

**UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY**

**QUESTIONNAIRE FOR JUDICIAL NOMINEES**

**PUBLIC**

1. **Name:** State full name (include any former names used).

Richard Brooke Jackson

2. **Position:** State the position for which you have been nominated.

United States District Judge for the District of Colorado

3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

Office:           State of Colorado  
                    Division Six, First Judicial District  
                    100 Jefferson County Parkway  
                    Golden, Colorado 80401



4. **Birthplace:** State year and place of birth.

1947; Bozeman, Montana

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1969 to 1972, Harvard Law School, J.D. (*cum laude*), 1972

1965 to 1969, Dartmouth College, A.B. (*magna cum laude*), 1969

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

1998 – Present  
State of Colorado  
100 Jefferson County Parkway  
Golden, Colorado 80401  
Chief Judge (2003-present)  
District Judge (1998-present)

1972 – 1998  
Holland & Hart  
555 17<sup>th</sup> Street  
Denver, Colorado 80202  
Partner (1978-1998)  
Associate (1972-1978)

1994 – 1998  
Town of Bow Mar, Colorado  
5191 Bow Mar Drive  
Bow Mar, Colorado 80123  
Town Prosecutor (part-time, I donated all compensation back to the town)

Summer 1971  
Herrick, Smith, Donald, Farley & Ketchum (since dissolved)  
Boston, Massachusetts  
Summer Associate

Summer 1970  
FMC Corporation (facility no longer in business)  
San Jose, California  
Assembly line labor

Summer 1970  
H.K. Porter, Inc. (facility no longer in business)  
Burlingame, California  
Night watchman

Summer 1969  
Philco Ford (facility no longer in business)  
San Jose, California  
Inventory control worker

1969 – 1971  
Harvard University  
Massachusetts Hall  
Cambridge, Massachusetts 02138  
Assistant Coach, Harvard College Debate Team (part-time)

Other Affiliations (uncompensated)

2006 – Present

Jefferson Foundation

809 Quail Street, Building #1

Lakewood, Colorado 80215

Director

2004 – Present

Jefferson County Criminal Justice Strategic Planning Committee

900 Jefferson County Parkway

Golden, Colorado 80401

Chair

1999 – Present

Jefferson County Corrections Board

Justice Services Division

3500 Illinois Street, #2800

Golden, Colorado 80401

Board Member (1999 – present)

Vice Chair (2004 – present)

2001 – 2006

Court Appointed Special Advocates of Jefferson and Gilpin Counties

100 Jefferson County Parkway, Room 2040

Golden, Colorado 80401

Director

1992 – 1996

Colorado Trial Lawyers Association

303 East 17<sup>th</sup> Avenue, #320

Denver, Colorado 80203

Director

1975 – 1979 (approximate)

Pinecrest Homeowner's Association

Denver, Colorado 80235

Director

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

As a student at Dartmouth College, I participated in the United States Army Reserve Officer Training Corps from 1965 to 1969. I was not “discharged,” but I was unable to

continue to the last two years of the four-year program and obtain a commission because of excessive refractive error in my eyes. I had been appointed to the United States Military Academy out of high school but was unable to pass its physical for the same reason. My eyesight was, however, and has always been correctible to 20/20. I registered for selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

“Barrister’s Best – Best State Judge in Colorado,” Law Week Colorado (2010)  
Judicial Excellence Award, American Board of Trial Advocates (2008)  
“500 Leading Judges in America,” Lawdragon Magazine (2006)  
Judicial Recognition Award, Peer I Community Corrections Program (2004)  
“Best of the Bar” Lifetime Achievement Award, Denver Business Journal (2004)  
Listing in The Best Lawyers in America (1993 – 1998)  
Fellow of the American College of Trial Lawyers (named in 1993)  
Winner & Oralist Ames Moot Court Competiton, Harvard Law School (1971)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

American Bar Association  
Co-Chair, Insurance Coverage Committee, Litigation Section (1994 – 1997)  
American College of Trial Lawyers  
Fellow (1993 – present)  
Colorado Bar Association  
Court Appointed Special Advocates of Jefferson and Gilpin Counties  
Director (2001 – 2006)  
Advisory Board (2006 – present)  
Colorado Trial Lawyers Association  
Board Member (1992 – 1996)  
Denver Bar Association  
First Judicial District (Jefferson & Gilpin Counties) Bar Association  
Jefferson County Criminal Justice Strategic Planning Committee  
Chair (2004 – present)  
Jefferson County Mediation Project  
Advisory Group Member (2000 – present)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Colorado, 1972  
District of Columbia, 1980

There have been no lapses in membership, although my D.C. Bar membership has been inactive since the mid-1990s because I have not had occasion to practice in the District of Columbia.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States, 1980  
United States Court of Appeals for the D.C. Circuit, 1980  
United States Court of Appeals for the Tenth Circuit, 1972  
United States District Court for the District of Colorado, 1972  
Colorado State courts, 1972  
D.C. Court of Appeals, 1980

There have been no lapses in membership, although my D.C. Bar membership has been inactive since the mid-1990s because I have not had occasion to practice in the District of Columbia.

**11. Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Bow Mar Owners Incorporated  
Dartmouth Club of the Greater Divide (intermittent membership 1972 – present)  
Dartmouth Club of Washington, D.C. (1979 – 1982)  
Dartmouth Lawyers' Association (1985 – present)  
Denver Association of Urban Debate Leagues  
    Advisory Board Member (2008 – present)  
Jefferson County Corrections Board  
    Board Member (1999 – present)  
    Vice Chair (2004 – present)  
Jefferson Foundation  
    Director (2005 – present)  
Kenwood Golf & Country Club (1980 – 1981)  
Mile High Dinner Club (mid 1990s – present)  
Pinehurst Country Club (1977 – 1979 & 1982 – present)

Pinecrest Homeowner's Association  
Board Member (approximately 1975 – 1979)  
YMCA of Metropolitan Denver (1981 – Present)

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

None of these organizations listed above currently discriminates or, to the best of my knowledge, formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies.

**12. Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

“Joe DiMaggio and You,” 37 The Colorado Lawyer 65 (April 2008). Copy supplied.

Occasional Column, “Ask the Judge,” Jefferson County Bar Association Newsletter (2004 – 2008). I have supplied copies of all columns I could locate.

Letter to the Editor, published as a Column entitled “The untold story of rapist’s sentence,” Rocky Mountain News, August 15, 1999. Copy supplied.

“ABA Manual for Complex Insurance Coverage Litigation: A Prescription for Efficient, Cost Effective and Manageable Litigation – A Reply,” 8 Fordham Env'tl. L. Rev. 59 (1996) (co-author). Copy supplied.

“Improving the Damages Appeal: A Few Words on Having the Last Word,” 32 Trial 66 (May 1996) (with Richard J. Crawford). Copy supplied.

Manual for Complex Insurance Coverage Litigation, Task Force of the Committee on Insurance Coverage Litigation American Bar Association, Section of Litigation (1993) (I am among 22 co-authors—I do not recall the particular sections to which I contributed). Copy supplied.

"Environmental Insurance Litigation Revisited: A Kinder, Gentler (Cheaper, Better) Approach," 41 Trial Talk 330 (December 1992). Copy supplied.

"Environmental Damage Claims: Colorado Favors Insureds," 41 Trial Talk 6 (January 1992). Copy supplied.

"A Practical Guide to Prosecuting Pollution Claims," 38 Risk Management 40 (August 1991). Copy supplied.

"Liability Insurance for Pollutions Claims: Avoiding a Litigation Wasteland," 26 Tulsa L.J. 209 (Winter 1990). Copy supplied.

"Environmental Cleanups and Insurance: Isn't There a Better Way?" 21 Envir. Rep. (BNA) 767 (1990). Copy supplied.

"The Political Question Doctrine: Where Does it Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan?" 44 U. Colo. L. Rev. 477 (1973). Copy supplied.

A Better New Hampshire, a 96-page book-magazine published in 10,000 copies by the Citizens Council for a Better New Hampshire, 1968, Coordinating Editor and author of two chapters. I do not have a copy.

Although I do not remember and have been unable to identify any other published material I have written or edited, there may be other published material that I have been unable to remember or identify.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

None that I recall or have been able to identify.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

In 2009, I submitted comments to the Jefferson County Citizens Budget Review Panel to address the budgetary needs of the Courthouse. I was asked a couple of times by the Board of County Commissioners to attend meetings of the Panel, talk about the Court and its needs, and answer questions. I did so, perhaps 30-45 minutes each time, and had no notes or written comments.

Although I do not remember and have been unable to identify any other testimony, official statements, or communications relating to matters of public policy or legal interpretation, there may be other such documents that I have been unable to remember or identify.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I have searched my files and electronic databases, and I am including all materials that I have found. The list below represents my best efforts to provide an answer that is as complete as possible, but I have spoken frequently at continuing legal education, bar association, community, and school group events—especially since I became a judge—and so there may be other presentations or speeches I have given that I am unable to identify or remember. I typically do not have a text but instead used brief handwritten, occasionally typed, notes. I have some of the notes and materials and have provided copies of everything I could locate.

Speech to graduating General Educational Development (GED) class on importance of education, sponsored by Red Rocks Community College, May 29, 2009. I have no notes, transcript, or recording. The address of the College is 13300 W. 6<sup>th</sup> Ave., Lakewood, CO 80228.

Panelist with author Philip Howard and two others to discuss his book Life Without Lawyers, sponsored by the Institute for the Advancement of the American Legal System at the University of Denver, April 3, 2009. Notes supplied.

Speech, Green Mountain Optimist Club about courts and justice system generally, June 17, 2008. I have no notes, transcript, or recording. The address for the Club is at 10350 W. Colfax Ave, Lakewood, CO 80215.

Keynote Speaker, Graduation, Jefferson County Sheriff's Office Police Academy, June 15, 2007. Notes supplied.

Speech to Colorado Chapter of American Board of Trial Advocates regarding the "vanishing jury trial" and other jury trial-related topics, October 24, 2006. Notes supplied.



Speech, "Civility and Professionalism are the Keys to a Satisfying Legal Career," sponsored by Colorado Bar Association, date not located. Notes supplied.

Address to Sixth Grade Continuation Program, Fairmont Elementary School, concerning education and independence, May 17, 2006. Notes supplied.

Presentation, awards of maintenance (alimony) in domestic relations cases, sponsored by First Judicial District Bar Association, December 3, 2005. I have no notes, transcript, or recording. The address of the Bar Association is P.O. Box 1733, Wheat Ridge, CO 80034.

Presentation, mediation and the unauthorized practice of law, probably to a bar association group but I do not recall, November 15, 2005. Notes supplied.

Speaker, Criminal Law Update, topic "Alternatives to Incarceration," sponsored by the Colorado Bar Association, March 24, 2005. I have no notes, transcript, or recording. The address of the Bar Association is 1900 Grant St., 9<sup>th</sup> Floor, Denver, CO 80203.

Panelist, luncheon seminar on awards of maintenance (alimony), sponsored by the Family Law Section of the Colorado Bar Association, March 18, 2005. Notes supplied.

Panelist, insurance coverage update, sponsored by the Insurance Coverage Committee of the Litigation Section of the American Bar Association, Tucson, Arizona, March 5, 2005. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

Panelist, "The Citizen and the Constitution," sponsored by the Fairmont Elementary School, January 26, 2005. I have no notes, transcript, or recording. The address of the School is 15975 W. 50<sup>th</sup> Ave., Golden, CO 80403.

Speaker, 2004 Annual Advanced Family Law Institute, sponsored by the Colorado Bar Association, December 3, 2004. Notes supplied.

