and can determine whether the information is more beneficial rather than harmful and/or whether it should be used in court, the defense could, through its investigation, provide the prosecution with evidence which may be used against the defendant. Accordingly, unless the court limits Rule 17(c) to the extent it requires the defense to serve the prosecution with copies of all defense SDTs, Mr. Nickal will be forced either to curtail the necessary investigation and, thus be deprived of effective assistance of counsel, or to provide the prosecution with evidence that may be used against him and, thus, waive several

constitutional rights, including the privilege against self-incrimination and due process of law. *See* Section IV, *infra.*

1. The law permits and the state and federal constitutions require that Mr.

Nickal be allowed to issue *ex parte* subpoenas when necessary. Mr. Nickal is willing to utilize the Rule 17(c) disclosure procedure when it does not result in a compromise between disclosure and the defense’s confidential investigation. As such, Mr. Nickal requests that this Honorable Court suspend the disclosure requirement of Rule 17(c) when necessary to preserve Mr. Nickal’s interests in this matter.

1. Crim. P. Rule 17(C), which governs the issuance and use of subpoenas for production of documentary evidence states in part:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. 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 into 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.

*Crim. P. 17(c)*

1. This section of the text reflects a 1996 amendment to Rule 17 that has not been tested here in the Colorado; for the reasons set forth below in Section I, the

amendment is unconstitutional as applied to Mr. Nickal, unless it is interpreted in a manner that allows counsel for the accused to conduct a confidential pre-trial investigation. Unless counsel can proceed as such, Mr. Nickal will be deprived of effective assistance of counsel in violation of Amendments VI and XIV of the of the United States Constitution and Art. II, § 16 of the Colorado Constitution.

1. At bare minimum, this Court must allow the defense some exceptions to the Rule 17(c) disclosure requirement so that the defense can conduct a confidential investigation and, in this way, provide Mr. Nickal with effective assistance of counsel. This Court is authorized to limit the reach of Rule 17(c)’s requirement of notice to opposing counsel by its inherent authority to interpret rules and statutes in a manner that renders them constitutional. Moreover, Rule 16 (III)(f) expressly contemplates that “the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera.*” *Crim. P. 16*.

# Rule 17(c)’s disclosure requirement impedes Mr. Nickal’s right to a confidential investigation and, thus, his right to effective assistance of counsel.

1. As part of counsel’s duty to provide effective assistance to the accused, counsel is required to make reasonable investigations in connection with the case. *E.g. Strickland v. Washington*, 466 U.S. 668, 691 (1984); *People v. White*, 182 Colo. At 421-422, 514 P.2d 69, 71 (1973); *see also ABA Stds. For Criminal Justice,* Prosecution Function and Defense Function, Std. 4-4.1 (3d ed. 1993). The Commentary to this Standard

makes clear the importance of thorough investigation for a lawyer to provide effective assistance to a client. The Commentary states, “Effective investigation by the lawyer has an important bearing on competent representation at trail, for without adequate investigation the lawyer is not in a position to make the best use of such mechanism as cross examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. *Id.*

1. The duty to investigate is even greater in a case such as this, where the sentence, should the defendant be found guilty of all crimes charged, is life in prison.
2. Mr. Nickal is entitled to a confidential pre-trial investigation. *See generally Richardson v. District Court,* 632 P.2d 595 (Colo. 1981) (reversing trial court’s order granting the prosecution’s motion for pre-trial discovery of the written and recorded statements of non-expert defense witnesses which were made to an investigator of the Public Defender’s Office in the course of his pre-trial investigation of the case on behalf of the defendant’s attorney); *see also Hutcinson v. People*, 742 P.2d 875, 881 (Colo. 1987) (analogous analysis concerning why accused is entitled to confidential expert); *Perez v. People, 745 P.2d 650 (Colo. 1987), rev’d People v. Perez*, 701 P.2d 104 (Colo. App. 1985); *Miller v. District Court*, 737 P.2d 834 (Colo. 1987).
3. It is commonly necessary for an accused to utilize the subpoena power to obtain information that is critical to an adequate pre-trial investigation for the trial. Institutions and individuals that gladly disclose information to law enforcement and the prosecution merely upon request, often insist on a subpoena before leasing

documents to the defense. Since the defense must use such means as part of their investigation, the disclosure requirement of Crim. P. 17(c) compromises Mr. Nickal’s right to a confidential investigation, which is part and parcel of his right to effective assistance of counsel and due process.

