No. 18-404

IN THE SUPREME COURT OF THE UNITED STATES

THE COLORADO INDEPENDENT, PETITIONER,

vs.

DISTRICT COURT FOR THE EIGHTEENTH JUDICIAL DISTRICT OF COLORADO, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

RESPONSE IN SUPPORT OF PETITION FOR CERTIORARI

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PARTIES TO THE PROCEEDING

The Colorado Independent is the Petitioner. The District Court for the Eighteenth Judicial District of Colorado is the Respondent. Sir Mario Owens is the capital defendant in the underlying case of *People v. Sir Mario Owens*, Arapahoe County District Court, 06CR705. The Colorado Supreme Court recognized Mr. Owens as a real party in interest who was authorized to file pleadings in the underlying matter, which involved a collateral proceeding in that Supreme Court. The Petition for a Writ of Certiorari lists Mr. Owens as a Party. Mr. Owens is not aligned with the Petitioner. As a Party below, Mr. Owens is a Respondent permitted to file a response in support of the relief requested by the Petitioner within the time otherwise provided by Rule 15.3. *See* Rule 12.6.

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STATEMENT OF THE CASE

The facts and background essential to resolving the question presented are straightforward. A jury convicted Mr. Owens in June 2008 of two counts of capital murder and sentenced him to death. This case elicited intense pretrial public interest and media coverage, a factor common to all Colorado capital cases. The case is now in the appeals stage and proceeding under Colorado's system of unitary review in capital cases.[1]

This case comes before this Honorable Court because of the state district court's unconstitutional sealing of pleadings, proceedings, and orders pertaining to a motion for special prosecutor. Mr. Owens and the public have constitutional rights to review these materials. The Petitioner sought access to these materials in the district court. Mr. Owens did not oppose public access and renewed his previous objections to the unrelenting sealing and secrecy surrounding his case and to the ongoing denial of his own fundamental rights to review the materials and to have public access to the proceedings against him. The district court denied the Petitioner access to the materials.

Thereafter, the Petitioner initiated a discretionary appeal before the Colorado Supreme Court, to review the district court's orders. Colorado requires parties with significant claims, which are separable from and collateral to the merits and demand immediate attention, to seek review only by invoking the Colorado Supreme Court's original jurisdiction. *See Paul v. People*, 105 P.3d 628, 631-33

[1] *See* Section 16-12-201, C.R.S. (2018), et. seq.

(Colo. 2005); *see also* C.A.R. Rule 21 (establishing procedure for original actions).

The Colorado Supreme Court accepted the discretionary appeal and in its analysis and holding construed the First Amendment in a published decision. In that decision, it categorically ruled that the public has no First Amendment right of access to court records – presumptive, qualified or otherwise. *See People v. Owens*, 2018 CO 55, ¶ 7, 420 P.3d 257, 258. In reaching this conclusion, the Court failed to properly uphold the public's right of access as required by the First and Fourteenth Amendments.

Well-established constitutional law requires specific findings of a compelling interest to override the presumption of openness intrinsic to judicial proceedings, and any closure of access to court pleadings or proceedings must be narrowly tailored to serve that compelling interest, after considering less restrictive alternatives. The state district court and Supreme Court failed to comply with these mandatory constitutional requirements. Without specific findings and careful adherence to constitutional mandates, sealing in a criminal case is inappropriate and unconstitutional. Sealing deprives Mr. Owens of his First, Sixth, and Fourteenth Amendment rights, and obstructs access of the press, thus depriving the public of its First Amendment right of access to judicial proceedings – a right that is particularly critical in the context of capital proceedings.

I. The Sealing Orders

The question presented arises from the state district court's continuing enforcement of one of its blanket sealing orders, which it entered during both the pretrial phase and the "postconviction review" phase.[2]

Petitioner's Statement of the Case correctly sets forth the facts as they pertain to the Petitioner's attempts to access distinct suppressed materials related to a motion to disqualify the prosecutors in the capital prosecution below. However, the district court's suppression orders regarding the motion for special prosecutor (SOPC-352), the related motions to unseal it (SOPC-353), and related documents go far beyond simply preventing public access to the sealed materials. The same orders have also prevented Mr. Owens – the individual condemned to Colorado's death row and to eventual execution – from being able to review the materials related to whether the prosecutors in his case should be disqualified on the basis of law and fact. The court's order prohibited access to the sealed materials by *anyone* other than "attorneys of record or court staff." Consequently, undersigned counsel for Mr. Owens have *never* been permitted to share the materials with their own client. The order also prevented his attorneys from publishing the materials to the public or Mr. Owens' family. As a result, the *only* opportunity Mr. Owens and his

[2] Under Colorado's system of unitary review in capital cases, "Postconviction review means review "by the trial court that occurs after conviction" in a death penalty case, but before the defendant's "Direct appeal." *See* Section 16-12-203(1) & (4), C.R.S. (2018).

family will ever have to review the sealed motions and supporting materials will be if the Petitioner ultimately prevails on its petition to this Court, and thereafter publishes the materials.