"Insurance Coverage Litigation Update," Colorado Trial Lawyers Association and Kansas Trial Lawyers Association Annual Convention, Snowmass, Colorado, August 12, 2004. I have no notes, transcript, or recording. The address of the Colorado Trial Lawyers Association is 303 E. 17<sup>th</sup> Ave., Suite 320, Denver, CO 80203.

Speaker, Colorado Bar Association seminar on jury reform, November 14, 2003. I have no notes, transcript, or recording. The address of the Bar Association is 1900 Grant St., 9<sup>th</sup> Floor, Denver, CO 80203.

Panelist, insurance coverage topics, annual meeting of Insurance Coverage Committee of the Litigation Section of the American Bar Association, Tucson, Arizona, March 8, 2003. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

Speaker, Family Law Institute, Colorado Bar Association, in Snowmass, Colorado, concerning family law topics that I no longer recall, July 28, 2002. I have no notes, transcript, or recording. The address of the Association is 1900 Grant Street, 3<sup>rd</sup> Floor, Denver, CO 80203.

Panelist, "Stack, Sway or Study: The Science and Ethics of Trial Consulting," sponsored by the American Society of Trial Consultants, June 8, 2002. Notes supplied.

Presentation, training for members of Judicial Performance Committees (evaluation of judges for retention recommendations), sponsored by the state Judicial Performance Committee of the State Court Administrator's Office, March 9, 2002. I have no notes, transcript, or recording. The address of the Commission is 1560 Broadway, Suite 1930 Denver, CO 80202.

Presentation, "Making an Appropriate Record on Jury Instructions," part of a "Trial Skills with Trial Lawyers" seminar sponsored by the Colorado Trial Lawyers Association, April 19, 2002. Notes supplied.

Panelist, "Lawyers and the Media," sponsored by the Faculty of Federal Advocates, May 18, 2001. I have no notes, transcript, or recording. The address of the organization is P.O. Box 12025, Denver, CO 80212.

Presentation, "Judicial Perspectives: A View from the Bench," sponsored by the Colorado Trial Lawyers Association, May 11, 2001. I have no notes, transcript, or recording. The address of the Association is 303 E. 17<sup>th</sup> Ave., Suite 320, Denver, CO 80203.

Presentation, "Critical Issues in Sentencing Sex Offenders," sponsored by the Jefferson County Children's Advocacy Center, April 13, 2001. I have no notes, transcript, or recording. The Center has since ceased operations.

Panelist, luncheon seminar on temporary and permanent maintenance, sponsored by the Family Law Section of the Colorado Bar Association, March 16, 2001. Notes supplied.

Panelist, litigation skills, sponsored by Insurance Coverage Committee of Litigation Section of the American Bar Association, approximately March 6, 1999. Notes supplied.

Panelist, seminar on "Getting Benched," sharing thoughts with and answering questions from individuals interested in a career with the Colorado state courts, sponsored by the Colorado Women's Bar Association, February 19, 1999. I have no notes, transcript, or recording. The address of the Bar Association is P.O. Box 350666, Westminster, CO 80035.

"The Mock Trial as a Settlement Mechanism and Trial Preparation Tool – a Live Demonstration and Soup-to-Nuts Guide," Annual Convention of the Litigation Section of the American Bar Association, New York, NY, April 1998. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

"Sunscreen for Trial Lawyers: Mock Try Your Case and Don't Get Burned," Annual Mid-Year Meeting of the Insurance Coverage Committee of the ABA Litigation Section, Acapulco, Mexico, February 1998. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

"Taming the Dragon: Management of the Legal Team in Complex Cases," Colorado Bar Association Annual Convention, Denver, Colorado, August 1997. I have no notes, transcript, or recording. The address of the Bar Association is 1900 Grant St., 9<sup>th</sup> Floor, Denver, CO 80203.

"The Basics of Insurance Claims for Environmental Losses," Colorado Trial Lawyers Association Seminar on "Hot Topics in Environmental Law and Toxic Torts," November 20, 1992. I have no notes, transcript, or recording. The address of the Association is 303 E. 17<sup>th</sup> Ave., Suite 320, Denver, CO 80203.

"Insurance Coverage for Environmental Claims – Legal and Practical Issues," Idaho State Bar Annual Meeting, Coeur d'Alene, Idaho, July 23, 1992. Copy supplied of the paper I presented.

"Handling Environmental Insurance Coverage Issues," American Bar Association Section of Business Law, Environmental Controls Committee, Spring Meeting, Orlando, Florida, April 10, 1992. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

"Practical Aspects of Insurance Coverage Cases in Environmental Law/Toxic Tort Litigation," Colorado Trial Lawyers Association, Environmental and Toxic Torts Seminar, February 8, 1991. Copy supplied of the paper I presented.

"Insurance Coverage for Environmental Damage: The Law and the Practice," Wyoming State Bar Convention, September 6, 1990. I have no notes, transcript, or recording. The address of the Wyoming State Bar is 4124 Laramie Street, Cheyenne, WY 82003.

“Rebuttal Summation on Damages Issues in Commercial and Business Tort Litigation,” Association of Trial Lawyers of America, Advanced Seminar, Vail, Colorado, August 16, 1990. I have no notes, transcript, or recording. The address of the organization is 777 6<sup>th</sup> St., N.W., Suite 200, Washington, DC 20001.

“Comprehensive General Liability Insurance Litigation in the 1990’s,” American Bar Association Section of Litigation, Committee on Insurance Coverage Litigation, Mid-Year Meeting, Tucson, AZ, April 7, 1990. I have no notes, transcript, or recording. The address of the ABA is 321 N. Clark St., Chicago, IL 60654.

“Insurance Coverage Issues in Environmental Litigation,” Dartmouth Lawyers Association, Colorado Ski-Seminar Weekend, Beaver Creek, Colorado, March 31, 1990. I have no notes, transcript, or recording. The address of the Association is P.O. Box 5002, Hanover, NH 03755.

In addition to the listings above, I have made it my practice to frequently present at continuing legal education (CLE) seminars and other trainings. I estimate that I have been a participant in panels at probably two or three dozen CLE seminars since I became a judge and I do not recall the specifics of each of them. I served on the faculty of the National Institute of Trial Advocacy, headquartered in Boulder, Colorado, during programs held in 1986, 1987, 1990, and 1991 (basic and advanced trial practice courses).

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have occasionally, particularly in my capacity as Chief Judge of the First Judicial District, been asked by the media to comment on various topics. I have searched my files and publicly-available Internet databases to identify all of the interviews I have given, and I have supplied the most complete listing available based on my searches and my recollection, but there may be others I have been unable to identify. I have supplied clips of all newspaper articles.

“WHAT THEY OWE YOU: About \$778 million is outstanding, but don’t expect criminals to pony up soon,” *The Denver Post*, Sept. 24, 2009.

“No relief in sight for court backlog,” *The Denver Post*, Apr. 9, 2009.

“Judge ‘dull’ to self, ‘dynamite’ to colleagues,” *The Denver Post*, Mar. 1, 2009.

“Wandering the halls of justice; Jefferson County courts takes its space crunch, remodeling ideas under advisement,” *The Denver Post*, Aug. 3, 2008.

"2nd chance for mentally ill teens; Program helps turn lives around, keeps kids out of the criminal-justice system," *The Denver Post*, Mar. 11, 2008.

"RTD cost-cutting hits Sixth Avenue segment hard," *Rocky Mountain News*, Oct. 26, 2007.

"Expanding Jeffco courts critical, says chief judge," *The Denver Post*, Apr. 12, 2007.

"'Avenging angel' gives killers life with no chance at parole," *Rocky Mountain News*, Feb. 28, 2007.

"Mandatory E-Filing Ordered In Jefferson County for Selected Court Case Types," *US States News*, May 24, 2006.

"Courts curbing public access to records," *Rocky Mountain News*, Mar. 8, 2006.

"Administrative Obstruction of Justice," *News Media & the Law*, Spring 2006.

"Jaclyn Senese Named District Administrator in First Judicial District," *US States News*, Sept. 26, 2005.

"Judge: Neagle shouldn't have been allowed to use alternate court exit to avoid media," Associated Press, June 17, 2005.

"Profiles of Success: William C. McClearn," *Colorado Lawyer*, Dec. 2004.

"BEST OF THE BAR: Lifetime Achievement Award - R. Brooke Jackson, Jackson's stands on tough cases takes conviction," *Denver Business Journal*, June 11, 2004.

"Priest-turned-Lawyer Never Stopped Helping," *Rocky Mountain News*, Feb. 14, 2004.

"Father gets probation in shooting of toddler," *The Denver Post*, Jan. 15, 2003.

"Youth Sentenced in Fatal Wreck," *Rocky Mountain News*, Dec. 28, 2001.

"Judging the Judge: After a year on the Jefferson County bench, Brooke Jackson knows it can be a real hot seat," *Westword*, Sept. 30, 1999.

"Judge Wants to Earn Public's Respect," *Rocky Mountain News*, Aug. 8, 1999.

"Top lawyer taking seat on bench," *The Denver Post*, Sept. 13, 1998.

“Detective is Angry with Koby, Will Sue,” *Boulder Daily Camera*, February 5, 1998.

“If Your Insurer Won’t Pay...,” *Kiplinger Personal Finance*, June 1995.

“10th Circuit says disposal of toxic waste voids cover,” *Business Insurance*, Jan. 20, 1992.

“Pollution exclusion overturned,” *Business Insurance*, Oct. 16, 1989.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 1998, I was appointed as a District Judge in the First Judicial District of Colorado, which covers Jefferson and Gilpin Counties. In 2003, I was appointed Chief Judge of the First Judicial District.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment?

250 (excluding summary judgments in civil cases and “permanent orders” hearings in domestic relations cases; there have been at least several hundred)

- i. Of these, approximately what percent were:

|                       |     |
|-----------------------|-----|
| jury trials:          | 70% |
| bench trials:         | 30% |
| civil proceedings:    | 45% |
| criminal proceedings: | 55% |

- b. Provide citations for all opinions you have written, including concurrences and dissents.

I have not published any opinions.

- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Fleming v. Stone*, No. 00CV884 (2000 to 2002) (copy of my first order attached).

Following the shootings at Columbine High School on April 20, 1999, a number of cases were filed in the Jefferson County District Court. The first case filed was randomly assigned to me, and all subsequent Columbine cases were also assigned to me. One group of these cases was brought by parents of deceased and injured victims (*Fleming, et al.*) against the Jefferson County Sheriff (*Stone*), with various media and other intervenors, seeking disclosure of information under Colorado's open records laws. I read literally thousands of documents, viewed and listened to perhaps hundreds of hours of audio and video tapes, conducted numerous hearings, and issued between a dozen and two dozen written orders.

|                         |   |
|-------------------------|---|
| Counsel for Plaintiffs: | Barry K. Arrington<br>7340 East Caley Avenue, #360<br>Centennial, CO 80111<br>Telephone: (303) 205-7870 |
|-------------------------|---|

|                         |  |
|-------------------------|--|
| Counsel for Defendants: | Lily Oeffler (now Hon.)<br>100 Jefferson County Parkway<br>Golden, CO 80401<br>Telephone: (303) 271-6110 |
|-------------------------|--|

|   |  |
|---|--|
| Counsel for Intervenor:<br>(The Denver Post): | Thomas B. Kelley<br>Steven D. Zansberg<br>1888 Sherman Street, #370<br>Denver, CO 80203<br>Telephone: (303) 376-2410 |
|---|--|

|                                       |   |
|---------------------------------------|---|
| Counsel for Intervenor<br>(Harrises): | C. Michael Montgomery<br>1775 Sherman Street, 21 <sup>st</sup> Floor<br>Denver, CO 80203<br>Telephone: (303) 592-6600 |
|---------------------------------------|---|

|                                       |   |
|---------------------------------------|---|
| Counsel for Intervenor<br>(Klebolds): | Franklin D. Patterson<br>5613 DTC Parkway, #400<br>Greenwood Village, CO 80111<br>Telephone: (303) 741-4539 |
|---------------------------------------|---|

2. *Village Homes v. Travelers Cas. and Sur. Co.*, No. 02CV410 (2002 to 2003) (copy of opinion attached).

