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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 |
| **REQUEST TO PRECLUDE JUDICIAL REHABILITATION OF CONSTITUTIONALLY INFIRM JURORS DURING *VOIR DIRE*** | |

Mr. Nickal, by and through counsel, requests that this Court limit its questions during counsel’s *voir dire* to non-leading and investigative questions, rather than those questions rehabilitative in nature. The grounds for this request are as follows:

# LAW

1. One of the goals of *voir dire* is to identify those jurors who should be excused for cause because of actual bias. *See, e.g., People v. Martinez*, 24 P.3d 639, 632 (Colo. App. 2000). Specially concurring in *People v. Merrow*, 181 P.3d 319 (Colo. App. 2007), Judge Webb observed that judicial rehabilitation following a challenge for cause runs the risk of frustrating this goal.
2. Judge Webb identified leading questions from the trial court as one of the causes for this information:

A record laden with leading questions by the trial court can leave the reviewing court uncertain about the sincerity of the prospective juror’s answers. The answers to such questions may suggest overt acquiesce in the trial court’s efforts to elicit a commitment to neutrality. But bias remains if the prospective juror tells the court only what it wants to hear, while covertly holding on the previously articulated views that precipitated the challenge.

*Id.* at 323.

1. Other courts have described the judicial rehabilitation as some variant of the following: “After you hear the evidence and my [instructions] on the law, and considering the oath you take as jurors, can you set aside your preconceptions and decide this case solely on the evidence and the law?” *Walls v. Kim*, 549 S.E.2d 797 (Ga. App. 2001).
2. This sort of question is “talismanic,” “loaded” and “the magic question.” *Id*. Courts recognize that jurors are likely to try to “please” the judge and give the rather obvious answer indicated by the leading questions[.]” *Price v. State*, 538 So.2d

468, 489 (Fl. DCA 3rd 1989). As a result, these answers alone must never determine the juror’s actual ability to be fair and impartial. *Id.; See also O’Dell v. Miller*, 565 S.E.2d 407 (W.Va. 2002).

1. Following a challenge for cause, a trial court should never ask questions that seem tailored to rehabilitate the juror. *Beck v. State Dep’t of Transp.,* 837 P.2d 105 (Alaska 1992). Instead, the court should ask only those questions that may be necessary to clarify any ambiguity in the juror’s answers. *Id*.*; see also Merrow, supra* (WEBB, J., specially concurring).
2. The 10th Circuit emphasized the importance of jurors not only being truthful, but that the court and its officers allow the juror to speak freely and truthfully about potential bias. *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964).

Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason. It therefore becomes imperative that the answers be truthful and complete. False or misleading answers may result in the seating of a juror who might have been discharged by the Court, challenged for cause by counsel or stricken through the exercise of peremptory challenge. The seating of such a juror could and probably would result in a miscarriage of justice and *therefore courts and attorneys, who are officials of the court, are ever mindful of the importance of jurors' answers* to questions regarding their qualifications.

*Id. at 786 (emphasis added).*

1. The reasoning against judicial rehabilitation has long been recognized in our legal system. Chief Justice Marshall stated in *United States v. Burr*:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision of the case, according to the testimony. He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it, but the law will not trust him… He will listen with more favor to that testimony which confirms, than to that which would change his opinion[.]

*U.S. v. Burr*, 25 Fed.Cas. 49,50 (C.C.D. Va. 1807)

# ARGUMENT

1. In this case, Mr. Nickal objects to any judicial rehabilitation, as it tends to not only encourage jurors to withhold truthful answers, but may result in the seating of a biased jury panel, in violation of Mr. Nickal’s 6th and 5th Amendment rights under the United States Constitution, and Article 2, Sec. 16 of the Colorado Constitution.
2. Mr. Nickal requests that all questions from the Court during defense counsel’s *voir dire,* and following a challenge for cause, be open-ended rather than leading, and focused only on clarifying any ambiguity in the juror’s answers rather than on rehabilitating the juror. Because of the trial court’s absolute duty of neutrality, “following a challenge for cause, the trial court should act *only* as a neutral arbiter.” *Merrow, supra* at 323 (WEBB, J., specially concurring; emphasis in the original).
3. This procedure is critical to protecting Mr. Nickal’s right to a fair trial:

It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of

bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares himself free from its influence. By what sort of principle is it to be determined that the statement of the man is better and more worthy of belief than the former?

*Johnson v. Reynolds*, 121 So. 793, 796 (Florida 1929).

# CONCLUSION

WHEREFORE, Mr. Nickal moves this Court to limit its further questioning of the jurors during *voir dire,* and following a challenge for cause, to non-leading and investigative questions, rather than those rehabilitative in nature. Mr. Nickal makes this request pursuant to his right to a fair trial, a fair and impartial jury, and all other rights accorded a criminal defendant under both the Colorado and United States’ constitutions.

Dated: July 20, 2017. Respectfully submitted,

/s/

Patrick Mulligan Reg. 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, she served the foregoing MOTION to all opposing counsel of record via ICCES.

