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Rethink death penalty in light of widespread government misconduct

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The post-conviction review court has made findings in the [Sir Mario Owens case](#). It is now established as fact that prosecutors deliberately and/or recklessly allowed two key witnesses for the state to present false evidence to the jury and, “with no legal justification,” failed to correct those falsehoods.

It is also now established as fact that prosecutors failed to disclose exculpatory evidence (i.e., evidence that points to a defendant’s innocence or impeaches the credibility of the witnesses against him) in more than 20 instances, concerning no fewer than 10 state witnesses. At the prosecution’s urging, the court found that these facts — somehow — do not merit relief.

We beg to differ and trust that the Colorado Supreme Court or the federal courts will reach different conclusions. Facts matter. Justice depends on getting basic principles right. When the government uses improper tactics to distort the truth and to hide evidence, stark moral clarity is demanded.

Other courts have recognized that when prosecutors behave with disregard for their constitutional obligations, it erodes public trust in our justice system, and chips away at the foundational premises of the rule of law. When courts acknowledge, yet forgive such transgressions, they invite their repetition.

Our criminal justice system becomes inherently vulnerable when prosecutors present false evidence and hide exculpatory evidence. Systemic failings cause innocent people to be wrongly convicted and executed.

Colorado's legislature established post-conviction review to ensure that if our state is ever going to execute a citizen in its name, then the process needs to be acutely trustworthy. The post-conviction court determines whether police and prosecutors disclosed all of the evidence in the case. Government misconduct is a primary cause of wrongful convictions and, once exposed, a leading factor in exonerations.

In the overwhelming number of criminal cases, Colorado's district attorneys practice an open file policy — meaning they open their entire file for defense inspection. But the 18th Judicial District's office does not adhere to an open file policy. A judge previously threw out the conviction of another capital defendant because that office hid exculpatory evidence. The court has now confirmed that the practice continued in Owens.



RJ Sangosti, Denver Post file

An Arapahoe County District Court judge recently denied the death penalty appeal of convicted killer Sir Mario Owens. Senior Judge Christopher Munch ruled that Owens received a fair trial despite the fact that prosecutors withheld some evidence that could have been favorable to his side.

The post-conviction court has now found that both police and prosecutors hid vast amounts of exculpatory evidence. Records showed that the DA's office funneled thousands of dollars to their witnesses. Prosecutors worked secret deals that enabled witnesses to avoid lengthy incarceration in exchange for testimony. Prosecutors even promised one key witness a car bought by taxpayers. The car was delivered after the trial. The DA's office allowed witnesses with criminal convictions to abscond from probation or commit new crimes with no consequences, so long as they testified in the prosecution's favor. This information was not disclosed to the defense, the court, or the jury.

This case has been George Brauchler's responsibility for the past five years. Brauchler not only has failed to take any responsibility for the egregious misconduct, he has affirmatively continued the office's practice of hiding evidence. For example, the case was delayed for a year and half while he forced Colorado's Supreme Court to consider and later reject his efforts to hide possibly exculpatory material concerning highly questionable conduct on the part of a juror. It wasn't discovered until 2015 that Brauchler's office had maintained secret files that contained still more favorable evidence showing hidden payments to state's witnesses.



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The pattern and practice exhibited by Brauchler's office and that of his predecessor tarnish the well-deserved image of so many of Colorado's honest and hardworking prosecutors who actually follow constitutional requirements and take their responsibilities seriously. When prosecutors present false evidence in the name of the people and hide exculpatory evidence, the state loses any moral authority it might otherwise have to impose the ultimate punishment.

In the 43 years since Colorado reinstated the death penalty, our state has spent between \$100-\$200 million on capital punishment. And yet, that massive expenditure has yielded one execution.

The time has come for Colorado to seriously consider whether the death penalty makes sense, given the financial burdens and misconduct that come with it.

James Castle and Jonathan Reppucci are Denver lawyers appointed by the court to represent Sir Mario Owens.

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