This was an insurance coverage case. A builder of new homes had been sued by second-generation purchasers of the homes on account of

alleged construction defects. The builder sought coverage under liability insurance policies that were in effect when the homes were built but not when the homes were subsequently resold. I denied the insurer's motion for summary judgment, distinguishing what the insurer claimed was controlling authority, *Browder v. United States Fidelity and Guaranty Company*, 893 P.2d 132 (1995), and subsequently ordered the insurer to indemnify the policyholder for a relatively small (\$200,000) amount. My judgment was affirmed by the Court of Appeals. 148 P.2d 293 (Colo. App. 2006) and later by the Colorado Supreme Court, *Travelers Cas. and Sur. Co. v. Village Homes of Colorado, Inc.*, 155 P.3d 369 (Colo. 2007). The case presented questions of insurance coverage law that were important to the construction industry in Colorado.

Counsel for Plaintiff: Bradley A. Levin  
1660 Wynkoop Street, #800  
Denver, CO 80202  
Telephone: (303) 575-9390

Counsel for Defendants: Leslie A. Eaton  
1225 17<sup>th</sup> Street, #2300  
Denver, CO 80202  
Telephone: (303) 299-7302

3. *DeHerrera v. Equity Link*, No. 03CV3356 (2003 to 2005) (copy of primary opinion attached).

This was a class action by individuals whose homes were "rescued" from foreclosure by a company that bought the homes and then leased them back to the homeowner with an option to repurchase. Following a trial to the Court I entered judgment in favor of the plaintiff class, finding that the lease/purchase program was in substance a loan; that the program did not violate the Colorado Uniform Consumer Credit Code, but that the defendants had violated the Colorado Consumer Protection Act and had engaged in a civil conspiracy. The case was affirmed on appeal. *DeHerrera v. EquityLink, LLC*, 2009 WL 2090999 (Colo. App. July 16, 2009) (unpublished).

Counsel for Plaintiff: John F. Head  
1860 Blake Street, #300  
Denver, CO 80202  
Telephone: (303) 623-6000

Counsel for Defendants: Bobee J. Musgrave  
1700 Lincoln Street, #4100  
Denver, CO 80202  
Telephone: (303) 861-7000



Co-counsel for Defendants: Joseph A. Murr  
410 17<sup>th</sup> Street, #2400  
Denver, CO 80202  
Telephone: (303) 534-2277

4. *Cornerstone Group XXII, LLC v. Wheat Ridge Urban Renewal Authority*, 04CV3513 (2004) (copy of opinion attached)

The City of Wheat Ridge, a suburb of Denver, condemned supposedly blighted private land in order to permit the construction of a Walgreens drug store. However, midway through the condemnation process the City renounced its contracts with Walgreens. Walgreens sued for specific performance and damages. I denied specific performance on grounds that courts do not have authority to order municipalities to resume and complete condemnation projects. My decision was later affirmed in part and reversed in part by the Colorado Court of Appeals. *Cornerstone Group XXII, LLC v. Wheat Ridge Urban Renewal Authority*, 151 P.3d 601 (Colo. App. 2006). The part of the Court of Appeals' decision that reversed my decision was in turn reversed by the Colorado Supreme Court, thus affirming my decision. *Wheat Ridge Urban Renewal Authority v. Cornerstone*, 176 P.3d 737 (Colo. 2007).

Counsel for Plaintiff: Thomas D. Leland  
370 17<sup>th</sup> Street, #4650  
Denver, CO 80202  
Telephone: (720) 931-3025

Counsel for Defendants: Steven J. Dawes  
1512 Larimer Street, #300  
Denver, CO 80202  
Telephone: (303) 298-1601

Co-counsel for Defendants: Corey Y. Hoffmann  
1350 17<sup>th</sup> Street, #450  
Denver, CO 80202  
Telephone: (303) 825-6444

5. *State of Colorado v. General Steel Domestic Sales, LLC*, No. 04CV143 (2004) (copy of opinion attached).

The Colorado Attorney General brought a suit against a company that sold steel buildings, employing nationwide radio advertising to attract potential customers. General Steel used a team of sales persons following a script to sell buildings to individuals who called in response to the ads. I divided the case into two phases and held a trial to the court

on the claims and defenses with a sampling of 11 customers. I found that the defendant company, its president and other officers violated the Colorado Consumer Protection Act and imposed injunctive relief, substantial civil penalties and attorney's fees. The parties settled for injunctive relief, several million dollars in monetary relief and attorney's fees before the case moved to the second phase, which would have involved a massive number of individual mini-trials. The Attorney General's Office published my opinion on its web site so that General Steel customers and potential customers around the country would be aware of it.

Counsel for Plaintiff: Marie E. Berkenkotter (now Hon.)  
1777 6<sup>th</sup> Street  
Boulder, CO 80306  
Telephone: (303) 441-3748

Co-counsel for Plaintiff: Jay B. Simonson  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, CO 80203  
Telephone: (303) 866-4500

Counsel for Defendant: Sean R. Gallagher  
1200 17<sup>th</sup> Street, #1500  
Denver, CO 80202  
Telephone: (303) 454-2415

Co-counsel for Defendant: Robert N. Miller  
1899 Wynkoop Street, #700  
Denver, CO 80202  
Telephone: (303) 291-2313

6. *City of Golden v. Jefferson County*, No. 03CV3045 (2004-2007) (copy of one order attached).

The City of Golden sits at the foot of Lookout Mountain in Jefferson County, Colorado. That mountain is the site of several telecommunications towers that serve the metropolitan Denver area. The Federal Communications Commission ordered that all television stations in the United States convert from analog to digital signals, and Denver's television stations wished to erect a new 730-foot tower on the mountain. This was opposed by the City, homeowner associations and the Colorado School of Mines for reasons including concerns about the health impact of radiation emissions, interference with the operation of equipment at the university, and damage to property values. The Board approved the tower following public hearings, leading to this litigation. I issued several orders over the course of this case. I am including an

order issued May 4, 2005, because it was the first substantive order and is representative of other orders that followed.

Counsel for the Plaintiff: David S. Williamson  
1650 38<sup>th</sup> St., #103W  
Boulder, CO 80301  
Telephone: (303)443-3100

Counsel for Defendant Board: Patricia W. Gilbert  
Eric Butler  
100 Jefferson County Pkwy., #5500  
Golden, CO 80401  
Telephone: (303) 271-8900

Counsel for Homeowners: Deborah Carney  
21789 Cabrini Boulevard  
Golden, CO 80401  
Telephone: (303) 526-9666

Counsel for the Tower Developer: David W. Stark  
1700 Lincoln Street, #3200  
Denver, CO 80203  
Telephone: (303) 607-3753

7. *People v. Armijo*, No. 04CR3211 (2004 to 2007) (appellate opinion is reported at 2010 WL 2106552 (Colo. App. May 27, 2010).

Among several murder cases over which I have presided, *Armijo* involved unusual questions of both fact and law. The defendant confessed to stabbing and killing his girlfriend but he pled not guilty by reason of insanity, arguing that he suffered from a psychosis resulting from long-term use of methamphetamine. His contention was that because he did not know that such drug use would cause psychosis, it amounted to “involuntary intoxication” and that this psychosis, coupled with pre-existing mental illness, rendered him unable to distinguish right from wrong when the act occurred. Alternatively, he argued that the court improperly imposed an NGRI plea over his objection. I declined to instruct the jury on his theory, and he was convicted. His conviction was affirmed by the Court of Appeals.

Counsel for the People: Bryan Cook  
500 Jefferson County Parkway  
Golden, CO 80401  
Telephone: (303) 271-6800

Matt Maillaro  
915 10<sup>th</sup> Street  
Greeley, CO 80632  
Telephone: (970) 356-4010

Counsel for the Defendant: David R. Jones  
303 16<sup>th</sup> St., #200  
Denver, CO 80202  
Telephone: (303) 629-9700

Dorothea Reiff  
560 Golden Ridge Road, #10  
Golden, CO 80401  
Telephone: (303) 279-7841

8. *Kim v. The Grover Coors Trust*, 02CV441 (2002-2004) (copy of opinion attached).

This was a class action in which shareholders of a Coors company, Graphic Packaging International Corporation, alleged that several members of the Coors family breached fiduciary duties in connection with the sale of convertible preferred stock to a Coors family trust. It was a very complex case, tried to the court in January 2004. I found that the defendants did not breach fiduciary duties. With the exception of the award of costs, which was remanded for a hearing (and settled before the hearing), the decision was later affirmed on appeal. *Kim v. Grover C. Trust*, 179 P.3d 86 (Colo. App. 2007).

Counsel for Plaintiff: John F. Harnes  
Gregory E. Keller  
964 3<sup>rd</sup> Avenue, 7<sup>th</sup> Floor  
New York, NY 10155-0798  
Telephone: (516) 773-6090

Counsel for Defendants: Thomas C. Bell  
1550 17<sup>th</sup> Street, #500  
Denver, CO 80202  
Telephone: (303) 892-747

9. *People v. Riggan*, No. 97CR1006 (1999) (copy of per curiam opinion attached).

From 1995 to 2002, Colorado used a three-judge panel system to determine whether to impose the death penalty in first degree murder cases where that penalty was sought. The district judge who presided over the guilt phase of the trial plus two district judges selected by lot

comprised the panel. Shortly after I was sworn in as a district judge in 1998 I was randomly selected and appointed by the Chief Justice to the first three-judge panel to hear and decide a death penalty case. The jury in the guilt phase did not convict on murder after deliberation; it convicted only on felony-murder. Following a penalty-phase trial, I wrote the per curiam opinion imposing a sentence of life without parole.

Counsel for People: Dennis Hall (now Hon.)  
100 Jefferson County Parkway  
Golden, CO 80401  
Telephone: (303) 271-6150

Counsel for Defendant: Dennis W. Hartley  
1974 South 8<sup>th</sup> Street, #5  
Colorado Springs, CO 80905  
Telephone: (719) 635-5521

10. *People v. Page*, No. 99CR2029 (2001) (copy of panel opinion including my concurring opinion that begins at page 28 attached).

I was appointed to a second three-judge death penalty panel in 2001. The defendant had been convicted in the Denver District Court of a brutal rape and murder and I was appointed to the three-judge panel presiding over the penalty phase. My two colleagues on the panel concluded that the case was not appropriate for the death penalty. I disagreed, and wrote separately that in view of the “circumstances that are repugnant to any sense of decency and humanity that I can muster within me” I felt that the defendant deserved the death penalty. But I credited compelling physical evidence of brain damage that showed the defendant to have severely limited ability to control impulses, and so I concurred in the result with my colleagues.

Counsel for the People: Philip A. Brimmer (now Hon.)  
901 19<sup>th</sup> Street  
Denver, CO 80294  
Telephone: (303) 335-2794

Counsel for the Defendant: James A. Castle  
1544 Race Street  
Denver, CO 80206  
Telephone: (303) 675-0500

Co-counsel for the Defendant: Randolph C. Canney  
1733 High Street  
Denver, CO 80218  
Telephone: (303) 388-5014

- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *Fleming v. Stone*, 00CV884 (copy of “Order Following In Camera Review – No. 1,” April 24, 2000, attached).

