SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 Arapahoe County District Court Honorable Gerald J. Rafferty, District Judge Case No. 06CR705 **In Re:** **People of the State of Colorado,** Respondent, vs. **Sir Mario Owens,** Petitioner.	**COURT USE ONLY** Case No.13SA161

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MOTION TO RECONSIDER DENIAL OF PETITION FOR ORIGINAL PROCEEDING AND ISSUANCE OF RULE TO SHOW CAUSE

Petitioner Sir Mario Owens, through his post-conviction counsel and pursuant to *C.A.R.* 2, 21 and 27, respectfully moves this Court to reconsider its order denying his *C.A.R.* 21 petition, which sought a Rule to Show Cause why the district court's unprecedented sealing orders should not be vacated as violating the constitutional right to access.

1. *C.A.R.* 27(a) authorizes a motion requesting "an application for an order or other relief." *C.A.R.* 21 does not preclude a motion for reconsideration. *C.A.R.* 2 affords discretion to suspend contrary requirements or provisions, if any exist.

2. On September 5, 2013, this Court denied Mr. Owens' *C.A.R.* 21 petition. Three justices indicated that they would have granted it. Because the issues presented are of such vital public importance, and the harm to Mr. Owens, the public and the press is so irreparable and injurious, Mr. Owens respectfully asks the Court to reconsider its denial of his petition and to address the significant issues presented.

3. The First Amendment and article 2, section 10 of the Colorado Constitution protect the free and open discussion of government affairs. Mr. Owens, the public, and the press all have fundamental rights under these

constitutional provisions. Mr. Owens has fundamental rights to disseminate information about his case, including information which documents and exposes serious misconduct committed by government actors and public officials, and to have a properly informed public serve a vital role as a check on governmental abuses. The public and the press have fundamental rights to access this information – and to be accurately and fully informed. Unless the public and press have such access, the criminal justice system cannot function properly or fairly.[1] These are basic liberties, and in this case, the rights of Mr. Owens, the public and the press converge.

4. The State of Colorado has no compelling interest or need to violate or infringe on these fundamental constitutional guarantees. To the contrary, the State has a compelling interest in respecting those rights and ensuring the free flow of information and ideas. To do otherwise irreparably harms and injures Colorado's citizens and all other Americans.

5. The district court's continued enforcement of its extremely restrictive and overly broad sealing orders, which prohibit dissemination of or public access

[1] *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 11-12 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566, 595 (1980) ("Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.").

to transcripts, evidence, and the registry of actions, constitutes governmental suppression and censorship. Public confidence in the government, the courts, the judicial system, and in Mr. Owens' convictions and death sentences, cannot be maintained where the proceedings are kept secret and "where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." [2]

6. Undersigned counsel have reviewed many recent infamous cases throughout the country and can find no instance in which a citizen's case, regardless of its seriousness, has been subjected to orders that forever seal every transcript. For example, transcripts or portions thereof were accessible to the public regarding the following criminal defendants' cases: (1) Whitey Bulger, who was convicted of 11 murders, many of which involved witnesses; (2) the Aryan Brotherhood, which carried out coordinated murders or attempted murders of 32 members of another prison gang in multiple prisons throughout the country (a central tenet of the Aryan Brotherhood is that it vows to murder anyone who provides testimony against it); (3) Oklahoma City bomber Timothy McVeigh, who was convicted in the bombing of the Alfred P. Murrah Federal Building in which

[2] *U.S. v. Holy Land Found. for Relief and Dev.*, 624 F.3d 685 (5th Cir. 2010) (citing *U.S. v. Cianfrani*, 573 F.2d 835, 859 (3rd Cir. 1978)).

168 people died; and (4) Ramzi Yousef, who was convicted for his role in the first World Trade Center bombings.

7. Its possible that this Court denied the petition because Mr. Owens raised issues based on his mother's (Monica Owens) request to review the record and on the press and public's right of access to the record, including transcripts of public proceedings. The Court may have concluded, that he is not the proper party to assert the rights of others. If the Court denied his petition based on that or a similar premise, then it should consider the attached documentation, which confirms that Mrs. Owens, the press, and numerous public interest organizations, which represent a wide cross-section of society, all support the request for openness and transparency in this case and urge the Court to address the issues presented, which are of grave fundamental importance. *See* Letter attached as Attachment A.

8. Mr. Owens is also concerned that this Court may not have viewed the petition as an assertion of his own First Amendment and art II, sec 10 rights to disseminate information about his cases. Litigants do not surrender their First Amendment rights at the courthouse door.[3] A defendant's First Amendment rights

[3] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, n.14 (1984).

may, in some limited circumstances, be subordinated to other interests.[4] The only interest presented for keeping the record in this capital case completely sealed so many years after the trial is the protection of witnesses. Even assuming that witness protection concerns justifies some type of sealing and redaction orders, the current orders are unnecessarily restrictive and overly broad given that they apply to information that does not disclose the identity or location of protected witnesses. The State has made no showing justifying a blanket order prohibiting dissemination of the record and the transcripts of the proceedings. Permissible restrictions on First Amendment freedoms must be "no greater than is necessary or essential to the protection of the particular governmental interest involved."[5] As previously argued and as the underlying record makes clear, the district court did not entertain less restrictive alternatives such as redaction, the use of initials, or the use of non-identifying monikers. The district court has made no attempt to narrowly tailor its restrictions, notwithstanding established and fundamental constitutional requirements that it do so.

