

# Colorado Supreme Court Holds There Is No Constitutional Protection for Public Access to Court Records

By Steve Zansberg

In a stunning ruling that has attracted widespread [criticism](#), on June 21, 2018, the Colorado Supreme Court held that the First Amendment provides no protection for the public's right to inspect or copy records on file in state courts. [People v. Owens](#).

The ruling came in a completed capital murder case. Owens is one of three convicts on Colorado's death row. The sealed records at issue are four documents that address serious and confirmed allegations of prosecutorial misconduct.

Owens was convicted in two separate trials of three murders. The second murder victim was a witness scheduled to testify against Owens at his first murder trial. Because the first murder was a gang-related killing and the second one was of a trial witness (and the witness' fiancé), the vast bulk of the court file is sealed.

After his second murder conviction, Owens moved to disqualify the prosecutor's office from his case on grounds of prosecutorial misconduct and conflict of interest. In a 1500+ page ruling, a newly appointed trial judge found multiple instances of prosecutorial misconduct (including the DA's withholding of evidence from Owens' defense team that could have been used to impeach prosecution witnesses). However, the judge found none of those misdeeds were sufficiently prejudicial to Owens' defense to warrant reversing the jury's verdict or the death sentence.

**The only reason cited in the order for withholding the judicial records above was "countervailing interests," but none were identified.**

## No Explanation For Continued Sealing

The *Colorado Independent*, an online news organization that covers the criminal justice system, among other beats, asked the trial court to unseal:

1. Owens' Motion to Disqualify the District Attorney and appoint a special prosecutor;
2. the People's Response;
3. the transcript of the hearing conducted behind closed doors on that motion; and
4. the court's ruling (order) denying Owens' motion.

After briefing was completed, the trial court issued a cursory, 2-page order unsealing only the portions of Owen's disqualification motion that recited his factual allegations of prosecutorial misconduct. The court, without citing a single judicial precedent or any other source of law, denied unsealing of the legal arguments in Owens' disqualification motion, the People's Response to that motion (including exhibits), the hearing transcript, and the court's

(Continued on page 30)

(Continued from page 29)

order denying Owens' disqualification motion. The only reason cited in the order for withholding the judicial records above was "countervailing interests," but none were identified.

### Petition for Discretionary Emergency Review Granted

The *Colorado Independent* filed an emergency petition for an extraordinary writ to the Colorado Supreme Court, urging it to order the trial court to enter record findings that satisfy the standards set forth in the two *Press Enterprise* cases (*Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986) & 464 U.S. 501 (1984)) in which the U.S. Supreme Court recognized a qualified First Amendment right of the public to attend judicial proceedings for which there is both a "tradition" and "logic" of public access.

The petition pointed to a 1966 Colorado Supreme Court case in which a newspaper had challenged the constitutionality of a state statute that restricted "the right" of access to pleadings on file in state court only to the parties to a case and their attorneys. Colorado's Supreme Court held that the statute must be interpreted to permit access to the newspaper because a contrary interpretation (imposing an absolute bar on public access) "would raise serious constitutional questions regarding freedom of the press. . ." Subsequently, Colorado's Supreme Court described its holding in that 1966 case as the court's having applied "the constitutional interpretation" of the statute.

Colorado's Supreme Court granted the *Colorado Independent's* petition and set a briefing schedule on its "Rule to Show Cause," ordering the District Court to explain why the emergency writ requested by the *Colorado Independent* should not be granted.

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### Colorado Supreme Court Ruling

On June 21, 2018 the Colorado Supreme Court issued a 5-page [ruling](#) in which it categorically rejected the proposition that the First Amendment (or the more expansive free speech provision of the Colorado Constitution) provides any protection for the public to access judicial records.

The *Colorado Independent* contends that the federal and state constitutions grant a presumptive right of access to documents filed in criminal cases. While presumptive access to judicial *proceedings* is a right recognized under both the state and federal constitutions, neither the United States Supreme Court nor this court has ever held that records filed with a court are treated the same way. We decline to conclude here that such unfettered access to criminal justice records is guaranteed by either the First Amendment or Article II, section 10 of the Colorado Constitution.

(Continued on page 31)

*(Continued from page 30)*

Misconstruing the nature of the relief sought in the Petition, the Court wrote “We find no support in United States Supreme Court jurisprudence for Petitioner’s contention that the First Amendment provides the public with a constitutional right of access to any and all court records in cases involving matters of public concern.” Repudiating its own prior rulings, the Court continued, “Moreover, we have never recognized any such constitutional right—whether under the First Amendment or Article II, section 10 of the Colorado Constitution.”

Thus, in short order, and without providing any explanation for rejecting its own prior precedents, the Colorado Supreme Court discharged its Rule to Show Cause and affirmed the trial court’s order keeping the four judicial records at issue under seal.

On June 21, 2018, the *Colorado Independent* filed a [Petition for Rehearing](#) to the Colorado Supreme Court, in which it pointed out that in both *Press-Enterprise* cases, the United States Supreme Court held that the trial court’s denial of access to the entire transcripts of closed judicial proceedings independently violated the First Amendment. The Petition for Rehearing also notes that all eleven of the twelve federal courts of appeal that have resolved the issue have recognized a qualified right, arising under the First Amendment, of the public to inspect judicial records in criminal cases.

On July 2, 2018, the Colorado Supreme Court denied the Petition for Rehearing. The *Colorado Independent* is considering filing a petition for certiorari to the United States Supreme Court.

*Steve Zansberg and Greg Szewczyk of Ballard Spahr’s Denver office represent the Colorado Independent. Matthew Grove of the Colorado Attorney General’s Office in Denver represents the Arapahoe County District Court.*