Counsel for Plaintiffs: Barry K. Arrington  
7340 East Caley Avenue, #360  
Centennial, CO 80111  
Telephone: (303) 205-7870

Counsel for Defendants: Lily Oeffler (now Hon.)  
100 Jefferson County Parkway  
Golden, CO 80401  
Telephone: (303) 271-6110

2. *Fleming v. Stone*, No. 00CV884 (copy of “Order Following In Camera Review – No. 8,” May 22, 2001, attached). My order was reversed by the Court of Appeals *sub nom Denver Post Corp. v. Cook*, 104 P.3d 293 (Colo. App. 2004). The Colorado Supreme Court *sub nom Harris v. Denver Post Corp.*, 123 P.3d 1166 (Colo. 2005), reversed the Court of Appeals (although it reached different conclusions than my opinion).

Counsel for the Plaintiff: Thomas B. Kelley  
Steven D. Zansberg  
1888 Sherman Street, #370  
Denver, CO 80203  
Telephone: (303) 376-2410

Counsel for the Defendant (Sheriff): Lily Oeffler (now Hon.)  
100 Jefferson County Parkway  
Golden, CO 80401  
Telephone: (303) 271-6110

Counsel for Intervenors (Harrises): C. Michael Montgomery  
1775 Sherman Street, 21<sup>st</sup> Floor  
Denver, CO 80203  
Telephone: (303) 592-6600

Counsel for Intervenors (Klebolds): Franklin D. Patterson  
5613 DTC Parkway, #400  
Greenwood Village, CO 80111  
Telephone: (303) 741-4539

3. *Kim v. The Grover Coors Trust*, 02CV441 (February 18, 2004) (copy attached).

Counsel for Plaintiff: John F. Harnes  
Gregory E. Keller  
964 3<sup>rd</sup> Avenue, 7<sup>th</sup> Floor  
New York, NY 10155-0798  
Telephone: (516) 773-6090

Counsel for Defendants: Thomas C. Bell  
1550 17<sup>th</sup> Street, #500  
Denver, CO 80202  
Telephone: (303) 892-9400

4. *DeHererra v. Equity Link*, No. 03CV3356 (December 30, 2005) (copy attached).

Counsel for Plaintiff: John F. Head  
1860 Blake Street, #300  
Denver, CO 80202  
Telephone: (303) 623-6000

Counsel for Defendants: Bobee J. Musgrave  
1700 Lincoln Street, #4100  
Denver, CO 80202  
Telephone: (303) 861-7000

Co-counsel for Defendants: Joseph A. Murr  
410 17<sup>th</sup> Street, #2400  
Denver, CO 80202  
Telephone: (303) 534-2277

5. *Cornerstone Group XXII, LLC v. Wheat Ridge Urban Renewal Authority*, 04CV3513 (December 30, 2004) (copy attached)

Counsel for Plaintiff: Thomas D. Leland  
370 17<sup>th</sup> Street, #4650  
Denver, CO 80202  
Telephone: (720) 931-3025

Counsel for Defendants: Steven J. Dawes  
1512 Larimer Street, #300  
Denver, CO 80202  
Telephone: (303) 298-1601

Co-counsel for Defendants: Corey Y. Hoffmann  
1350 17<sup>th</sup> Street, #450  
Denver, CO 80202  
Telephone: (303) 825-6444

6. *Colorado v. General Steel Domestic Sales, LLC*, No. 04CV143 (June 4, 2004) (copy attached).

Counsel for Plaintiff: Marie E. Berkenkotter (now Hon.)  
1777 6<sup>th</sup> Street  
Boulder, CO 80306  
Telephone: (303) 441-3748

Co-counsel for Plaintiff: Jay B. Simonson  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, CO 80203  
Telephone: (303) 866-4500

Counsel for Defendant: Sean R. Gallagher  
1200 17<sup>th</sup> Street, #1500  
Denver, CO 80202  
Telephone: (303) 454-2415

Co-counsel for Defendant: Robert N. Miller  
1899 Wynkoop Street, #700  
Denver, CO 80202  
Telephone: (303) 291-2313

7. *City of Golden v. Jefferson County*, No. 03CV3045 (copy of May 4, 2005 order attached).

Counsel for the Plaintiff: David S. Williamson  
1650 38<sup>th</sup> St., #103W  
Boulder, CO 80301  
Telephone: (303) 443-3100

Counsel for Defendant Board: Eric Butler  
100 Jefferson County Pkwy., #5500  
Golden, CO 80401  
Telephone: (303) 271-8900

Counsel for Homeowners: Deborah Carney  
21789 Cabrini Boulevard  
Golden, CO 80401  
Telephone: (303) 526-9666



Counsel for the Tower Developer: David W. Stark  
1700 Lincoln Street, #3200  
Denver, CO 80203  
Telephone: (303) 607-3753

8. *Borders v. Aspen Equestrian Estates, LLC*, No. 08CV3026 (March 24, 2009 and March 16, 2010) (two-part opinion attached)

Counsel for Plaintiffs: Michael L. O'Donnell  
Carolyn J. Fairless  
Steven M. Kelso  
1801 California Street, #3600  
Denver, CO 80202  
Telephone: (303) 244-1800

9. *People v. Riggan.*, No. 97CR1006 (April 16, 1999) (copy attached).

Counsel for People: Dennis Hall (now Hon.)  
100 Jefferson County Parkway  
Golden, CO 80401  
Telephone: (303) 271-6150

Counsel for Defendant: Dennis W. Hartley  
1974 South 8<sup>th</sup> Street, #5  
Colorado Springs, CO 80905  
Telephone: (719) 635-5521

10. *People v. Page*, No. 99CR2029 (March 2, 2001) (copy attached -- concurring opinion).

Counsel for the People: Philip A. Brimmer (now Hon.)  
901 19<sup>th</sup> Street  
Denver, CO 80294  
Telephone: (303) 335-2794

Counsel for the Defendant: James A. Castle  
1544 Race Street  
Denver, CO 80206  
Telephone: (303) 675-0500

Co-counsel for the Defendant: Randolph C. Canney  
1733 High Street  
Denver, CO 80218  
Telephone: (303) 388-5014

Counsel for Defendants:

Kenneth D. Noel  
202 North Ave., #235  
Grand Junction, CO 81501  
Telephone: (970) 589-6444

- e. list of all cases in which certiorari was requested or granted.

I am not aware of any case over which I presided in which certiorari was requested or granted by the Supreme Court of the United States.

- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

Supreme Court:

*People v. Shari*, 204 P.3d 453 (Colo. 2009) (reversed order disqualifying public defender which had been based on my finding of a conflict of interest; Rule 21 proceeding)

*Harris v. Denver Post Corp.*, 123 P.3d 1166 (Colo. 2005) (reversed order denying access by media to certain records seized from Harris and Klebold homes pursuant to search warrant)

*People v. Dunaway*, 88 P.3d 619 (Colo. 2004) (reinstated my judgment after reversal by Court of Appeals, finding that my error had been harmless)

Court of Appeals:

*Coley v. Jefferson County School District R-1*, No. 08CA369 (Slip Op. November 13, 2008) (reversed order finding that governmental immunity did not bar claims)

*Tsoupakis v. Neidich*, No. 06CA1550 (Slip Op. March 13, 2008) (affirming dismissal of complaint for lack of personal jurisdiction as to one defendant but reversing as to the other defendant)

*Novak v. Craven*, 195 P.3d 1115 (Colo. App. 2008) (remanding for award of costs but affirming on merits)

*People v. Chavez*, No. 06CA444 (Slip Op. December 20, 2007) (reversing revocation of probation and remanding for further advisement)

*Davis v. Hill*, No. 06CA1906 (Slip Op. December 6, 2007) (reversing summary judgment for plaintiffs; following trial, court entered judgment for plaintiffs, which was affirmed on second appeal)

*People v. Smith*, No. 04CR634 (Slip Op. May 17, 2007) (reversing conviction on one count that merged with another count but affirming judgment in all other respects)

*People v. Rickman*, 155 P.3d 399 (Colo. App. 2006), *cert. granted* 2007 WL 93093 (Jan. 16, 2007) (reversing conviction for violation of bail bond condition, because condition was established by pretrial services rather than county court), *aff'd in part, rev'd in part*, *People v. Rickman*, 178 P.3d 1212 (Colo. 2008) (reinstating a portion of my ruling)

*People v. Renander*, 151 P.3d 657 (Colo. App. 2006) (reversed order reassembling 47 counts of sexual exploitation of children into 36 counts)

*People v. Walters*, 148 P.3d 331 (Colo. App. 2006) (plain error not to strike sua sponte certain remarks of prosecutor in closing argument notwithstanding absence of objection by defendant)

*People v. Bowers*, 04CA1135 (Slip Op. June 22, 2006) (reversing denial of post-conviction motion and remanding for hearing)

*People v. Louie*, 03CA46 (Slip Op. December 15, 2005) (vacating convictions on certain counts, affirming on other counts)

*Haas v. Haas*, 03CA1120 (Slip Op. December 23, 2004) (reversing order that parties pay children's future orthodontia expenses as part of their child support obligation; affirmed in all other respects)

*Reis v. Reis*, 03CA1317 (Slip Op. October 21, 2004) (reversing maintenance and child support calculations due to double counting of one expense item; otherwise affirmed)

*People v. Bowman*, No. 02CA1200 (Slip Op. September 23, 2004) (reversing conviction on one count due to inadequate advisement regarding right to counsel at pretrial motions hearing; otherwise affirmed)

*Department of Transportation v. Auslaender*, 94 P.3d 1239 (Colo. App. 2004) (reversing portion of order enjoining CDOT from approving construction of deceleration lane without a court hearing)

*Branch v. Colorado Department of Corrections*, 89 P.3d 496 (Colo. App. 2003) (court erred in failing to award costs to inmate who was prevailing party in successful civil suit against DOC)

*Linke v. Outdoor Systems, Inc.*, No. 01CA858 (Slip. Op. August 21, 2003) (reversing judgment granting specific performance to property owner against holder of easement for outdoor billboards)

*People v. Huerta-Lozano*, No. 00CR2908 (Slip Op. July 10, 2003) (reversal of conviction because court improperly denied defendant's challenge of a prospective juror for cause)

*Blesch v. Denver Publishing Co.*, 62 P.3d 1060 (Colo. App. 2002) (reversing order denying the Rocky Mountain News access to a portion of an autopsy report)

*In re Custody of C.M.*, 74 P.3d 342 (Colo. App. 2002) (remanding order granting visitation rights to child's grandmother for further factual findings)

*In re Marriage of Mitchell*, 55 P.3d 183 (Colo. App. 2002) (concerning method of enforcing an attorney's lien)

*Jaimes v. State Farm*, 53 P.3d 743 (Colo. 2002) (court originally affirmed finding that policy exclusion was valid under then existing law but later reversed based upon intervening Supreme Court decision changing law)

*Klebold v. Search and Seizures Conducted at 9351 Cougar Road, Littleton, Colorado*, No. 01CA1240 (Slip Op. May 16, 2002) (reversing denial of return of property seized under search warrants and remanding for further hearing)

*People v. Bowers*, No. 00CA1181 (Slip Op. April 11, 2002) (reversing conviction on vehicular assault count but affirming in all other respects)

*Florence v. Pool*, No. 01CA189 (Slip Op. March 21, 2002) (reversing order affirming magistrate's extension of a temporary injunction)

#### Additional Cases:

There are two cases where the Court of Appeals reversed in part but the Supreme Court reinstated my judgment: *Cornerstone Group XXII, LLC v. Wheat Ridge Urban Renewal Authority*, 151 P.3d 601 (Colo. App. 2006), *rev'd Wheat Ridge Urban Renewal Authority v. Cornerstone*, 176 P.3d 737 (Colo. 2007); *People v. Manzo*, 144 P.3d 551 (Colo. 2006).