Respondent Owens also must take this opportunity to correct the factual record as set forth in the district court's order denying access. Contrary to that court's finding that all factual material was already unsealed or in the public domain, the motion for special prosecutor set forth factual material that is not publicly known and which is the basis of the sealing order. The motion also attached 15 separate appendices containing factual materials relevant to the motion for special prosecutor, several of which remain sealed from public view. The related motion to unseal the motion for special prosecutor also includes factual material that it not publicly known. The undersigned are under orders not to reveal the contents of any of these sealed materials, so explication of why this Court should authorize public access or, at the very least, require the state courts to follow constitutionally requirements cannot be set forth herein with any meaningful specificity. Suffice it to say that factual materials attached to a motion for special prosecutor can include materials such as affidavits, transcripts, reports, expert opinions, correspondence, etc.

In addition, events occurring after the Petitioner sought access in the district court and the Colorado Supreme Court cast light on the degree to which this State's courts are now exercising their unbridled sealing powers. After the Colorado Supreme Court issued its published decision on the matter, the state district court,

in a secret order which itself has been withheld from the public and even the parties, has now suppressed the entire court file from any public access. *See* Appendix A, Motion for Notice of Suppression of Court File (SOPC-387). This action and the actions of other Colorado courts evidence an extensive pattern and practice of unbridled sealing of court records and matters. *See* Petition, at 26, citing David Migoya, *Shrouded Justice: Thousands of Colorado Court Cases Hidden from Public View on Judges' Orders*, Denver Post 7/12/18).

Although the issue raised by the petition for certiorari solely relates to the suppression of certain materials related to the motion for special prosecutor, the status quo in this capital case is that the entire court file and docketing sheet, every single exhibit, and almost all transcripts are now suppressed from any public access whatsoever unless or until a member of the public is able to follow a labyrinthine process and, thereafter, convince the state district court to exercise it "discretion" to permit access on a transcript-by-transcript basis. *Owens*, 2018 CO at ¶ 8, 420 P.3d at 259. It is from this Orwellian state of affairs that the Petitioner seeks access to only a small fraction of the whole mountain of sealed materials in this case.

ARGUMENT

I. The state courts have ignored binding, clearly-established constitutional law by prohibiting Mr. Owens, the press, and the public from accessing the motion for special prosecutor, related pleadings, proceedings, and orders, without satisfying mandatory constitutional requirements.

A. Governing law

1. Mr. Owens, the press, and the public have constitutional rights affording public access to these proceedings.

The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (*Press–Enterprise II*).

Mr. Owens has personal and fundamental constitutional rights to participate in and access his own proceedings and for the public to have access to them so that it can make its own determinations as to the fairness and reliability of the process that has condemned him to death. These rights are guaranteed by the First and Sixth Amendments and extended to the States through the Due Process Clause of the Fourteenth Amendment. *See Presley v. Georgia*, 558 U.S. 209, 211-213 (2010); *In re Oliver*, 333 U.S. 257, 273 (1948); *Gitlow v. New York*, 268 U.S. 652, 664 (1925); *cf. Farretta v. California*, 42 U.S. 806, 819-20 (1975); *McCoy v. Louisiana*, 138 S.Ct. 1500, 1507-1509 (2018).

The right to a public trial is "unmistakably" for the benefit of the accused. *Presley*, 558 U.S. at 213 ("There could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit."); *see also Waller v. Georgia*, 467 U.S. 39, 46 (1984) ("The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions…."), quoting *In re Oliver*, 333 U.S. at 270, n.25. The Sixth Amendment requires that the party seeking to seal pleadings or close proceedings:

> must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller, 467 U.S. at 48, citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-11 (1984) ("*Press-Enterprise I*"))

The right to a public trial encompasses more than just the trial itself – it extends "to those hearings whose subject matter involve[s] the values that the right to a public trial serves." *United States v. Rivera*, 682 F.3d 1223, 1228 (9th Cir. 2012) (public trial rights apply to sentencing proceedings). This right extends to and includes post-conviction proceedings. *See CBS, Inc. v. United States District Court*, 765 F.2d 823, 825 (9th Cir. 1985) ("The primary justifications for access to criminal proceedings, first that criminal trials historically have been open to the press and to the public, and, second, that access to criminal trials plays a significant role in the functioning of the judicial process and the governmental system, … apply with as much force to post-conviction proceedings as to the trial itself."); *see also United States v. Simone*, 14 F.3d 833, 835 (3d Cir. 1994) (First Amendment right of access applies to post-trial hearings to investigate juror misconduct).

