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| DISTRICT COURT  JEFFERSON COUNTY, COLORADO  100 JEFFERSON COUNTY PARKWAY F  GOLDEN, COLORADO 80401 C | ATE FILED: July 27, 2017 11:27 ILING ID: B66D91699A5C1  ASE NUMBER: 2016CR1463   COURT USE ONLY | AM   |
| **THE PEOPLE OF THE STATE OF COLORADO**  Plaintiff, v.  **GARY NICKAL**,  Accused. |
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| **MOTION TO SUPPRESS SEARCH OF CELL PHONES AND**  **COMPUTERS** | | |

Mr. Nickal, by and through counsel, requests this Court to suppress evidence gained through the illegal search and seizure of Gary and Molly Nickal’s cell phones. In support of this motion, Mr. Nickal states the following:

# FACTS

1. On April 28, 2017, police responded to a call of an apparent suicide at the

home of Gary Nickal. When police arrived, they found Molly Nickal, Mr. Nickal’s wife, deceased. The apparent cause of death was a shotgun blast to the head.

1. When police entered the home, they spoke with Mr. Nickal, and made observations regarding the home and Mrs. Nickal. Police noted that Mr. Nickal picked up his phone while police searched the home. Officers did not ask Mr. Nickal why he picked up his phone and there is no indication that Mr. Nickal used the phone in any non-permissible or nefarious manner. One officer, however, believed that Mr. Nickal “appeared to be sending a text message.” There is no evidence for this belief.
2. That same day, officer Michael Lynch signed an affidavit in support of a search warrant. Listed in that warrant was a request to seize and search any cell phone found in the home, as well as any computer. The only mention of a cell phone in the affidavit in support of the warrant is the reference to Mr. Nickal picking up his phone while police were in his home. There is no mention of any computer.

# LAW

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend IV; see also: COLO. CONST. Art. 2, Sec. 7 (“The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or

things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or

affirmation reduced to writing.”).

1. To establish probable cause, the affiant to a search warrant must provide more than just a signed statement and a belief that the information received is credible. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). The affiant must demonstrate, through the totality of the circumstances, that there was probable cause to believe a crime has been committed, and that there is probable cause to believe that there is evidence of a crime at the location described in the warrant. *Id.*
2. Courts must remain vigilant in their review of warrants in order to ensure that the issuance of the warrant is predicated on probable cause to believe the items listed to be searched or seized are contraband or evidence of a crime; rather than simply the unfounded suspicions of the affiant or another officer. *Id.* at 239; *see also People v. Dailey*, 639 P.2d 1068 (Colo. 1982).
3. In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court

announced a “good faith” exception to the warrant requirement: when an officer acts in objectively reasonable reliance upon a magistrate’s determination of probable cause, the fact that the warrant did not issue upon probable cause will not trigger the exclusionary rule. The government bears the burden of proving objectively reasonable reliance, and that the officer(s) obtained the warrant in good faith. *Id.; People v. Gutierrez*, 222 P.3d 925 (Colo. 2009).

# ARGUMENT

1. Police requested and were granted a warrant to search Mr. Nickal’s home. Among the materials listed and seized were cell phones belonging to Molly Nickal and Gary Nickal. While indicated in the search warrant, discovery does not reflect any search of a computer, or a computer being in police custody.
2. The affidavit supplied by police in support of their request for a warrant does not support the search and seizure of these items. The affidavit mentions Mr. Nickal using a cell phone while in the presence of officers at his home, but using a cell phone is not criminal. Nor does the affidavit indicate how or why police believe the cell phone was used in any criminal episode. The request for the cell phone, rather, is simply a belief, on the part of one of the officers who first spoke with Mr. Nickal, that the phone may contain evidence. Per *Illinois v. Gates*, a belief is not sufficient to support probable cause to issue a warrant, seize property, or search that property. *See* 462 U.S at 239.
3. Nor would police be justified in relying upon the warrant to seize the cell phone in this instance. There is no objectively reasonable purpose given to seize the cell phones of Gary and Molly Nickal; there is no nexus given between the cell phones and any possible crime. Therefore, police could not be justified in an

“objectively reasonable” reliance upon a magistrate’s determination of probable cause*. United States v. Leon*, 468 U.S. 897 (1984).

# CONCLUSION

WHEREFORE, Mr. Nickal, by and through counsel, requests that this Honorable Court suppress evidence gained through the illegal search and seizure of Gary and Molly Nickal’s cell phones, as well as any, as of yet undisclosed, evidence obtained through the search and seizure of any computer. Further, Mr. Nickal requests the Court schedule a hearing on this motion, far enough in advance of trial, that Mr. Nickal may obtain a transcript as necessary. Mr. Nickal makes this request pursuant to his right to be free from illegal searches and seizures, right to due process, and all other rights, accorded to a criminal defendant, pursuant to 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.