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

All of my orders and opinions are unpublished. Each order and opinion is placed in the files of the court clerk.

- h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

*People v. Anderson*, No. 00CR933 (October 23, 2001) (copy attached)

*People v. Hererra*, No. 03CR370 (August 29, 2003) (copy attached)

*People v. Valdez*, No. 98CR3147 (August 21, 2006)

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have not sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

For the first five or six years on the bench I automatically recused myself sua sponte in any case involving my former law firm. Since that time I have not automatically recused, but I have always disclosed my prior relationship with the firm and invited all parties to notify my division clerk if they would like for me to recuse. I have not kept a record of those cases. I estimate that there have been half a dozen such cases.

I recused myself sua sponte in a case in which one of the lawyers was the subject of a complaint to the Office of Attorney Regulation Counsel that I had filed in a previous year. I do not have a record of the case.

I have recused myself in three cases in which a particular attorney was counsel of record, because I am concerned that I might be prejudiced based upon his behavior both in court and with employees in our Clerk's Office. I believe that one of those recusals might have been on a motion by the attorney. The others were sua sponte. I do not have a record of the cases.

As chief judge, I have disqualified our entire bench in a case involving criminal charges filed against a temporary employee in the clerk's office; a case involving the homicide death of a current district judge's stepson; a pro se suit against the First Judicial District by a criminal defendant who objected to probable cause findings made by a district judge at a preliminary hearing; a case in which a county court judge received a DUI; a suit against a law firm in which one of the present district judges formerly was a partner; and a case in which a county court judge was listed as a witness.

I recently recused, on the motion of the defendant in a criminal case, after I refused to impose a probationary sentence to which the parties had agreed and to which I had tentatively agreed. I declined to impose the sentence after I received a report from our Probation Department indicating that it did not wish to supervise the individual, because he was considered a community safety risk. The defendant meanwhile had been debriefed by the prosecution, allegedly due to his belief that the court would impose a probationary sentence. The prosecution did not request recusal, but I decided in the circumstances that I could not judge the parties' sentencing arguments objectively. The case is *People v. Giesen*, No. 09CR75.

I do not recall any other situation in which I have recused or disqualified myself or been asked to recuse or disqualify myself.

**15. Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Town Prosecutor, Town of Bow Mar, Colorado, appointed by the late Mayor Mary Carter (1994 – 1998).

Jefferson County Corrections Board, appointed by Board of County Commissioners, Jefferson County, Colorado; the present Board of County Commissioners members are Kathy Hartman, J. Kevin McCasky and Faye Griffin. I have served as a board member since 1999 and as vice chair since 2004.

I have not been a candidate for elective office, nor have I been an unsuccessful nominee for an appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I am a registered Democrat. I have not held an office in or rendered services to any political party or organization. I have not played a role in a political campaign.

**16. Legal Career:** Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:

- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1972 – 1998  
Holland & Hart  
555 17<sup>th</sup> Street  
Denver, Colorado 80202  
Partner (1978-1998)  
Associate (1972-1978)

1994 – 1998  
Town of Bow Mar, Colorado  
5191 Bow Mar Drive  
Bow Mar, Colorado 80123  
Town Prosecutor (part-time)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have not served as a mediator or arbitrator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

My practice focused on civil litigation. As an associate attorney I took whatever cases were assigned, usually as a junior attorney on the case, ranging from environmental and labor cases to all manner of commercial disputes. As a partner I continued a broad commercial litigation practice. However, in approximately 1982 I began to develop a tort practice for the law firm, including personal injury, products liability, and professional negligence. In 1988 I handled a significant insurance coverage case on behalf of a client whose business had become a Superfund cleanup site. That led to a number of similar cases, and insurance coverage work became a significant part of my practice from 1988 to 1998.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Typical clients in the first six years were natural resources companies (mining, oil and gas) with environmental problems; corporations with labor relations problems, wrongful discharge claims; and whatever else was assigned by partners with whom I worked. From 1979 through 1981, while in my then-firm's new Washington, D.C. office, I continued my commercial litigation practice out of Colorado but added D.C.-based federal district and court of appeals cases on behalf of large mining companies. From 1982 through 1998 I continued with a commercial litigation practice on behalf of corporate clients but developed a plaintiff's contingency fee practice as well. The clients were individuals who had sustained injuries from accidents, defective products or professional negligence. From 1988 through 1998 perhaps the majority of my clients were companies with significant environmental problems who were seeking insurance coverage for cleanup work under comprehensive general liability policies.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

- i. Indicate the percentage of your practice in:

- |                             |      |
|-----------------------------|------|
| 1. federal courts:          | 60 % |
| 2. state courts of record:  | 39 % |
| 3. other courts:            |      |
| 4. administrative agencies: | 1%   |



ii. Indicate the percentage of your practice in:

- |                          |     |
|--------------------------|-----|
| 1. civil proceedings:    | 99% |
| 2. criminal proceedings: | 1%  |

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I estimate that I tried between 50 and 75 cases, nearly always as either sole counsel or chief counsel.

i. What percentage of these trials were:

- |              |      |
|--------------|------|
| 1. jury:     | 65 % |
| 2. non-jury: | 35 % |

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not argued a case in the Supreme Court of the United States. I participated in the preparation of an amicus brief on a petition for a writ of certiorari in approximately 1973 and probably have had some role in the preparation of one or two other certiorari petitions, but I have no record of them.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *FMC Corporation v. Liberty Mutual Ins. Co. and Lloyds of London*, No. 643058, Superior Court, Santa Clara County, California, Hon. Frank Cliff, 1994 to 1997.

I represented FMC Corporation in a series of four jury trials over a three-year period. FMC owned a number of chemical and insecticide plants in various states, all of which faced Superfund cleanups as a result of seepage from waste ponds and other environmental contamination that had occurred years earlier, generally in the 1940s through the 1960s. FMC's liability insurers denied coverage for the costs of the cleanups. I was the lead trial lawyer for FMC and worked with a staff of two junior lawyers, a paralegal, and a secretary. Each trial covered several FMC sites. The results varied, but in general, FMC received verdicts and recovered damages, collectively amounting to between \$20 and \$30 million.

Opposing Counsel:  
John M. Bentley  
1001 Marshall Street  
Redwood City, CA 94063  
Telephone: (650) 364-8200

David L. Suddendorf  
One Maritime Plaza, #2475  
San Francisco, CA 94111  
Telephone: (415) 834-3800

Peter J. Whalen  
Four Embarcadero Center, #1000  
San Francisco, CA 94111  
Telephone: (415) 981-5550

2. *Broderick Investment Co. v. Hartford*, No. 86-Z-1033, United States District Court for the District of Colorado, Hon. Zita Weinshienk, 1988 to 1993.

I was lead trial counsel for the plaintiff, which owned a former wood treatment plant that had become a Superfund site as a result of seepage of wood treating chemicals from an unlined waste pond. The case was first tried in 1989, resulting in what was then believed to be the first jury verdict in the country in favor of a policyholder against a liability insurer for cleanup of environmental damage. The case was reversed on appeal. 954 F.2d 601 (10th Cir. 1992). On retrial, we again received a multimillion dollar jury verdict.

Opposing Counsel:  
Thomas L. Roberts  
1660 Wynkoop, #800  
Denver, CO 80202  
Telephone: (303) 575-9390

3. *Zartman v. The TruGreen Companies, LLC*, Larimer County or Weld County District Court (approximately 1994).

This was a personal injury case in which I represented the plaintiff who lost her leg when the defendant's truck struck her motorcycle. It did not go to trial. I do not recall the judge assignment, as it settled before going before the court. I believe the case was filed in the early to mid 1990s. Despite my lack of recollection of these details, I include the case because of its significance to the client and my law firm. I was able to obtain a multimillion dollar settlement that provided lifelong care and financial stability for the client. My law firm agreed to reduce the percentage of the contingency fee to which it was entitled because the settlement was negotiated fairly early in the case, and the additional payment to the client helped her achieve the financial security she needed. That was a precedent that the firm was willing to consider in future cases if appropriate.

Opposing counsel:

Jonathan A. Cross

7100 East Belleview Avenue, #G-11

Greenwood Village, CO 80111

Telephone: (303) 333-4122

4. *Schmutz v. Boulder Community Hospital*, 83CV1164-5, Boulder County District Court, Hon. Murray Richtel, 1988 to 1992.

This was a product liability and medical negligence case. The plaintiff suffered a stroke when an electric drill being used to cut through his scalp to evacuate a subdural hematoma malfunctioned, causing the drill to plunge into the brain. The case was first tried in 1989, primarily by other counsel, resulting in a defense verdict. I took the case over on appeal. The Supreme Court reversed and remanded for a new trial. *Schmutz v. Bolles*, 800 P.2d 1307 (Colo. 1990). I tried the case and obtained a six-million dollar jury verdict. The case was later settled while on appeal.

Opposing Counsel:

Thomas N. Alfrey

999 18<sup>th</sup> Street, #1600

Denver, CO 80202

Telephone: (303) 292-2700

Paul D Cooper

1512 Larimer Street, #600

Denver, CO 80202

Telephone: (303) 607-0077

Paul E. Scott:  
1050 17<sup>th</sup> Street, #2500  
Denver, CO 80265  
Telephone: (303) 825-2700

5. *Westminster v. Shaw Heights*, Jefferson County, Colorado District Court, Hon. William Demoulin, 1990 to 1991.

I represented the City of Westminster, Colorado, a suburb of Denver. Water is a relatively scarce resource in Colorado and provokes considerable litigation. This case involved a dispute over the rates and the right of the City to terminate municipal water supply contracts. It was interesting in that it involved sophisticated ratemaking analysis, and it was highly important to the City's ability to conserve its water rights and to obtain a reasonable return on the amount it charged to out-of-City consumers. It was tried to the Court, resulting in a judgment in favor of the City. A later somewhat similar dispute between the same parties resulted in a judgment for the consumer.

Opposing Counsel:  
Richard L. Harring  
1700 Lincoln Street, #3800  
Denver, CO 80203  
Telephone: (303) 839-3910

6. *In re University Hills Fire*, Denver District Court, Hon. Warren Martin, 1986 to 1987.

I represented the manufacturer of a fluorescent light ballast located in a pharmacy that was said to be the source of a five-alarm fire that destroyed a major shopping center in Denver, Colorado. I was lead trial counsel. Our theory of defense, developed with the help of highly qualified electrical and fire source and origin experts, was that the ballast was not the cause of the fire; rather, the fire had started in another location within the shopping center. After spelling out the theory in our opening statement, supported by diagrams illustrating why the ballast could not have caused the fire, the case settled. Our client's insurance carrier contributed a nominal amount to the settlement, as other defendants paid the lion's share.

Opposing Counsel:  
Daniel W. Patterson  
145 Garland Street  
Denver, CO 80206  
Telephone: (303) 907-3546

L. Tyrone Holt  
1675 Broadway, #2100  
Denver, CO 80202  
Telephone: (303) 225-4221

7. *Scott v. University of Colorado Health Sciences Center*, Denver District Court, Hon. John McMullen, 1986 to 1987.

I represented the plaintiff in a medical malpractice case. My client had been in an automobile accident. Neurosurgeons diagnosed and treated a closed head injury. They did not diagnose that Mr. Scott had also sustained a dislocated and badly fractured hip. After a few days in the Denver hospital, he was transported to his local hospital in Texas, where doctors discovered the hip injury. During surgery an infection developed, ultimately resulting in a hip replacement and the loss of four inches of length in the impacted leg. The theory of the case was that the neurosurgeons were negligent in failing to conduct a complete physical examination that would have discovered the hip injury at a time when it could have been successfully treated. I was lead trial counsel for the plaintiff. The jury rendered a verdict for the defendant. The Court of Appeals affirmed. My petition for a writ of certiorari to the Colorado Supreme Court was granted on the issue of whether Colorado would recognize the doctrine of "loss of a significant chance" as a viable theory of causation and damages. However, after oral argument, the Court retroactively denied certiorari as improvidently granted.