Mr. Owens and the public also have First Amendment rights to public access to his criminal proceedings. "[T]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question." *Presley*, 558 U.S. at 213. Nevertheless, precedents concerning the reach of the public's First Amendment right of access inform the scope of the defendant's Sixth Amendment right to a public trial, because "there can be little doubt that the explicit Sixth Amendment

right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Waller*, 467 U.S. at 46.

The First Amendment guarantees the public – and the press – a qualified right of access to criminal proceedings and transcripts of those proceedings. *See Press-Enter. II*, 478 U.S. at 8-14 (preliminary hearings); *Press-Enter.* I, 464 U.S. at 510-11 (voir dire); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 603 (1982) (testimony of child victim of sex offense); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-581 (1980) (criminal trial).

This right of access is premised on "the common understanding that 'a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " *Globe Newspaper*, 457 U.S. at 604, quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966). By guaranteeing that "the individual citizen can effectively participate in and contribute to our republican system of self-government," the First Amendment right of access ensures that "this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-605 (citations omitted).

The right of access is a right to gather and receive information, not just a right to attend the proceedings. *Richmond Newspapers*, 448 U.S. at 573. Thus, the public's right to access extends to documents filed in a criminal case. *See Press-Enter. II*, 478 U.S. at 13-14; *see also CBS*, 765 F.2d at 825 (finding "no principled basis for affording greater confidentiality to post-trial documents and proceedings than is given to pretrial matters").

What is publically known here is that Mr. Owens' motion for special prosecutor alleges misconduct on the part of the individual prosecutors who sought and obtained a death sentence against him. At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988). "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id*. Information related to alleged government misconduct is "speech which has traditionally been recognized as lying at the core of the First Amendment," and therefore implicates the core values the First Amendment was designed to protect. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673-674 (1944), when he wrote that "one of the prerogatives of American citizenship is the right to criticize public men and measures." Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks." *Id*. at 41, citing *New York Times Co. v Sullivan*, 376 U.S. 254, 270 (1964).[3]

[3] Neither the district court nor the Colorado Supreme Court found that the sealed materials contain any false statements of facts, were filed for an improper purpose, or contained anything offensive, unreasoned or immoderate.

The Colorado Independent, and by derivation Mr. Owens himself, have a qualified right to openness regarding the motion for special prosecutor and related proceedings, if for no other reason, than to openly examine the conduct of the prosecutors who, in the name of the citizens of Colorado, sought and obtained Mr. Owens death sentence.

2. A presumption of openness exists, which can only be overcome by strict adherence to procedural and substantive constitutional requirements.

Openness, transparency, and public access to criminal proceedings are "essential to the proper functioning of the criminal justice system." *Press-Enter. II*, 478 U.S. at 11-12; *Richmond Newspapers*, 448 U.S. at 566, 579. As stated in *Richmond Newspapers*:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case.

Id. at 572. Therefore, "a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice." *Id*.

To insure stringent safeguarding of the fundamental constitutional rights at stake, courts considering closure of proceedings must give interested parties prior notice and an opportunity to be heard before deciding the issue, and must support any decision to close with reasons and findings of record, including why no less drastic alternatives to closure are feasible. *See In re Charlotte Observer (Div. of Knight Publ'g Co),* 882 F.2d 850, 853 (4th Cir. 1989); *see also Phoenix Newspapers*

Inc. v. U.S. Dist. Court for Dist. of Arizona, 156 F.3d 940, 947-48 (9th Cir.1998) ("if a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives. If objections are made, a hearing on the objections must be held as soon as possible.").

"Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 606-607 (citations omitted)*; see also Press-Enter. I*, 464 U.S. at 510 ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). "The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered, and that less restrictive alternatives do not exist." *Id.* (emphasis added).

B. Application to this Case

1. The rulings complained of utterly disregard constitutional requirements and are deficient in many regards.

Both the First and Sixth Amendment rights to public access and a public trial apply here, as does the presumption of openness. Therefore, the state courts' rulings prohibiting Mr. Owens and the public from accessing the motion for special prosecutor, the evidence submitted in support of that motion, a related motion, the

related court proceedings, and the order denying the Motion, cannot stand as a constitutional matter without specific, on-the-record findings, demonstrating that such "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enter. I*, 464 U.S. at 510.