1. In contrast, the prosecution’s investigation is not so compromised: the prosecution’s investigation does not involve the right to effective assistance of counsel, nor is there any prosecutorial privilege- on the contrary, the prosecution is *required* to disclose all evidence to the defense. Thus, not only is Rule 17(c) unconstitutional, but it detrimentally and disproportionally impacts the defense.
2. The mere disclosure of what is being subpoenaed, even if the court does not require disclosure of the actual documents to the prosecution, will deprive Mr. Nickal of the requisite confidentiality to conduct an adequate pretrial investigation. Once the prosecution is aware of the existence and direction of the defense investigation, it will be able to obtain the documents itself and use them as they see fit.
3. The mere disclosure of what is being subpoenaed, even if the court does not require disclosure of the actual documents to the prosecution, will deprive Mr. Nickal of the requisite confidentiality to conduct an adequate pretrial investigation. Once the prosecution is aware of the existence and direction of the defense investigation, it will be able to obtain the documents itself. As such, the mere disclosure of the defense’s decision to issue a pre-trial investigatory SDT will deprive

Mr. Nickal of his right to a confidential investigation. Thus, to the extent Crim. P. 17(c) requires such disclosures, it violates Mr. Nickal’s right to effective assistance of counsel.

1. Furthermore, this disclosure also implicates Mr. Nickal’s privilege against self-incrimination under the state and federal constitutions, since the decisions of counsel to investigate particular areas are often based on confidential attorney-client communications. For the same reason, Rule 17(c) also violates the Colorado attorney- client communications privilege, as well as the work product doctrine’s prohibition against disclosure of defense counsel’s trial strategy.
2. Rule 16 has been carefully crafted to limit defense disclosure to the prosecution in a manner that comports with constitutional limitations. *See Richardson v. District Court, Supra.* Rule 17 should be read in conjunction with Rule 16 and not in a manner that impermissibly chills the ability of the defense to investigate both the substantive and penalty phases of a case. Rule 16 and Rule 17 should be read together in a manner that protects and preserves the constitutional rights of an accused; constitutional rights necessarily override procedure.
3. Pursuant to Rule 16, Part III (d), this Court has the authority to enter protective orders:

With regard to all matters of discovery under this rule, upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and

information to which a party is entitled must be disclosed in time to permit his counsel make beneficial use thereof.

*Crim. P. 16*.

1. Pursuant to Rule 17(c), the court’s disclosure of documents obtained via SDTs is discretionary. *See Id.* [“The court *may* direct that books, [etc. requested by subpoena] be produced before the court … to be inspected by the parties or their attorneys.] Accordingly, pursuant to the express language of the Rule, the court is authorized to not disclose subpoenaed documents. The court can also exercise its authority to assure Mr. Nickal the confidential investigation necessary for effective assistance of counsel by entering a protective order that allows for the issuance of *ex parte* SDTs, when necessary to ensure a confidential investigation.
2. It is well recognized, in the context of the defense seeking recovery of costs for investigation, that the prosecution has no right to participate in defense motions for such costs, and that a defendant has a right to a confidential investigation of his/her case. *See generally Ake v. Oklahoma*, 470 U.S. 68 (1985); *McGregor v. State*, 754 P.2d 1216, 1217 (Okla. Crim. 1988) (intention of *Ake* majority is manifest that hearings at which defense makes requisite showing for psychiatric expert be held *ex parte*).
3. As such, the right of an accused to a confidential investigation is impaired if the defense is required to give the prosecution notice of all pre-trial or pre- hearing investigation subpoenas.