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[4] *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563 (1976); *id.* at 601, n.27 (Brennan, J., *concurring*); *Oklahoma Publishing Co. v. Dist. Ct,*, 430 U.S. 308, 310-311 (1977); *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966).

[5] *Seattle Times Co. v. Rhinehart*, 467 U.S. at 32 ; *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *Brown v. Glines*, 444 U.S. 348, 354-355 (1980); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

9. Many local and national press associations and public interest organizations have now very clearly asserted their First Amendment rights to access to the record in this case. Local entities concerned with a free press, including the Colorado Press Association and the Colorado Freedom of Information Coalition, have signed Attachment A, and urge the Court to address the important issues presented. So too have national press associations, including the Reporters Committee for Freedom of the Press and the First Amendment Coalition.

10. Groups that investigate criminal cases to determine whether a defendant has been wrongfully convicted or is actually innocent have an interest in access to court records. These raw materials are the bricks and mortar of their investigative work. The Center on Wrongful Convictions at Northwestern University, a signator to Attachment A, has long undertaken the hard work of finding, freeing and exonerating innocent defendants. In scores of cases, it has unearthed evidence of wrongfully convicted defendants by reviewing transcripts and records of public proceedings. Other Innocence Projects, including the Colorado Innocence Project, are also signators to Attachment A.

11. Groups that advocate for abolishing the death penalty also represent a segment of the public, and they have an interest in analyzing the fairness and

justness of capital prosecutions. Among their central arguments is that capital punishment is often meted out arbitrarily and is frequently accompanied by government misconduct and/or ineffective assistance of counsel, or both. These groups have an independent interest in analyzing cases, including *Owens* and *Ray*, in order to make their own judgments and arguments as to the fairness of capital proceedings. These groups, such as the National Association of Criminal Defense Lawyers (NACDL), the Colorado Criminal Defense Bar (CCDB), and Coloradans for Alternatives to the Death Penalty (COADP), have also signed Attachment A.

12. Several of the groups that have signed the attached letter urging the Court to address the issues have a particular interest in open access to these capital cases. For example, the National Association for the Advancement of Colored People (NAACP) is a signator. The NAACP is and has been an opponent of capital punishment based on its position that race plays a disproportionate role in cases involving the death penalty. *See* www.action.naacp.org. Mr. Owens and Mr. Ray are two of three men on Colorado's death row. All three are African Americans. Of the three other men currently facing death penalty prosecutions in Colorado, two are minority defendants, one of whom is an African American. The NAACP and other members of the public have an interest in the openness of these proceedings so that they can reach their own conclusions on whether race played a

role in these cases. As pointed out in Attachment 18 to the original petition, racial disparities in the imposition of the death penalty are an issue that the public has a critical interest in analyzing and eradicating.

WHEREFORE, Petitioner Sir Mario Owens respectfully requests that the Court reconsider its previous decision and issue a Rule to Show Cause why the district court's sealing and redaction orders should not be vacated.

Respectfully submitted this 19th day of September 2013.

s/ James A. Castle
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Post-conviction Counsel for Petitioner Sir Mario Owens

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September 2013, a true and correct copy of the foregoing **MOTION TO RECONSIDER DENIAL OF PETITION FOR ORIGINAL PROCEEDING AND ISSUANCE OF RULE TO SHOW CAUSE** was properly served via ICCES or U.S. Mail, postage prepaid, or as indicated, on the following:

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/s/ Gennifer Westhoff

ATTACHMENT A

The below organizations have reviewed the discretionary appeals and requests for original proceedings filed by Sir Mario Owens and Robert Ray (13SA161 and 13SA162) which were denied without an opinion on September 5, 2013. We respectfully encourage the Colorado Supreme Court to reconsider its decision not to address the issues contained within these appeals because they are of great public importance.

Public access to judicial records furthers not only the interests of the general public, but also the integrity of the judicial system. The right to public access promotes trust in the judicial process, curbs potential judicial and governmental abuses, and provides the public with a more complete understanding of the judicial system, including a better perception of how it promotes fairness and justice.

The complete sealing of all transcripts, all exhibits, and the registries of actions in the *Owens* and *Ray* cases is not consistent with a free and open society, and threatens basic and fundamental liberties. Allowing these cases to remain cloaked in secrecy and hidden from public review and scrutiny will undermine public confidence in both the government and the judicial process. That such sealing and secrecy has been imposed in capital cases where there are substantial claims of serious government misconduct will further undermine societal trust in its institutions.

The public interest demands that matters involving the government's decision to execute two of its citizens be transparent and open. Public confidence cannot be maintained if our government and judicial system operate behind closed doors.

We therefore respectfully ask the Court to reconsider its order and address these important issues.

Signed,

Monica Owens
National Association for the Advancement of Colored People (NAACP)
Colorado Press Association

Colorado Freedom of Information Coalition
Reporters Committee for Freedom of the Press
First Amendment Coalition
Colorado Independent
Equal Justice Initiative
Colorado Criminal Justice Reform Coalition (CCJRC)
Colorado Innocence Project (CIP)
Center on Wrongful Convictions - Northwestern University Law
Georgia Innocence Project
Colorado Criminal Defense Bar (CCDB)
National Association of Criminal Defense Lawyers (NACDL)
Colorado for Alternatives to the Death Penalty (COADP)
The Colorado Prison Law Project