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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 |
| **OBJECTION TO JURY QUESTIONING PURSUANT TO COLORADO**  **CRIMINAL RULE OF PROCEDURE 24(G)** | |

Gary Nickal, through counsel, requests that this Court employ its’ discretion under Crim. P. 24(G) and prohibit the use of juror questions at trial. In support of this motion, Mr. Nickal states the following:

# BACKGROUND

1. The use of questions submitted by the jury, during trial, is a recent

development in Colorado, and not a practice employed nationwide. In 2000, the Colorado Supreme Court began a pilot program to test jury questions, and after a two-year trial period, issued a report on their findings. This was called the Dodge Report.

1. In 2003, the Colorado Supreme Court voted to adopt jury questions, and in 2004, the practice began in earnest, with Colorado Crim. P. 24(g) coming into effect.
2. This development is contrasted against the general historical trend from the common law to our modern courts which saw the jury pass from an inquisitive body, into a passive, decision making body. *See State v. Costello*, 646 N.W.2d. 204, 208 (Minn. 2002). This trend is recognized in our own courts through the repeated affirmations of the importance of a neutral, impartial jury that objectively, and dispassionately evaluates the information presented at trial. *See People v. Richardson*, 58 P.3d. 1039, 1042 (Colo. App. 2002); *see also Gaytan v. People*, 888 p.2d. 259, 269 (Colo. 1995).

# LAW

1. As mentioned, jury questioning is not used nationwide. Four states, Georgia, Mississippi, Nebraska, and Texas prohibit the practice. *See Johnson v. State*, 507 S.E.2d. 737, 742 (Ga. 1998); *Wharton v. State*, 734 So.2d 985, 990 (Miss. 1998); *State v. Zima*, 468 N.W.2d 377, 380 (Neb. 1991); *Morrison v. State*, 845 S.W.2d 882, 888-

89 (Tex. Crim. App. 1992). Other jurisdictions that allow the practice, strongly

discourage it. *See United States v. Thompson*, 76 F.3d 442, 448 (2d Cir. 1996); *United States v. Feinberg*, 89 F.3d 333, 336-336 (7th Cir. 1996).

1. Some courts have ruled that permitting jurors to ask questions distorts the adversarial process and alters the state’s burden of proof. *See Costello*, 646 N.W.2d at 209; *see also Johnson*, 507 S.E.2d at 742. As such, it implicates the right to a fair trial and an impartial jury. U.S. CONST. amends. V, VI, XIV; COLO. CONST., art. II, Sec. 16, 25; *see also Morrison v. People*, 19 P.3d 668, 672 (Colo. 2000).
2. As the court in *Costello* observed, “one cannot investigate unless one has a hypothesis about what happened in the particular criminal case.” *Costello,* 646 N.W.2d at 211. Further, by allowing a juror to ask questions, the court may allow the juror to elicit testimony that satisfies an element of the crime charged, thereby relieving the prosecution of their burden to prove the defendant guilty. *Id.* at 209. According to the Colorado Supreme Court’s Dodge Report, defense attorneys reported that jury questions assisted the state in meeting their burden in 25% of cases, judges stated jury questions helped the prosecution meet their burden in 17.8% of cases, and prosecutors themselves admitted to the jury questions assisting them in meeting their burden in 20% of their cases. *See Dodge Report*, fig. 18, p. 32.
3. Even a defendant’s right to testify may be infringed as jurors ask questions that are not permitted by the rules of evidence. In *Johnson*, a juror asked a testifying defendant about his past drug use in violation of rule 404(b). The court there opined that “[i]f the defendant refused to answer, as was his right, or if counsel

had objected, the prejudicial effect on the jury could have been more devastating than the answer… while such a risk always arises when a question goes unanswered, the risk is exacerbated when the question is the jury’s own.” *Johnson*, 892 F.2d at 713. (J. Lay, Concurring). Unlike a prosecutor, who must give notice of their intent to question on 404(b) evidence, a juror’s question would be unpredictable. A defendant, therefore, could not make a decision to testify based upon a weighing of the circumstances that would await him on the stand. Similar situations have been ruled unconstitutional. *See Brooks v. Tennessee*, 406 U.S. 605, 610 (1972)(court’s ruling that defendant must testify as defenses’ first witness or not at all “impermissibly burdened the defendant’s right to testify because it forced him to decide whether to do so before he could determine that it was in his best interest.” Similarly, by the end of Colorado’s pilot program with jury questions, 33% of attorneys said that jury questioning had an impact on the defendant’s decision to testify. *See Dodge Report*, p. 23.

1. Colorado Crim. P. 24(g) provides, in part, that the trial court shall have the discretion to prohibit or limit questioning in a particular trial.

# ARGUMENT

1. Murder charges are the most serious charges an individual can face in our justice system. As such, they often spark the most intrigue and interest of the public. This can be particularly true where the murder involves a defendant related to the victim. It also means courts must take special persuasions to ensure that the rights

of the accused are protected.

1. Here, Mr. Nickal is accused of shooting his wife in the head with a shotgun. Jurors may, in this case, want to ask Mr. Nickal, and other witnesses, about Mr. Nickal and Mrs. Nickal’s relationship, Mr. Nickal’s criminal history, if Mr. Nickal has a violent past, or if Mrs. Nickal was a peaceful person. This evidence, depending on the witness and stage of the trial, may or may not be admissible.
2. Due to the weight of the charges and the severity of the consequences that face Mr. Nickal, the Court should take extra care to ensure Mr. Nickal’s right to a fair and impartial jury is protected as is his right to have the *prosecution* prove each and every element of the charges against him beyond a reasonable doubt.

WHEREFORE, Mr. Nickal requests that this Court employ is discretion under Crim. P. 24(G) and prohibit the use of juror questions at trial. Mr. Nickal makes this motion pursuant to his rights to due process, proof beyond a reasonable doubt, testify in his defense, a fair and impartial jury, and all other rights accorded to a criminal defendant under both the Colorado and United State’s constitutions.

Dated: July 27, 2017 Respectfully Submitted,

/s/ Patrick Mulligan

Registration # 16981

Jennifer Longtin, #43509

The Law Office of Jennifer E. Longtin, LLC

# 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.