# Rule 17(c) violates Mr. Nickal’s constitutional privilege against self- incrimination by permitting the government to obtain incriminating material discovered by counsel in the course of investigating his case.

1. The requirement that the defense divulge to the government all SDTs, and the specific items subpoenaed, permits the prosecution to discover damaging information that the defense discovers while investigating the case.
2. The Fifth Amendment to the United States Constitution, and its’ Colorado counterpart, apply to more than police interrogation; it may be invoked whenever a witness reasonably believes that a disclosure might tend to incriminate him. *Kastigar v. United States,* 406 U.S. 441, 444-45, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). It also applies when the witness believes the disclosure, “could lead to other evidence that might be so used.” *Id.* A defendant is not always able to determine whether or not what he tells his attorney is incriminating or might lead to incriminating evidence.
3. The Tenth Circuit has indicated that a provision such as 17(c) will not be held constitutional. In *United States v. Bump*, 605 F.2d 548 (10th Cir. 1979), the court upheld the constitutionality of Crim. P. 16(b), mandating discovery of defense theories and alibi defenses. Because this information would be used at trial, compelling early discovery did not violate the defendant’s constitutional rights. The

court viewed it as an issue of timing, rather than compulsion, but in doing so warned against compulsion which wasn’t simply a matter of time:

It has been pointed out many times, however, that the prosecution’s right of discovery arises *only after* the defense seeks discovery of similar evidence from the government and the forced disclosure applies *only* to evidence the defendant intends to produce at trial.

*Id.* at 552 (citing *United States v. Nobles*, 422 U.S. 225, 235, 95 S.Ct. 2160,

45 L.Ed2d141 (1975).

The *Nobles* Court had indicated that compulsion of third-party statements, collected by the defense investigator, was permissible when the defense sought to impeach the third parties at trial with those statements. Compulsion was permissible only because it did not compel the defendant to bear witness against himself or extort communications from him.

1. The Supreme Court thus implied that Rule 16’s constitutionality was based, at least in part, upon “timing,” and predicated on the assumption that the prosecution was not permitted to gain access to information that the defense did not intend to present at trial. The Colorado Supreme Court considered Rule 16 in an earlier case and had come to a similar conclusion. *People v. District Court, 187 Colo. 333, 531 P.2d 626 (Colo. 1975).* The Court held that Rule 16 “passed constitutional muster” only when, “the discovery which was ordered was limited to those matters which would eventually be revealed at trial.” *Id.* at 339, 531 P.2d at 629. The Rule would be interpreted to deny discovery, “where the defendant would be forced to relinquish his

right against self-incrimination or to disclose information which will not be used at trial.” *Id.* at 340, 531 P.2d 630.

1. In *People v. Pierson*, 670 P.2d 770 (1983), the court held that an exercise of the privilege against self-incrimination must be “scrupulously honored.” *Id.* at 774. The Court expressly determined that the prosecution has a right to obtain discovery only where the defendant is not forced to relinquish his right against self- incrimination or to disclose information which will not be used at trial. *People v. District Court*, supra, at 339, 531 P.2d at 630. The discovery mandate would be held, “invalid if it seeks information which might serve as an unconstitutional link in a chain of evidence tending to establish the accused’s guilt of a criminal offense.” *Id.* at 343, 531 P.2d at 632.
2. Accordingly, a rule mandating discovery which permits the prosecution to build a case on the defendant’s disclosures to his attorney is constitutionally prohibited because it violates the defendant’s privilege against self-incrimination. Under the court’s reasoning, and that of the 10th Circuit, Crim.P. 17(c) is “invalid”, and may not be enforced against the defendant. Mr. Nickal is entitled to judicial protection of his Fifth Amendment rights, and this Court can only provide such protection by permitting *ex parte* application for subpoena duces tecum and barring government access to the testimonial information and inferences contained therein.

