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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 TO RECOGNIZE CHILD WITNESSES AS INCOMPETENT**  **TO TESTIFY** | |

Gary Nickal, by and through counsel, requests that this Honorable Court issue an order recognizing Alexandrea, Kameryn, and Calvin Nickal as incompetent to serve as witnesses in a trial on this matter. In support of this motion, Mr. Nickal states the following:

# FACTS

1. Alexandra, Kameryn, and Calvin Nickal are the children of Molly and Gary Nickal. Alexandra was eight-years old on the night of her mother’s death, while Kameryn was seven, and Calvin was just three-months old.
2. As of July 21, 2017, Alexandra is nine-years old, Kameryn in eight, and Calvin is one and one-half-years old.
3. All three children were in the home when Mrs. Nickal passed away.

# LAW

1. C.R.S. § 13-90-106 indicates that children under the age of ten may be incompetent to testify at trial, and the Court must make findings for them to be allowed to be placed under oath.
2. To be found competent to testify, the Court must make a finding that the child witness is capable of “receiving just impressions of the facts respecting which they are examined or of relating them truly.” *Id.*
3. Further, an inquiry into a child witness' competency requires that the court determine whether the child was competent both at the time of the alleged act and at the time she is to testify. *People v. Bowers*, 801 P.2d 511,519 (Colo. 1990).
4. Corruption of witness memory has long been grounds for exclusion of evidence in Colorado. *See People v. Romero*, 745 P.2d 1003 (Colo. 1987); *see also People v. Hansen*, 920 P.2d 831, 838-39 (Colo.App. 1995) (trial court deciding admissibility of child's hearsay statements under § 13-25-129 must determine whether reliability of out

of court statements was tainted by events intervening between the alleged acts of sexual abuse and the time the statements were made).

1. Courts have shown additional concern not just that testimony may be corrupted through time, but may also be tainted through improper techniques. "Taint" has been described as "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." *Com v. Delbridge*, 855 A.2d 27,35 (Pa. 2003) (citing Julie Jablonski, Assessing the Future o/Taint Hearings, 33 Suff. J. Trial & App. Adv. 49, 50 (1998)). "The core belief underlying the theory of taint is that a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy." *Id.* (citing Josephine A. Bulkey, *The Impact o/New Child Witness Research on Sexual Abuse Prosecutions, in Perspectives on Children's Testimony* 208, 213 (Stephen J. Ceci et al. eds, 1989)).

# ARGUMENT

1. On April 28, 2017, all three children were well under the age of ten.

None have yet reached ten-years old, and by the date of trial, only Alexandra will have reached the age of ten. It is unlikely that Calvin has any memory of these events, due to his infancy.

1. Since April 28, 2017, on a number of occasions, Alexandra and

Kameryn have been interviewed and questioned about what happened to their mother. This includes not only forensic professional interviews, but also informal questions that may have been posed by family members, and questions the children may ask themselves or others.

1. Due to their age, Alexandra and Kameryn remain impressionable and susceptible to suggestion. *See Bulkey*. Because of the time between the death of Molly Nickal and trial, their age at the time of their mother’s death, the number of times they have been asked to discuss the events at hand, and their own confusing feelings over death of their mother and their father being charged with murder, Alexandra and Kameryn Nickal cannot be relied upon to have received “just impressions of the facts” and to “relat[e] them truly.” C.R.S. 16-90-106.

# CONCLUSION

WHEREFORE, Gary Nickal requests this Honorable Court to recognize all three of the Nickal Children as incompetent to serve as witnesses in a trial on this matter. Mr. Nickal further requests, that this Court schedule a hearing on this motion, far enough in advance of trial, that Mr. Nickal may obtain a transcript as necessary.

Dated: July 27, 2017 Respectfully Submitted,

/s/ Patrick Mulligan,

Reg. No. 161981



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.