Opposing Counsel:  
Mark A. Fogg  
1050 17<sup>th</sup> Street, #2500  
Denver, CO 80265  
Telephone: (303) 825-2700

Kevin J. Kuhn  
1801 California Street, #3600  
Denver, CO 80202  
Telephone: (303) 244-1800

8. *Bertrand v. BMX, Inc.*, United States District Court for the District of Colorado, Hon. Alfred A. Arraj, 1984 to 1985.

This was the first plaintiff's personal injury case I took to trial. The client was a teenage boy who was riding a motocross bicycle when, during a jump, the front wheel fell off, causing him to crash and sustain a closed head injury. Our theory was that the front wheel retention device had been improperly designed and had failed, thus resulting in the accident. The defense was that the wheel had come off as a result of

the accident, and that there was nothing defective or unreasonably dangerous about its design. A key piece of evidence was a policeman's testimony that he observed two marks in the dirt that were consistent with the impact of the front forks of a bicycle. The case settled for several hundred thousand dollars on the third day of trial.

Opposing Counsel:  
Geoffrey S. Race  
1700 Broadway, #1020  
Denver, CO 80290  
Telephone: (303) 830-1212

9. *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982).

I represented Asarco, which wished to conduct mining operations in northwest Montana. The Sierra Club opposed the operation because of concern about its impact on a small population of grizzly bears in the area. The legal issues concerned the National Environmental Policy Act and the Endangered Species Act. We obtained an order of summary judgment in the district court, Hon. Gerhard A. Gesell, 510 F. Supp. 1186, which the U.S. Court of Appeals for the District of Columbia Circuit affirmed on appeal. The case established important principles under the two federal statutes and permitted the mining operation.

Opposing Counsel:  
Karin P. Sheldon  
2260 Baseline Road  
Boulder, CO 80302  
Telephone: (303) 444-1888

10. *Mazurek v. Nielsen*, 599 P.2d 269 (Colo. App. 1979).

My client was a homeowner who was defrauded by a seller and the involved realtors. The jury entered a verdict for the homeowner that was not huge, although it was substantial in the eyes of the client and substantial for the location (Routt County, Hon. Donald Lorenz) at the time. The judgment was reversed on appeal based upon a faulty jury instruction but later settled without a retrial.

Opposing counsel:  
James C. Vaughters  
5981 South Lima Street  
Englewood, CO 80111  
Telephone: (303) 771-7103

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

While in private practice, 1972 to 1998, I focused on a combination of commercial litigation and personal injury litigation, representing both plaintiffs and defendants. I opened the Washington, D.C. office of my law firm. I served on a number of committees within the firm, including being a member of its Management Committee and Chairperson of its Litigation Department. My pro bono activities focused on representation of individuals in personal injury claims and occasional criminal defense and family law matters.

I also served as the Town Prosecutor for my town, a suburb of Denver, prosecuting municipal ordinance violations on a pro bono basis. I was actively involved in teaching trial advocacy at the National Institute for Trial Advocacy, the University of Colorado Law School, and within my law firm. I was one of the founders of the firm's in-house graphics and in-house trial consultant departments. I participated in bar association committees, but my primary office was as the co-chair for a period of three years of the Insurance Coverage Committee of the Litigation Section of the American Bar Association. This was a large committee of some 1500 to 2000 members at the time.

As a district judge I have handled a mixed docket of criminal (felony), civil and domestic relations cases. In 2003 I was appointed Chief Judge by the Chief Justice of the Colorado Supreme Court, thereby taking on substantial administrative responsibilities in addition to a full case load. I have served on several committees within the Judicial Branch, most recently a committee that reviewed, modified and proposed to the Supreme Court Colorado's version of the Model Code of Judicial Discipline.

I have been actively involved in numerous community activities, many of which involve the criminal justice system, but others that involve the public schools and a program to introduce competitive debating into certain low income, inner city schools in Denver. Perhaps the most prominent of those activities is the Criminal Justice Strategic Planning Committee, which I have chaired since January 2004. This committee is comprised of key individuals in the criminal justice community (District Attorney, head Public Defender, private defense bar, Sheriff, Police Chiefs of all cities within Jefferson County, Chief Probation Officer, County Commissioners, Superintendent of Schools, local politicians, Department of Corrections, and lower court judges). The committee has a planning staff, and over the years it has implemented creative procedures to improve our criminal justice system that are receiving national attention. I have also maintained good working relationships with our local bar association and with the state legislators from Jefferson County.

I have performed no lobbying activities on behalf of any client or organization.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I served on the faculty of the mid-term trial advocacy course at the University of Colorado Law School in 1984, 1985, 1987, 1989, 1991, and 1998. I have twice made a presentation to a Criminal Procedure class at the University of Colorado Law School (Prof. William T. Pizzi) on the subject of plea bargaining. The first of these was on March 7, 2002. The second class was probably in 2003 or 2004. On June 21, 2010 I presented a one and one-half hour "lecture" on motions practice and trials to the court to a "Principles of Persuasion" class at the University of Denver Law School. I am attaching the notes I used for the presentation.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I will receive payments, upon retirement, from the Colorado Public Employees Retirement Association.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.



**24. Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I know of nothing that would present a potential conflict of interest.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If any matter were to arise that involved an actual or potential conflict of interest, I would handle it by careful and diligent application of the Code of Conduct for United States Judges as well as other relevant Canons and statutory provisions.

- 25. Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

During my years in practice I handled some Thursday Night Bar (Metro Volunteer Lawyers) appointments (domestic and civil cases). I took occasional appointments in criminal cases in both Denver and Adams counties. I took one plaintiff's employment discrimination case at the request of United States District Judge Sherman Finesilver that ended up being tried and ultimately resolved in the Tenth Circuit. *Blondo v. Bailar*, 548 F.2d 301 (10th Cir. 1977). In addition, I represented a variety of Holland & Hart employees in all manner of litigation matters where they could not afford counsel over the years. I did a great deal of teaching, speaking and writing. I served as the Town Prosecutor for my town. I estimate that I devoted an average of 50-100 hours per year to pro bono activities of one kind or another.

**26. Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

In 2009 United States Senators Mark Udall and Michael Bennet appointed a bipartisan selection commission to recommend candidates for two vacancies on the District Court. I submitted an application, was interviewed by the commission on May 15, 2009, was among applicants recommended to the two Senators, and was interviewed by Senators Udall and Bennet on June 12, 2009. Later in June 2009 I was advised that I was one of six applicants whose names were being sent to the White House by the two Senators. On June 8, 2010, Senator Udall's office informed me that I would be hearing from the White House.

Since June 10, 2010, I have been in contact with pre-nomination officials at the Department of Justice. On July 30, 2010, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice. On September 29, 2010, the President submitted my nomination to the Senate.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

AFFIDAVIT

I, Richard Brooke Jackson, do swear  
that the information provided in this statement is, to the best  
of my knowledge, true and accurate.

10-1-10

(DATE)

Richard Brooke Jackson

(NAME)

Judith A. Kinney

(NOTARY)

Commission 11/20/2012

[REDACTED]

January 5, 2011

Hon. Patrick J. Leahy  
Chairman, Committee on the Judiciary  
United States Senate  
Washington DC 20510

Dear Mr. Chairman:

I have reviewed the Questionnaire for Judicial Nominees and supplemental materials dated October 1, 2010 that were filed with the Senate Judiciary Committee following my nomination for the United States District Court for the District of Colorado. With the following exceptions, I certify that the information contained in my prior submissions is, to the best of my knowledge, true and accurate:

Question 12(d):

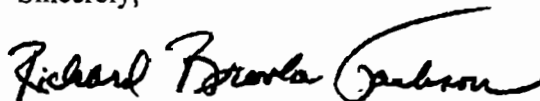
Panelist, Winning Trial Tactics and Skills, section on "Rapport with Judge and Jury," sponsored by Colorado Bar Association and American College of Trial Lawyers, November 12, 2010. My only written material was a copy of my article, "Joe DiMaggio and You," 37 The Colorado Lawyer 65 (April 2008)(copy previously supplied).

Question 13(f) (Court of Appeals opinions):

*People v. Jones*, No. 07CA1984 (Slip. Op. December 2, 2010)(affirming judgment of conviction and sentence to life in prison without parole, one victim, but remanding for resentencing on a separate conviction of attempted first degree murder, different victim)(copy enclosed)

I am also forwarding an updated Net Worth Statement and Financial Disclosure Report as requested in the Questionnaire. I thank the Committee for its consideration of my nomination.

Sincerely,



Richard Brooke Jackson

CC: Hon. Charles Grassley

07CA1984 Peo v. Jones 12-02-2010

COLORADO COURT OF APPEALS

---

Court of Appeals No. 07CA1984  
Jefferson County District Court No. 05CR4231  
Honorable R. Brooke Jackson, Judge

---

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kenji Myricks Jones,

Defendant-Appellant.

---

JUDGMENTS AFFIRMED, SENTENCE VACATED,  
AND CASE REMANDED WITH DIRECTIONS

Division III  
Opinion by JUDGE DAILEY  
J. Jones and Lichtenstein, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**  
Announced December 2, 2010

---

John W. Suthers, Attorney General, John T. Lee, Assistant Attorney General,  
Denver, Colorado, for Plaintiff-Appellee

Law Offices of Jonathan S. Willett, Jonathan S. Willett, Denver, Colorado, for  
Defendant-Appellant

Defendant, Kenji Myricks Jones, appeals the judgments of conviction entered on jury verdicts finding him guilty of first degree murder, attempted first degree murder, two counts of aggravated robbery, three counts of possession of a controlled substance, and possession of more than eight ounces of marijuana. We affirm the judgments of conviction, vacate defendant's sentence for attempted murder, and remand for resentencing on that conviction.

### *I. Background*

Defendant was charged as a result of an incident in which he and two other men allegedly used guns to forcibly enter the Arvada home of two of their long-time friends, one of whom was a drug dealer. Inside the home, the three men stole drugs (including ecstasy, mushrooms, cocaine, and marijuana), money, and other valuables from the occupants, taunted and terrorized them with a knife, and, ultimately, shot them both in the head. The female occupant died; the male survived and testified at trial.

In addition to the male victim's testimony, the prosecution also presented evidence that (1) defendant and the two other men were seen together talking, in a secretive manner, at a bar a few hours

before the robbery; (2) defendant owned a gun; (3) after the robbery, defendant stored white plastic bags filled with drugs at a coworker's home; (4) defendant tested positive for gunshot residue when he was arrested a day after the incident; and (5) latex gloves found in a trash can in defendant's front yard had both his and the female victim's DNA on them.

In his defense, defendant asserted that (1) the surviving victim identified him and the other two men as perpetrators of the incident to divert attention away from the fact that he (the surviving victim) shot the female victim in an act of domestic violence; (2) defendant was inebriated when he left the bar that evening (and thus, presumably, did not have sufficient mental or physical ability to assist in the episode); (3) gunshot residue is easily transferable; and (4) the DNA found on the gloves was from a time, three days before the incident, when defendant was with both victims.

The jury convicted defendant of the numerous charges against him, and the trial court sentenced him to an aggregate term of life imprisonment without the possibility of parole, plus eighty years.

## *II. Substitution of Counsel*

Defendant contends that the trial court abused its discretion when it failed to appoint substitute counsel, despite an apparent breakdown in communications between himself and his attorney. We disagree.