# Crim. P.17(c) violates the defendant’s constitutional right to effective assistance of counsel by permitting governmental intrusion into

**privileged communications necessary to the investigation and preparation of meaningful defenses.**

1. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), established a two-prong test for determining whether a criminal defendant has been denied the effective assistance of counsel guaranteed by the Sixth Amendment. If a defendant can establish that his representation did not meet an objective standard of reasonable advocacy, and that he was prejudiced by error and suffered an unfair outcome as a result, he may then obtain relief. *Id.*
2. The *Strickland* court created a presumption against ineffective assistance of counsel claims, but permitted the courts to presume prejudice against the defendant in a few narrow categories. Where local law or practice permitted State interference in the attorney-client relationship or with counsel’s attempt to mount a defense, prejudice might be inferred. *Id.* at 692, 104 S.Ct. at 2067. An inference of prejudice also exists when the defendant’s counsel is burdened by a conflict of interest. *Id.* A showing that there was an active conflict of interest adversely affecting the representation will establish a Sixth Amendment violation. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980). A defendant who demonstrates that an actual conflict of interest affected the adequacy of representation is not required to demonstrate how he was prejudiced. *Id.* Both of the foregoing categories apply to the effects of Crim. P. 17(c).
3. The requirement that defense counsel provide the prosecution with information communicated by the accused in confidence, which must be investigated if there is to be an effective defense, ties counsel’s hands. A prudent attorney cannot investigate a witness who might prove harmful to the defense when the government may intrude into that investigation and gain access to anything he discovers. Similarly, a prudent defense attorney cannot risk a demand for production of documents which might produce evidence damaging to their client
4. The Supreme Court has found that deliberate governmental intrusion into the attorney-client relationship may warrant dismissal of charges when “demonstrable prejudice or a substantial threat thereof” is shown. *See United States v. Morrison*, 449 U.S. 361, 365, 101 S. Ct. 665-667-68, 66 L.Ed.2d 564 (1981); *Wetatherford v. Bursey*, 429 U.S. 545, 550-51 (1977).
5. In *Weatherford*, the Court held that, if the government purposely intrudes into the attorney-client relationship, and the evidence obtained is used at trial, or if the prosecution obtains any details of the defendant’s trial preparation or strategy, or if information so obtained is used in any other way to the substantial detriment of the defendant, the right to effective assistance of counsel has been violated. *Id. Weatherford* concerned a government informant who attended defense strategy sessions, but communicated no information to the prosecution and was not there at the government’s behest. In that circumstance, governmental intrusion was not purposeful and not did it result in prejudice to the defense. *Id.*
6. Colorado has adopted the *Weatherford* standard, and in defining effective assistance of counsel, the court noted, “[t]he right to effective assistance of counsel is thus the right to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *Id.* at 881 (citing *United States v. Chronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.ed.2d 657 (1984)). Unfair advantage gained by the prosecution through discovery of the defense strategy and investigation violates the Sixth Amendment, because, “if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.” *Id.* at 657, 104 S.Ct. at 2066. A meaningful defense requires full investigation into unearthed facts, which will disclose potential defenses and mitigation. *Id.* If the investigatory function is curtailed, proper preparation cannot be made by counsel. *Id.* “Without knowledgeable trial preparation defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client.” *Id.* (citing *People v. White*, 182 Colo. 417, 421-22, 514 P.2d 69, 71 (1973)).
7. Crim. P. 17(c) actually mandates purposeful governmental intrusion into the attorney-client relationship in violation of the *Weatherford* prohibition and the *Hutchinson* standard. It eviscerates the requirement of meaningful adversarial confrontation, because whether the defense is investigating an alibi, eyewitnesses, alibi witnesses, mitigation, or mental health, the prosecution need only follow behind to know, or at the very least, to infer, what the defense has learned.
8. Knowledge of the existence of certain records can yield inferential knowledge of their contents. When the information is provided to counsel by the defendant, particularly if it concerns him or someone unknown to the prosecution, the prosecution may well have no other source for the information and may be unable to discover it in any other way. The defense should not be required to disclose such information until it has completed its investigation and decided that the evidence will, in fact, be used. *See generally Crim.P. 16.*
9. As such, Crim. P. 17(c) mandates a discovery procedure in violation of the Constitution, and which has been strictly prohibited by the United States and Colorado Courts.