Here, the rulings complained of clearly do not meet any of the mandatory constitutional requirements and, therefore, cannot withstand constitutional scrutiny. The state district court entered the orders complained of without providing notice to the public or the press and without granting any opportunity for them to be heard. It did not require the prosecutors to identify or articulate a compelling state interest that could justify sealing. It did not take evidence or make any findings as to what harm the court was seeking to prevent by sealing and closing the proceedings or why such drastic measures were necessary. It did not consider less restrictive alternatives. It did not make any factual findings – much less specific findings – that would permit meaningful review. It offered no explanation or justification as to why the court is depriving Mr. Owens of constitutional rights that are unmistakably for his benefit, including his fundamental rights to participate in his own defense, to autonomy, to open and public proceedings, and to access and publish speech critical of the government and bearing on the fairness of the process by which the State of Colorado seeks to execute him. By failing to give the press and the public any notice that it was sealing and closing the proceedings, the court deprived them of any opportunity to be heard, to object, or to offer alternatives and, thus, deprived them of their own

First Amendment rights to access. Here, the disputed orders are "narrowly tailored to nothing but the suppression of lawful speech." *Lawson v. Murray*, 515 S.Ct. 1110, 1114 (1995) (Scalia, J., concurring).

"A trial is a public event. What transpires in the courtroom is public property…. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *See Craig v. Harney*, 331 U.S. 367, 374 (1947).

The motions, the orders denying them, the reasoning provided by the state district court in reaching its ruling, and all of the surrounding circumstances discussed in the sealed materials bear directly on the lawfulness, fairness, and wholesomeness of the capital proceedings against Mr. Owens. These are public and state interests of the highest order. *See, e.g., Williams v. Pennsylvania*, 136 S.Ct. 1899, 1909 (2016); *In re Murchison*, 349 U.S. 133, 136 (1955) ("The conduct of justice must not only achieve the reality of fairness, it must also 'satisfy the appearance of justice.'").

2. The state courts' rulings deprived – and continue to deprive – Mr. Owens of his autonomy and his ability to participate fully in his defense.

Mr. Owens has a right to participate in his own defense. *See*, *e.g.*, *Farretta*, 42 U.S. at 819-20 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. … The right to defend is given directly to the accused; for it is he who

suffers the consequences if the defense fails."). Thus, he continues to have a present and powerful need (a) to actually review the motion for special prosecutor, the order that resolved that motion against him and in favor of the prosecution, and the related motion, (b) to consult with his own attorneys about the motions and the order (and indeed the Petitioner's certiorari petition), and (c) to publish the facts and circumstances surrounding his case. These facts and circumstances include many demonstrable instances of serious, unrelenting and extensive prosecutorial misconduct, some of which are at the heart of the motion for special prosecutor. Although the elected district attorney and his chief deputies may not wish certain allegations and the credible and substantial evidentiary basis supporting them ever to see the light of day, Mr. Owens has an overriding need to publicly declare and maintain that he was wrongfully convicted and to publicly challenge the fairness of the proceedings against him and the ongoing secrecy surrounding his case. Further delay or restraint in the expression of Mr. Owens' rights is unjustified and unconstitutional.

II. The Colorado courts' blatant disregard for clearly established constitutional mandates cannot be remedied in the future.

The district court's sealing and closure orders, and the state Supreme Court's decision to maintain them, are without justification and collide head-on with basic constitutional protections and values. "Courts, too, are bound by the First Amendment." *Citizens United v. Federal Election Comm.*, 558 U.S. 310, 326 (2010). This Honorable Court should not, as a constitutional matter, tolerate continued enforcement of the state courts' orders that plainly violate fundamental rights and

strike at the very core of the First Amendment by suppressing speech and information on issues of public concern at exactly the same time that speech matters most. To do so would result in continuing constitutional injury and harm that is irreparable and deeply damaging to democratic principles of self-government and public confidence in the integrity of the criminal justice system.

Independent public scrutiny – made possible by public and media access – plays a significant role in the proper functioning of any capital punishment system. An informed public debate is critical in determining whether the death penalty comports with human dignity and "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall*, 558 U.S. 220 (2010). "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." *Globe Newspaper*, 457 U.S. at 606.

The current state of affairs in Colorado cannot endure any longer without irrevocably damaging this Nation's historic tradition of openness and transparency in criminal cases and without irreparably eroding public confidence in the integrity of the process. To permit critical portions of the motion for special prosecutor, the evidence supporting that motion, the transcript of a related proceeding, and a related motion to remain under a shroud of secrecy would be to "unduly minimize …

the value of 'openness' itself," a value that is threatened whenever access to criminal proceedings is denied. *See Simone*, 14 F.3d at 842, citing *Charlotte Observer*, 882 F.2d at 856. Each day that the motion for special prosecutor and related items remain hidden compounds the problem; resolution at some distant future appeal cannot restore the ongoing absence of public scrutiny or the ability of Mr. Owens to participate fully in his own defense.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted this 29th day of October 2018.

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