### *A. Facts*

Four months before a date scheduled for trial (and approximately ten months before trial actually commenced), defendant filed a pro se request for substitute counsel and had his attorney file a motion to withdraw from the case. In the letter accompanying his pro se motion, defendant alleged, as grounds for a change in counsel, that

- his attorney had made a comment which, in defendant's view, reflected a lack of belief in his cause and raised, in defendant's mind, the question as to whether the attorney would or could provide proper representation on his behalf;
- his attorney had become upset when defendant expressed his desire to have him dismissed and again when defendant asked "why [he] had not received a copy of discovery";



- he was unable to contact his attorney because (1) the attorney would not accept collect calls, and (2) the attorney's suggestion that he communicate with him through defendant's mother was impractical, given his mother's limited financial ability to receive collect calls and her difficulty, due to advanced age, in repeating important questions or answers; and
- in the previous five months, he had only seen or spoken to his attorney "a total of three times other than in court, . . . and that was only for a minute or two."

Correspondingly, at defendant's request, his attorney filed a motion to withdraw, in which he asserted that "the attorney-client relationship has deteriorated to the point that counsel can no longer meaningfully represent the defendant," because of "numerous and protracted disagreements . . . regarding strategy and litigation in this case."

Within days of the filing of these motions, the trial court – through a different judge – conducted a hearing at which defendant, given the opportunity to elaborate on his complaints, said only, "I

haven't received discovery[,] . . . basically I'm left in the dark[,] . . . [and] I feel like he's not going to represent me or fight for me." In response to defendant's comments and what appeared to the court to be a normal "communication issue," the attorney

- confirmed that he would "[a]bsolutely" work on finding a workable way of communicating with defendant;
- stated that defendant had, while in jail, viewed on DVD most of the discovery, until he said "he didn't want to see any more";
- acknowledged that there was a time in which he had not communicated with defendant, but explained that during that time he was attempting to negotiate a plea, which depended, in part, on input from another prosecutor's office, input which was not forthcoming for months: "In that time I really had nothing to talk about with [defendant] because we were awaiting . . . input" from the other prosecutor's office; and,
- opined that defendant's disappointment with him stemmed from the "harsh" plea offer that was ultimately made in the case, and that he feared he and defendant would not have a

productive working relationship in the future because of defendant's deterioration of trust in him.

Based on what it had heard, the court denied the motions for withdrawal and substitution for counsel, finding that (1) there was no animosity between defendant and his attorney; (2) "there's no indication of any ethical problem" between defendant and his attorney, (3) "there is no indication . . . that [the attorney] is not going to be able to provide effective assistance of counsel," and (4) the extent of any future communication, or whether there would be a breakdown in communication, "was solely within the province of [defendant] to determine."

Approximately seven weeks later, defendant's attorney filed a second motion to withdraw from the case, repeating the contents of his earlier motion, but adding that, because of his disagreements with defendant, "it has become impossible for counsel to effectively represent" defendant and "there has been a complete breakdown in communications" between them.

The trial court - again acting through the different judge - conducted a hearing on the motion. At the hearing, defendant said

that he had filed a grievance against his attorney with the supreme court. When asked by the trial court whether it was "because of lack of contact or lack of ability," defendant responded, "I'm not happy with his performance. I don't think he's representing me the way he should." Later, he affirmed, as "correct," the court's understanding that he had "issues communicating and [he] did not like the course that [his] case was taking with [his] current attorney." After the court warned defendant that it would not change counsel based on defendant's refusal to talk to or cooperate with his attorney, defendant stated that he was "not happy with the representation" because, unlike his codefendants, he did not have an investigator assigned to his case. He indicated that he had talked with his attorney, but only for a few minutes, two or three weeks earlier.

In response to defendant's comments, his attorney said that

- he had hired an experienced investigator, who had indeed met with defendant;
- a co-counsel had been appointed in the case;

- defendant had sent him a letter asking him to not visit defendant anymore; and,
- the problem, as he saw it, was that defendant had interpreted counsel's request for defendant's input as an indication that counsel did not know what he was doing.

During the course of the hearing, the court determined that (1) there was not an ethical issue other than that defendant "was unhappy about the communication and with what he perceives as being [the] planned defense in the case" and (2) this was insufficient justification for requiring a substitution of counsel. Defendant agreed that he would meet and cooperate with his lawyers and investigator.

Defendant made no further complaint about his attorneys for the remainder of time leading up to trial, that is, for eight months.

#### *B. General Principles and Standard of Review*

"An attorney's motion to withdraw, as well as a defendant's motion to discharge an attorney, are matters addressed to the sound discretion of the trial court, whose ruling will not be disturbed on review absent a clear abuse of discretion." *People v.*

*Hodges*, 134 P.3d 419, 425 (Colo. App. 2005), *aff'd*, 158 P.3d 922 (Colo. 2007).

“[I]f the trial court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point at which counsel is unable to give effective assistance in the presentation of a defense, then the court is justified in refusing to appoint new counsel.” *People v. Rocha*, 872 P.2d 1285, 1289 (Colo. App. 1993).

When a defendant objects to court-appointed counsel, the trial court must inquire into the reasons for the dissatisfaction. *People v. Kelling*, 151 P.3d 650, 653 (Colo. App. 2006). An indigent defendant is not, however, entitled to new counsel absent a showing of good cause therefor, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict with appointed counsel that may lead to an apparently unjust verdict. *Id.*

Disagreements about matters of trial preparation, strategy, and tactics do not establish good cause for substitution of counsel. *Id.* Similarly, “[t]he mere loss of confidence in his appointed

counsel does not establish 'good cause'; the "[d]efendant must have some well founded reason for believing that the appointed attorney cannot or will not competently represent him." 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 11.4(b), at 703-04 (3d ed. 2007).

### *C. Analysis*

Initially, we observe that, during the course of the two hearings, the court gave defendant ample opportunity to state the grounds of his dissatisfaction with his lawyer.

Next, we reject defendant's assertion that the trial court misunderstood or misapplied the applicable legal standard for determining whether appointment of new counsel was warranted. Although, at different times, the court said that there was no ethical reason to require substitution of counsel,<sup>1</sup> it did not confine its analysis to that factor alone. Instead, during both hearings, the

---

<sup>1</sup> We note, in this regard, that the fact that defendant filed a grievance with the supreme court did not require disqualification of his trial counsel. See *People v. Martinez*, 722 P.2d 445, 446 (Colo. App. 1986) ("The mere filing of a grievance because of disagreement as to trial tactics does not, without more, demonstrate that the relationship has deteriorated to a point at which counsel is unable to give effective aid to the client.").

court recognized that there appeared to be some type of communication problem, just not of a type or degree that would warrant appointment of new counsel.

To warrant discharge of original counsel and appointment of a new one, defendant had the burden of showing a "complete breakdown in communications." *Kelling*, 151 P.3d at 653. In *United States v. Lott*, 310 F.3d 1231, 1249 (10th Cir. 2002), the Tenth Circuit Court of Appeals noted:

The types of communication breakdowns that constitute "total breakdowns" defy easy definition, and to our knowledge no court or commentator has put forth a precise definition. As a general matter, however, we believe that to prove a total breakdown in communication, a defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible.

*See also Kelling*, 151 P.3d at 656 (the defendant's burden was to show "a completely fractured relationship with appointed counsel because of . . . a total breakdown in communication").

Whether a defendant has substantially and unreasonably contributed to the underlying conflict with his attorney, or to a



breakdown in communications between them, has been identified as a factor in assessing whether new counsel should be appointed. See *People v. Bergerud*, 223 P.3d 686, 695, 705 (Colo. 2010) (citing *Lott*, 310 F.3d at 1250-51).

Here, the record does not reveal an attorney-client relationship shorn by such a severe and pervasive conflict or by such minimal contact that meaningful communication was not possible. Instead, it reveals that (1) defendant's disagreements with his counsel centered on counsel's inability to obtain a better plea offer and other strategic matters; (2) counsel had provided defendant access to discovery; (3) there was a period of time in which counsel had not contacted defendant because there was nothing new to talk about; (4) counsel was willing to find more workable ways of communicating with defendant; and (5) though defendant had, at times, refused or resisted efforts to be contacted by counsel or his assistants, he ultimately agreed to meet and cooperate with his attorneys and investigators.

From these facts, and the fact that defendant made no further complaint about his attorney in the eight months leading up to

trial, we perceive no abuse of the court's discretion from its denial of the motions for withdrawal and substitution of counsel. Cf. *People v. Thornton*, \_\_\_ P.3d \_\_\_, \_\_\_ (Colo. App. No. 08CA1027, Sept. 30, 2010) (no complete breakdown in communication where, although trial counsel acknowledged that "there have been a lot of communication breakdowns," he maintained that he was continuing to represent the defendant's interests and "had a number of visits with" the defendant); *People v. Gonyea*, 195 P.3d 1171, 1173 (Colo. App. 2008) (no abuse of discretion in declining to dismiss counsel where the defendant's own actions had contributed to the problems between them and, because the defendant and his attorney agreed to resolve their differences and cooperate, there was no breakdown of communication); *Hodges*, 134 P.3d at 425-26 (attorney's statement that he was "concerned that we're not truly communicating" did not require a finding of a complete breakdown of communication); *People v. Jenkins*, 83 P.3d 1122, 1126 (Colo. App. 2003) (the defendant's allegations that counsel was not defending him zealously, had not spent adequate time with him, had met with him only once in nine months, had not discussed

potential witnesses, and had not given him copies of discovery did not show a complete breakdown of communication).

### *III. Relieving the Prosecution of Its Burden of its Proof*

Next, defendant contends that reversal is required because, during jury voir dire, the trial court made a statement that relieved the prosecution from its burden of proving that a murder and an assault occurred. Again, we disagree.

#### *A. Facts*

At defendant's request, the court, during voir dire, told the prospective jurors of the names of the other two suspects to ensure that no one knew them. One prospective juror indicated she had heard about them or the incident, and that it involved "murder or shootings." Subsequently, another prospective juror said that she may have trouble being fair and impartial knowing that there was a murder involved. In response, the court said:

There was a person shot to death. That's not going to be disputed. There was a person shot and wounded. That won't be disputed either. The dispute concerns whether [defendant] was involved. And if he was involved in any part of the incident, whether he is guilty of what he is charged with. None of us have to think murder is a good idea. Of course not. It's not.

Murder is the most serious level of felony crime that we have in our system. But the issue here is whether or not [defendant] is guilty. Regardless of what [the other gunmen] did or didn't do, regardless of whether they've been tried and convicted or not, the issue in this case is what, if any, participation did [defendant] have? And more specifically, beyond a reasonable doubt, did he do what he's accused of doing? That's it.

Defendant subsequently moved for a mistrial on the grounds that the court had wrongfully relieved the prosecution of its burden of proof by stating that there was no dispute as to whether a murder occurred. The court denied the motion, noting that it thought it only said "there's no dispute there was a shooting." The court indicated that it would consider any curative instruction proposed by defendant. Although defendant never tendered a curative instruction, the court gave one sua sponte.

#### *B. General Legal Principles & Analysis*

The prosecution must prove every element of a charged crime beyond a reasonable doubt. *People v. Dunaway*, 88 P.3d 619, 627 (Colo. 2004). As a result, a trial court errs when it instructs a jury that, as a matter of law, the prosecution has satisfied its burden of proving one of the elements, thereby withdrawing that

element from the jury's consideration. *People v. Gracey*, 940 P.2d 1050, 1053 (Colo. App. 1996).

Here, we perceive nothing improper about the court's remarks. Contrary to defendant's assertion, the trial court did not tell the jury that "a murder and assault occurred." Indeed, the court did not refer to an assault at all and its only references to murder were general remarks about its seriousness and that no one had to think it was a "good idea."

The only things the court said were undisputed were that one person was shot to death, while another person was shot and wounded. The court was correct, and its recitation of those facts did not, in any way, indicate that a murder – or an assault – had in fact been committed.

Moreover, the court, on its own accord, informed the jury, after defendant's motion for mistrial:

I think it's not disputed that one person was killed and one person was injured . . . it's disputed for what role, if any, the defendant had in any of it. But if I said that it's undisputed that a murder took place, murder really is a technical term. And the People have to prove that a murder took place, as well as . . . if this defendant had any role in it . . . I think

it's just undisputed that there was an incident where someone was killed and someone was injured, and the rest of it has to be proven.

In our view, this instruction sufficed to alleviate any potential prejudice occasioned by the court's earlier remark. *See People v. Mersman*, 148 P.3d 199, 203 (Colo. App. 2006) (generally, curative instructions will remedy any harm caused by a prejudicial statement); *People v. McNeely*, 68 P.3d 540, 542 (Colo. App. 2002) (curative instruction "inadequate only when evidence is so prejudicial that, but for its exposure, the jury might not have found the defendant guilty") (quoting *People v. Gillispie*, 767 P.2d 778, 780 (Colo. App. 1988)); *cf. Edmisten v. People*, 176 Colo. 262, 276, 490 P.2d 58, 65 (1971) ("error in admitting evidence may be cured by instructing the jury to disregard it unless such evidence is so prejudicial that the jury will unlikely be able to erase it from their minds").

Also, the court instructed the jurors regarding the presumption of innocence and the burden of proof, and, absent evidence to the contrary, we presume they followed those

instructions. See, e.g., *People v. McKeel*, \_\_\_ P.3d \_\_\_, \_\_\_ (Colo. No. 10SA164, Oct. 18, 2010).<sup>2</sup>

#### *IV. Hearsay & Confrontation*

We are also unpersuaded by defendant's contention that reversal is required because the trial court erroneously admitted several hearsay statements in violation of his constitutional right to confront adverse witnesses.

##### *A. Facts*

During trial, the following evidence was admitted:

---

<sup>2</sup> Defendant appears to argue that the prejudice from the court's comment was heightened or revealed when (1) the court, ostensibly in response to his motion for mistrial, admitted evidence of another codefendant's subsequent purchase of a gun, and (2) the jury inquired, during deliberations, about the applicability of a complicity instruction to the charges. We have, however, already determined that the court's comments were not prejudicial. And because, by defendant's own admission, "the motion for mistrial has no bearing on the admissibility of evidence," and because defendant did not raise the evidentiary or jury inquiry issues as separate claims of error, or support them with either authority or developed argument, we decline to address those issues. See *People v. Wallin*, 167 P.3d 183, 187 (Colo. App. 2007) (declining to address arguments presented in a perfunctory or conclusory manner); see also *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim [for appellate review].").

- a police officer recounted what the surviving male victim told him on the way to the hospital about the incident;
- the male victim testified that, during the robbery, the female victim asked defendant, "How can you do this? You're like my brother," to which defendant responded, "It is what it is";
- a detective testified that the male victim had told him at the police station that he was concerned that the men responsible for the robbery and shootings "were going to kill his family"; and,
- the same detective testified that, when asked at the station whether he shot the female victim in a domestic dispute and then shot himself to make it look like a murder-suicide, the male victim said, "That did not happen."

Defendant objected to the first two statements as hearsay and to the last two statements on both hearsay and confrontation grounds. The trial court ruled that the first statement was admissible as an excited utterance and that the second statement was admissible because it was not offered for the truth of the matter asserted (and, thus, was not hearsay). The court overruled



defendant's objections to the last two statements without making any additional findings.

*B. General Legal Principles and Standard of Review*

Hearsay is defined as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c); *see People v. Huckleberry*, 768 P.2d 1235, 1241 (Colo. 1989). Hearsay is inadmissible, unless it falls within an exception to the rule against hearsay. CRE 802.

An out-of-court statement offered, not for the truth of the matter it asserts, but solely to show its effect on the listener, is not hearsay. *People v. Rodriguez*, 888 P.2d 278, 287 (Colo. App. 1994).

The admission of hearsay evidence may implicate a defendant's confrontation rights under the federal and state constitutions. *See Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 2274, 165 L.Ed.2d 224 (2006) (admission of "testimonial" hearsay violates federal confrontation rights); *Compan v. People*, 121 P.3d 876, 882-86 (Colo. 2005) (admission of nontestimonial hearsay as violative of state confrontation rights).

However, the admission of nonhearsay does not implicate a defendant's confrontation rights. *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S.Ct. 1354, 1369, 158 L.Ed.2d 177 (2004) ("The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *People v. Isom*, 140 P.3d 100, 103 (Colo. App. 2005) (no right of confrontation or hearsay preclusion exists when statements are not offered for their truth); *People v. Bornman*, 953 P.2d 952, 956 (Colo. App. 1997) (because the information was not hearsay, "no issue of confrontation is presented").

Trial courts have considerable discretion in determining the admissibility of evidence, and we will not disturb their evidentiary determinations on appeal absent a showing of an abuse of discretion. *People v. Boykins*, 140 P.3d 87, 95 (Colo. App. 2005).

### *C. Analysis*

Initially, we note that, although defendant properly preserved his hearsay objections in the trial court, he has not properly presented some of them to us for review. See *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("If an appellant

fails to comply with [the] requirements [of presenting an argument] on a particular issue, the appellant has abandoned that issue on appeal irrespective of how well the issue was preserved at trial.”).

For instance, defendant has provided no argument challenging the trial court’s determination that the account given by the victim on the way to a hospital was, if hearsay, admissible as an excited utterance. Because he has not challenged that part of the trial court’s ruling, his challenge to the admissibility of the victim’s account is not properly before us. *Cf. IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008) (it is incumbent on the appellant to challenge on appeal all stated reasons or grounds for the trial court’s decision, and failure to do so requires affirmance of the trial court’s ruling).<sup>3</sup>

With respect to the other statements, defendant does not attempt to show how they were admitted for the truth of the matter,

---

<sup>3</sup> By its nature, an excited utterance is unlikely to be “testimonial” hearsay implicating confrontation rights. *See People v. King*, 121 P.3d 234, 240 (Colo. App. 2005). In any event, the admission of hearsay from a witness who, like the male victim, testifies at trial and is subject to cross-examination does not violate a defendant’s right to confrontation. *See People v. Argomaniz-Ramirez*, 102 P.3d 1015, 1019 (Colo. 2004).

and, thus, qualified as hearsay. Instead, he equates truth of the matter asserted with whether the statement was important to the prosecution's case or prejudicial to his own.

Because the prosecution was not trying to prove the truth of the matter asserted in the female victim's statement (that is, how could defendant do this, since he and she were indeed like family), it was not admitted for a hearsay purpose. Indeed, it was admitted for nonhearsay purposes, that is, for its effect on the listener (here, defendant), *see Rodriguez*, 888 P.2d at 287, and for providing context for his response.<sup>4</sup> *See People v. Arnold*, 826 P.2d 365, 366 (Colo. App. 1991).

Similarly, although at trial the prosecution proffered the third statement as an excited utterance, the value of that statement did not depend on the truthfulness of its content, that is, whether the

---

<sup>4</sup> An out-of-court statement to another person "is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in [the other], such as receiving notice or having knowledge or motive, or to show the information which [the other] had as bearing on the reasonableness, good faith, or voluntariness of subsequent conduct . . . ." 2 *McCormick on Evidence* § 249, at 134-35 (K Broun 6th ed. 2006). It is not hearsay because the value of the statement does not depend upon its truth. *Id.* at 135.

men who perpetrated the robbery and shootings would, in fact, kill the surviving victim's family members. Regardless of its truth, the statement tended to explain why (i.e., fear) the surviving victim delayed identifying his assailants. As such, the statement was not inadmissible as hearsay. See 2 *McCormick on Evidence* § 249, at 133 (statement is not hearsay when its value does not depend upon its truth); cf. *People v. Mossman*, 17 P.3d 165, 168 (Colo. App. 2000) (trial court should have permitted the testimony of two witnesses who would have substantiated the defendant's affirmative defense that he took his daughter from his ex-wife because he believed she was being abused while living with his ex-wife and another man).<sup>5</sup>

---

<sup>5</sup> Also, the detective had previously related to the jury this very same statement, without objection; and, the victim himself had testified that he delayed identifying his assailants out of fear for his family's safety. The statement to which defendant objected was, then, cumulative to other evidence admitted in the case. See *People v. Caldwell*, 43 P.3d 663, 668-69 (Colo. App. 2001) (holding that because the statements challenged as inadmissible hearsay were merely cumulative of other evidence, their admission was harmless beyond a reasonable doubt); *People v. Robinson*, 874 P.2d 453, 461 (Colo. App. 1993) (any violation of the defendant's confrontation clause rights was harmless beyond a reasonable doubt because hearsay testimony at issue was merely cumulative).

Finally, although a somewhat closer question, we perceive no abuse of the court's discretion in admitting evidence of the male victim's out-of-court denial of killing his companion. Just before the statement was mentioned, the prosecution had elicited evidence from the detective that "Everybody" – including the male victim – was a "possible suspect at that point." Thus, the detective's follow-up inquiry, and the victim's answer thereto, can be viewed as explaining, in part, why the police investigation proceeded as it did – a nonhearsay purpose. *See People v. Robinson*, 226 P.3d 1145, 1152 (Colo. App. 2009).

Because all three of these statements were not inadmissible hearsay, admitting them necessarily did not violate defendant's confrontation rights. Consequently, we perceive no grounds for reversing defendant's convictions.

#### *V. Sentencing*

We are, however, persuaded by defendant's contention that his case must be remanded for resentencing on his conviction for attempted first degree murder.

A remand for resentencing is appropriate where a trial court misapprehends the scope of its discretion: for example, where a trial court imposes consecutive sentences under the mistaken belief that it has no discretion to impose concurrent sentences. *People v. O'Connell*, 134 P.3d 460, 466 (Colo. App. 2005).

Here, the trial court sentenced defendant to forty-eight years imprisonment for the attempted murder consecutive to his sentence to life without parole for the murder. In so doing, the court stated its belief that the law mandated a consecutive sentence because attempted first degree murder is a crime of violence. However, in the absence of a special interrogatory, as here, attempted first degree murder is not a crime of violence. § 18-1.3-406(6), C.R.S. 2010; *People v. Webster*, 987 P.2d 836, 843 (Colo. App. 1998). Therefore, the trial court was mistaken when it twice said that it was required to impose a consecutive sentence for the attempted murder conviction.

Accordingly, we vacate that sentence and remand for resentencing on that conviction alone. *Compare O'Connell*, 134 P.3d at 466-67 (affirming the defendant's conviction where trial

court never indicated that it believed that consecutive sentences were required and it indicated that it had reviewed and considered the case law pertaining to consecutive and concurrent sentencing), *with People v. Smith*, 881 P.2d 385, 390 (Colo. App. 1994) (vacating and remanding for resentencing three of the defendant's convictions because the trial court mistakenly believed that consecutive sentences were mandated by statute).

In reaching this conclusion, we necessarily reject the prosecution's assertion that a remand is unnecessary because "it appears that the district court would have imposed consecutive sentences if it believed it had the discretion [] to do so." Our reading of the record does not disclose a clear intent one way or the other on the issue.

The judgments of conviction are affirmed, the sentence on the attempted murder conviction is vacated, and the matter is remanded for resentencing.

JUDGE J. JONES and JUDGE LICHTENSTEIN concur.