# Crim. P. 17(c)violates a defendant’s right to Due Process because it forces him to choose between constitutionally protected rights.

1. The Supreme Court announced, in *Simons v. United States*, 390 U.S. 377, 394 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968), that conflicting laws may not compel a defendant to choose between his Fifth Amendment privilege and another constitutionally-protected right. The *Simmons* Court held that a defendant’s testimony at a suppression hearing, necessary to establish standing to object to a search, could not later be used to establish possession or guilt. To do so would force the defendant to choose between his Fourth and Fifth Amendment rights. *Id.*
2. The Tenth Circuit utilized the *Simmons* rationale in a situation involving Fifth and Sixth Amendment conflicts. In *United States v. Hardwell*, 80 F. 3d 1471 (10th

Cir. 1996), the Court found that the government’s use of the defendant’s affidavit of indigence, to prove he had no legitimate source of income to support a drug purchase, violated his right against self-incrimination. *Id at 1482-84.* The prosecution could not use such evidence because it was not permitted to force the defendant to “waive one privilege for the purpose of invoking another.” *Id.* A defendant may not be forced to choose between his right to counsel and his privilege against self-incrimination. *Id.*

1. Colorado courts have also recognized that it is fundamentally unfair, and a violation of due process, to require the accused to choose between the exercise of two constitutional rights:

A constitutional right may be said to be impermissibly burdened when there is some penalty imposed for exercising the right. *E.g., Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L.ed.2d 106 (1965)(permitting prosecutorial comment on an accused’s election not to testify and allowing jury to draw adverse inference from accused’s failure to testify impermissibly chills privilege against self-incrimination); *People v. Chavez*, 621 P.2d 1362, 1365 (Colo. 1981), *cert. denied*, *sub nom. Colorado v. Chavez*, 451 U.S. 1028, 101 S. Ct. 3019, 69 L.Ed.2d 398

(1981)(requiring a defendant facing habitual criminal charges to choose between his constitutional right to testify in his own defense and his constitutional right to require the state to prove the elements of habitual criminality beyond a reasonable doubt creates an intolerable tension between two constitutional rights in violation of due process of law); *People v. Rosenthal*, 617 P.2d 551 (Colo. 1980)(permitting unrestricted prosecutorial use t guilt trial of defendant’s statements to psychiatrist retained by defendant in connection with insanity plea would directly clash with privilege against self-incrimination by requiring defendant to forego privilege at guilt trial in order to exercise right to plead and defend on insanity grounds).

*Apodaca v. People*, 712 P.2d 467, 473 (Colo. 1985).

1. As previously discussed, the election between Fifth and Sixth Amendment rights is precisely the Sophie’s choice which faces a defendant confronted with the disclosure requirement of Crim. P. 17(c). A defendant must choose to either tell his attorney the facts necessary for a meaningful investigation, or he may secure his privilege against self-incrimination. One cannot do both under the present law and have his lawyer conduct adequate and zealous investigation; thus Mr. Nickal is forced into a forbidden election between two critical rights. Because Crim.

P. 17(c)requires this election, it offends both the U.S. and Colorado constitutions. To preserve Mr. Nickal’s rights, the defense requests that this Court enjoin this prohibited operation of the rule.

**CONCLUSION**

WHEREFORE, Mr. Nickal, by and through counsel, respectfully requests that this Honorable Court grant this motion, permitting the defense to conduct its necessary confidential investigations in a constitutional manner. Alternatively, Mr. Nickal respectfully requests this Honorable Court set this matter for a hearing.

Dated: July 17, 2017 Respectfully Submitted,



Jennifer E. Longtin, Esq. #43509

# Certificate of Service

The undersigned does hereby certify that on July 27, 2017, s/he did serve the foregoing MOTION via ICCES to all counsel of record.

