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| DISTRICT COURT  JEFFERSON COUNTY, COLORADO 100 JEFFERSON COUNTY PARKWAY GOLDEN, COLORADO 80401 | DATE FILED: July 20, 2017 5:21 PM FILING ID: 5DBBF67C36E06  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 |
| **NOTICE OF LIMITED USE OF DISCLOSURES MADE DURING**  **COURT ORDERED AND PRIVATE EVALUATIONS** | |

Gary Nickal is placing some of his medical history at issue, therefore, according to statute, is waiving privilege as to that condition. However, Mr. Nickal does not believe that this waiver is absolute, and states as follows:

1. The information obtained in compulsory mental examinations is admissible only on the issue of mental condition and insanity raised by defendants themselves. *People v. Bondurant*, 296 P. 3d 200, (Colo. App. 2012). The only permissible use of statements made during a sanity examination is to determine whether a defendant was capable of forming a culpable mental state. *People v. Herrera*, 87 P. 3d 240 (Colo. App. 2003).
2. C.R.S. 13-90-107 states: “A physician, surgeon, or registered professional nurse duly authorized to practice his profession pursuant to the laws of this state or any other state shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.”
3. This privilege applies “equally to in-court testimony and to pretrial discovery of information.” *Weil v. Dillon Companies, Inc.*, 109 P. 3d 127, 129 (Colo. 2005). A waiver of the privilege can occur through a patient’s conduct, or a direct release of information, “when the patient has either expressly or impliedly ‘forsaken his claim of confidentiality with respect to the information in question.’ ” *Alcon v. Spicer*, 113 P. 3d 735, 739 (Colo. 2005) (quoting *Clark v. District Court*, 668 P.2d 3, 8 (Colo. 1983)). “The claimant of the privilege bears the burden of establishing the applicability of the privilege…Once the privilege has been established, the burden of demonstrating waiver rests with the party seeking to overcome the privilege.” *Alcon*, 113 P. 3d at 739. A party can establish a waiver by showing that the privilege holder interjected his physical condition into the

case as the basis for a claim or affirmative defense; however, this does not act as a

complete waiver of all protected communications, the privilege is retained regarding communications unrelated to the claim or defense. *Id*. (emphasis added).

1. In *Alcon v. Spicer*, the Court found that the plaintiff had waived her privilege as to records pertaining to lower back pain, neck and shoulder pain, a chipped tooth, and depression; namely her specific claimed injuries. The court denied discovery of another doctor’s records and ten years of pharmaceutical records on the basis that they were outside of the scope of the implied waiver of the patient-physician privilege. *Id*. at 741. Although possibly relevant,

[R]elevance alone cannot be the test for waiver of the physician- patient…privilege. Extending waiver to anything that is relevant would be to allow the exception to destroy the privilege. Such a standard would ignore the fundamental purpose of evidentiary privileges, which is to preclude discovery and admission of relevant evidence under prescribed circumstances.

*Id*. (internal citations omitted). Thus, although there may be a waiver of some information caused by an individual’s testimony regarding specific medical conditions, this waiver does not extend to the sum of that person’s medical records.

1. Thus, although the prosecution, through operation of statute, is entitled to review any evaluation performed regarding the specific mental conditions at issue, Mr. Nickal retains his physician privilege as to the remainder of his medical records. Should this issue come into contention, Mr. Nickal requests this Honorable Court perform an

in camera review of any records that the prosecution alleges are relevant prior to releasing such records.

1. Further, pursuant to C.R.S. 16-8-107, statements acquired directly or indirectly, for the first time, during a psychological examination, are only admissible as to the contention that Mr. Nickal did not form the culpable mental state for the offense charged, not to the issue of factual guilt or innocence. Furthermore, this information may also be used for impeachment purposes, but only if Mr. Nickal chooses to testify in his own defense.

Mr. Nickal, therefore, respectfully requests that this Honorable Court put the prosecution on notice of the above, should relevant statements or medical records, of Mr. Nickal, come to issue at trial.

Dated: July 20, 2017 Respectfully Submitted,

/S/

Patrick Mulligan

Registration No. 161981

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The Law Office of Jennifer E. Longtin, LLC

**Certificate of Service**

The undersigned does hereby certify that on July 20, 2017, s/he served the foregoing NOTICE to all opposing counsel of record via ICCES:

