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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. |
| MULLIGAN BRIET, LLC |  | |
| Patrick Mulligan, #16981 |  | |
| 1801 Broadway, Suite 1203 |  | |
| Denver, CO 80202  PH. 303-295-1500 | Case No. 16CR001463 | |
| 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 | Division: 12 | |
| Ph. 303.747.6898 |  | |
| Fax. 800.243.2691 |  | |
| [Jen@jlongtinlaw.com](mailto:Jen@jlongtinlaw.com) |  | |
| **MOTION TO SUPPRESS STATEMENTS AS INVOLUNTARY** | | |

Mr. Nickal, through counsel, moves this Court to suppress any statements made to law enforcement personnel during the investigation of this matter as involuntarily given. The grounds for this motion are the following:

# FACTUAL BACKGROUND

1. On Thursday, April 28, 2016, Mr. Nickal was laboring under the effects of a mental health episode brought on by Adderall use and the negative effects of stress. This mental health episode limited, if not, prevented Mr. Nickal from making knowing and intelligent choices in regards to his constitutional rights.
2. When Mr. Nickal was contacted by police on April 28, 2016, he was laboring under this same mental health episode. Police observations of Mr. Nickal, on scene and during later interactions that evening, describe Mr. Nickal as showing no emotion what so ever, licking blood off his hands, and repeating “I don’t know” while on scene with officers.
3. While at his home, several officers surrounded Mr. Nickal and requested that he come with them down to the police station and make a statement. Mr. Nickal complied.
4. Mr. Nickal was taken to the Westminster police station where officers indicate that Mr. Nickal gave a voluntary statement.
5. Defense counsel believes that Mr. Nickal’s decision to speak to officers was not made knowingly and voluntarily, and that his decision to speak with officers, as well as his statements, were the product of a mentally ill mind.

# LEGAL AUTHORITY

1. A suspect’s statements must be suppressed if they are involuntarily given.

*Jackson v. Denno*, 378 U.S. 368 (1964); *People v. Mendoza-Rodriguez*, 790 P.2d 810, 816 (1990). U.S. Const. Amends. V, VI, XIV; Colo. Const., art. II, §§ 16, 25.

1. When a defendant in a criminal trial objects to the admission of a confession, he or she is entitled to a fair hearing where both the, “underlying factual issues and the voluntariness of his confession are actually and reliably determined.” *Denno*, 378 U.S. at 380. This includes whether the statements in question were elicited in violation of *Miranda*, as well as if the statements were involuntarily given. *See Id.*
2. Involuntary confessions are forbidden under the Fourteenth Amendment of the U.S. Constitution because of the “probable unreliability of confessions,” obtained through coercion, as well as because of the strong societal conviction that, “police must obey the law while enforcing the law;” life and liberty, “’are as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.’” *Id.* at 386 (citing *Spano v. NY*, 360 U.S. 315 (1959)).
3. For a statement to be voluntary, it must be the, “product of an individual’s free and rational choice;” therefore, the court must look to whether the individual’s, “will has been overborne.” *Mendoza-Rodrigues*, 790 P.2d at 816. The statement, “must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *Brady v. U.S*., 397 U.S. 742, 753 (1970); *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Mendoza-*

*Rodriguez*, 790 P.2d at 816. “…the blood of the accused is not the only hallmark of an unconstitutional inquisition.” *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960).

1. In determining voluntariness, the court must look to, “the events and occurrences surrounding the statement and the mental condition of the maker.” *People*

*v. Miller*, 829 P.2d 443 (Colo. Ct. App. 1991); *see also Mincey v. Arizona*, 437 U.S. 385 (1978); *People v. Smith*, 716 P.2d 1115 (Colo. 1986).

1. Subtle forms of psychological coercion by police may be sufficient to render a statement involuntary. *Arizona v. Fulminante*, 499 U.S. 279 (1991); *People v. Gennings*, 808 P.2d 839, 843-44 (Colo. 1991). A suspect’s mental condition is a factor to be considered in determining whether he may be susceptible to coercion. *People v. Parks*, 579 P.2d 76 (Colo. 1978). The intoxication of a suspect is also relevant in determining whether his waiver of rights and statements to police were voluntary. *See People v. Helm*, 633 P.2d 1071 (Colo. 1981).
2. To be voluntary, the totality of the circumstances must show that the accused’s statement is the product of his free and unconstrained choice, and is not a result of official coercion, intimidation, or deception. *Connelly*, 479 U.S. at 167. In determining the voluntariness of the defendant’s statement, the trial court must weigh “the circumstances of pressure against the power of resistance of the person confessing.” *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 2331, 147 L.Ed.2d 405, 413 (2000). The totality of the circumstances includes all significant details surrounding and inhering in the interrogation including: (1) whether defendant was in

custody or free to leave; (2) whether he was aware of his situation; (3) whether Miranda warnings were given prior to interrogation; (4) whether the defendant understood and waived his rights; (5) whether the defendant had the opportunity to confer with counsel or anyone else prior to the interrogation; (6) whether the defendant’s statement was made during interrogation rather than volunteered; (7) whether any overt or implied threat or promise was directed toward the defendant; (8) the method and style employed in the interrogation; (9) the length and place of the interrogation; (10) the defendant’s mental and physical condition immediately prior to and during the interrogation; and,

(11) the defendant’s educational background, employment status, prior experience with law enforcement and the criminal justice system. *Gennings*, 808 P.2d at 843; *People v. Dracon*, 884 P.2d 712, 718 (Colo. 1994).

1. The prosecution bears the burden, under a preponderance of the evidence standard, to prove that the statement in question was made voluntarily. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *Miller*, 829 P.2d at 445.
2. While the courts have held that at least some government conduct must be present in order to render a confession involuntary, the bar for government conduct has been set intentionally low by the courts. *See Colorado v. Connely*, 479 U.S. 157 (1986). The Supreme Court has even stated that the mere presence of police is coercive. “Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system

which may ultimately cause the suspect to be charged with a crime” *Oregon v. Mathiason*, 429 U.S. 492 (1977).

1. In *Effland v. People*, the court held that by simply questioning a defendant while they labored under a mental condition, the government satisfied the requirement for government conduct. 240 P.3d 868 (Colo. 2010); *see also People v. Medina*, 25 P.3d 1216 (Colo. 2001)(ruling sufficient government conduct when police persisted in questioning a defendant in light of their emotional and psychological state).
2. Nor do police have to be aware of the defendant’s mental condition at the time of questioning. In *Blackburn v. Alabama*, the Supreme Court held that sufficient police conduct to render statements involuntary when officers questioned the defendant during a then unknown schizophrenic episode. 361 U.S. 199 (1960). Police testified that they believed that the defendant was of sound mind when they conducted lengthy interrogations with him, and the schizophrenic episode was not diagnosed until a period of at least several days had passed since the interrogation. *See Id.* at 201-02, 204.
3. a. Ultimately, “To be voluntary, a statement must be the product of an essentially free and unconstrained choice by its maker.” *People v. Klinck*, 259 P.3d 489, 495 (2011). This is, in part, why it is not the burden of the defendant to show that a statement to police was involuntary, but instead, it is the burden of the state to show the statement was in fact voluntary; because every interaction with police is laced with coercion, by virtue of the power of the officer. *People v. Clayton*, 207 P.3d 831, 834-835 (Colo. 2009).

# ARGUMENT

1. On April 28, 2016, Gary Nickal was suffering under the effects of a mental illness. Police observations support this fact, noting Mr. Nickal did not show any emotion to his surrounding environment, was unaware of dried blood on his hands, licked that blood off his hands when it was brought to his attention, and repeated “I don’t know” when asked where the blood came from.
2. When police arrived on scene, despite being called in on an apparent suicide, officer began examining the scene as if it were a murder, recording a number of observations in their notes that indicated that Ms. Nickal may not have shot herself. This includes an unprovoked statement from one of the Nickals’ daughters stating her father took the gun away from Molly Nickal after she had shot herself, and fired it again to keep Ms. Nickal from hurting herself.
3. Despite Mr. Nickal’s clearly disturbed state, and police observations about the nature of Ms. Nickal’s death, officers asked Mr. Nickal to return to the Westminster Police Station to give a statement. At no point in time was Mr. Reynolds read his Miranda Rights.
4. Once at the police station, in a room with a uniformed police officer, Mr. Nickal was in custody. No reasonable person would free to break off their encounter with police at this point.
5. In this room, in custody, Mr. Nickal was interrogated about the death of his wife. Police asked him about what happened, and pressed him on details of her death. These questions were designed with the intent of eliciting an incriminating response.
6. While police assert that Mr. Nickal gave a voluntary statement to police, under the effects of Mr. Nickal’s mental illness, Mr. Nickal could not voluntarily, knowingly, or intelligently agree to make a statement to officers. An involuntary statement is constitutionally prohibited. In Mr. Nickal’s then existing mental state, Mr. Nickal was susceptible to subtle forms of psychological coercion and influence, which the Supreme Court has recognized, underpin any interaction with law enforcement personnel. *See Mathiason*, 429 U.S. 492 (“Any interview of one suspected of a crime by a police officer will have coercive aspects to it…”).
7. Even if police were unaware of Mr. Nickal’s then existing mental illness, Mr. Nickal’s statements should be excluded as they were not the product of a free and unconstrained choice on the part of Mr. Nickal. The choice to speak to officers, and any statements made, are tainted by the effects of his mental illness, and therefore could not be characterized as a free and unrestrained choice. *Klinck*, 259 P.3d at 495.

Under the effects of this coercion, Mr. Nickal gave incriminating statements which should be suppressed in accordance with Mr. Nickal’s Fourth Amendment rights.

# CONCLUSION

WHEREFORE, Mr. Nickal requests an order suppressing all statements from Mr. Nickal to police, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article II, §§ 16 and 25 of the Colorado Constitution.

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 served the foregoing REQUEST FOR NOTICE to all opposing counsel of record via ICCES:

