IN THE SUPREME COURT
OF THE
STATE OF VERMONT

IN RE: SEARCH WARRANTS

Supreme Court Docket No. 2011-228

Appeal from the

Vermont Superior Court, Criminal Division.
Chittenden Unit

APPELLANT STATE OF VERMONT'S BRIEF

STATE OF VERMONT

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ISSUES PRESENTED

I. There is no First Amendment or common law right of access to search warrant materials in an active pre-arrest investigation.

II. Pursuant to its authority over court records, this Court should rule that there is no public right of access to pre-arrest search warrant materials in active investigation.

III. In the alternative, the Chittenden Criminal Division erred in denying the State's motion to seal or redact the search warrant materials.

IV. The Chittenden Criminal Division erred when it failed to hold a hearing on the State's motion.

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STATEMENT OF THE CASE

The State has appealed from a decision of the Vermont Superior Court, Criminal Division, Chittenden Unit, denying a motion to seal search warrant materials in the on-going investigation into the disappearance of William and Lorraine Currier.

STATEMENT OF THE FACTS

William and Lorraine Currier were last seen leaving work on June 8, 2011. They were reported missing after they failed to appear at work the next day. According to press reports "Police have said they have evidence to show that they were at their Colbert Street home [in the town of Essex] at about 7 p.m. [on] June 8."[1] The Currier's car was found on June 10, 2011, approximately three-quarters of a mile from their home.

A. Search Warrants, The Filing of Returns and Requests for Access to Search Warrant Materials

As part of the investigation into the Currier's disappearance Vermont law enforcement officers obtained a number of search warrants for locations in Chittenden County. On June 15, 2011, Sam Hemingway, a reporter with the Burlington Free Press, submitted a written request to the Vermont Superior Court, Chittenden Criminal Division, for copies of "Search warrants in Currier case for 8 Colbert Street, dark blue Saturn, Currier's cell phone, bank [account] and credit card receipts." Judge Levitt denied the request the following day because "no returns have been filed." Printed Case ("PC") at 35; Redacted Printed Case ("RPC") at 4.[2]

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[1] http://www.burlingtonfreepress.com/apps/pbcs.dll/article?AID=2011110803001

[2] Since this appeal involves *ex parte* proceedings and sealed documents the State has prepared two printed cases – a Printed Case filed under seal which "contain[s] such extracts from the record as are necessary to present fully the questions raised," V.R.A.P. 30(a), and a Redacted Printed Case containing the public documents.

On June 16, 2011, the State filed a motion to seal search warrants, application for search warrants and affidavits filed in support of the search warrants in the Currier investigation.[3] On June 16, 2011, Judge Levitt denied the motion, noting, "They are not public, yet." PC at 36; 37; RPC at 5.

On June 21, 2011, returns were made and inventories filed on four search warrants that had been executed as part of the investigation into the disappearance of the Curriers.[4] PC at 8-9; 16-17; 24-26; 33-34. That same day, the State submitted a renewed motion to seal. Judge Levitt denied the motion noting that it "need[ed] a particularized showing to seal, not a general, it will 'compromise the investigation' to disclose. What info is known only to the police and the perp? How will disclosure impede the investigation?" PC at 38-39; 40; RPC at 6.

The State contacted court staff at the Chittenden Criminal Division seeking guidance on how to proceed. The standard practice in the court, as in other courts of this state, was to schedule the motion to seal for an *ex parte* hearing upon the State's filing of such a motion. Upon information and belief, the court staff informed the State that there would be no hearing and that it should submit supplemental pleadings in writing and supported by an affidavit.

B. The Supplemental Motion to Seal

Later on June 21, 2011, the State submitted a detailed supplemental motion to seal. The supplemental motion first identified the documents that the State sought to seal. The

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[3] The State was following the standard practice in the Chittenden Criminal Division whereby a motion was filed and the Court then scheduled a motion hearing pursuant to § 7 of the Rules for Public Access to Court Records.

[4] The four search warrants at issue in this matter were obtained over a period of one week. The affidavits in support of the search warrants are substantially similar and reflect information developed during the course of the investigation over that week. PC at 6-7; 12-15; 20-23; 29-32.

State's motion then identified legal authority for the motion to seal citing *In re Sealed Documents*, 172 Vt. 152, 772 A.2d 518 (2001). The motion outlined information that was not public and reasons why, under the circumstances, release of the information would present a substantial threat to effective law enforcement.[5] Finally, the motion clearly indicated that the State was willing to redact the documents as an alternative to a sealing order. In support of the motion and as requested by the court, the State submitted an affidavit from the investigating officer Detective Morgan Lawton of the Essex Police Department. The affidavit of the officer provided background regarding the investigation into the disappearance of the Curriers. In 12 separate paragraphs the affidavit described information that was not known to the public.[6] PC at 41-45; 46-47. Det. Lawton's affidavit also described why maintaining the confidentiality of the information was important:

> 15. It is common practice in police investigation to keep details learned through investigation confidential, in order to be able to use those details to decipher credible tips and information from non-credible tips and information. If all of the above information were to be released to the public it would significantly hamper our ability to determine what information we receive is legitimate and relevant to our investigation, and what information is not.
> 16. Any potential suspect may be following this investigation in the media. The release of the above information would give any suspect access to most information and evidence the police possess. This would allow a suspect to easily avoid detection and/or respond to police questioning. It is also likely that any potential witness or false witness may be following media coverage of this investigation. Release of the above information could unduly influence the recollection of true witnesses, or allow any false witnesses to tailor information to fit with what is already known to the police.

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[5] The State's pleading thus responded to the Judge's request to identify information known only to law enforcement and a perpetrator.

[6] Reading Detective Lawton's affidavit in conjunction with the affidavits of probable cause and other search warrant materials clearly identifies the information that is not public. See, for example, the Lawton affidavit at ¶ 4 and the probable cause affidavits at ¶ 14. PC at 7; 14; 22; 31; 46.

In re Search Warrants, 2011 VT 88, ¶ 7 (Dooley, J., dissenting). Paragraph 17 has not been disclosed and provides a further example of why, at this stage of the investigation, it is important to maintain the confidentiality of the information. PC at 47.

On June 23, 2011, the court denied the State's motion. The court outlined a standard of review citing decisions of this Court. The court concluded that

> the State must demonstrate a showing of substantial harm, demonstrated with specificity with respect to each document. The Court has reviewed the affidavits in support of the search warrants, plus the four returns and inventories, as well as the State's submissions, especially pages 3-4 of the Supplemental Renewed Motion to Seal. The State has made only general assertions that the police investigation will be jeopardized if information is released. [Sentence Redacted]. Furthermore, the listing of items in the search warrant inventories are not so specific that access to the public will jeopardize the police investigation.
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> Prior to the execution of the warrant, search warrants are not available to the public, in order to allow the police to perform their search without interference. The search warrants for the searches that have not yet been executed continue to be closed to the public. The returns that have been made indicate that a number of the searches have already been performed. Evidence was either found or not found. The public has a right to information about the police investigation that is filed with the court, and that access can not cause interference with a completed search.
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> The State has not argued that a substantial risk exists to the privacy or safety of the missing individuals. Although the State has argued that disclosure poses a "substantial risk to the investigation," the possibility of a risk is not the same as the existence of "substantial threat to the interests of effective law enforcement." There must be compelling reasons for the closure of court records. In a free and democratic society, there is always some risk that information will be misused or applied to nefarious ends. The State has not met its burden of demonstrating compelling reasons that overcome the presumption of public access.

PC at 2-3; RPC at 2-3. The trial court's order did not address the State's offer to redact the search warrant materials. The State then requested that the criminal division stay the order pending an evidentiary hearing at which evidence would be presented from Essex Police Department officers. The State also renewed the request to redact documents. The

court denied the motion noting, "The State has presented no additional information to indicate why the order issued 6/22/11 [sic] would be changed after a hearing." PC at 48; 49; RPC at 8.

The State then filed a notice of appeal and motion for a stay pending appeal. The State sought an order precluding release of the materials pending appeal. PC at 50; 51-53; RPC at 7.

On June 27, 2011, the Chittenden Criminal Division denied the State's motion for a stay noting, "[t]he court does not believe that the State has outlined sufficient reasons to justify sealing the records or a stay of the order. It appears that the issues raised by the State would apply to any ongoing investigation. *See In re Sealed Documents*, 172 Vt. 152 (2001) (general allegations of harm are insufficient)." PC at 54; RPC at 8.

C. Proceedings in the Vermont Supreme Court

On June 28, 2011, Justice Skoglund issued an Entry Order temporarily granting the State's request to seal the search warrant materials "pending full review of the stay request by the full Court." *In re Search Warrants*, No. 2011-228 (Vt., June 28, 2011) (Skoglund, J.). The order further indicated that

> the State may file supplemental briefing in support of the motion by July 1, 2011. In its brief, the State is requested to address: (1) the interplay between 1 V.S.A. § 317(c)(5) (exempting from disclosure "records dealing with the detection and investigation of crime") and Rule 6(b)(15) of the Rules for Public Access to Court Records (providing for public access to "Records of the issuance of a search warrant, until the date of the return of the warrant, unless sealed by order of the court"); and (2) the distinction, if any, between this case and decisions of the Court dealing with post-indictment requests for access to search warrants and related materials.

Id. The State and the Burlington Free Press submitted additional pleadings to this Court. On July 18, 2011, this Court issued an entry order granting the State's motion. This Court noted that:

> Regarding the likelihood of the State prevailing on the merits of its challenge to the criminal division's refusal to seal the requested documents, we note that the instant matter involves circumstances not present in *In re Sealed Documents* that militate in favor of a more cautionary approach to releasing the search warrant documents. In *In re Sealed Documents*, the victims of the crime were deceased and the suspects in custody. Here, in contrast, the putative victims are missing and no suspects are in custody. Under these circumstances, both the State and the public have a heightened interest in not undermining the criminal investigation through the revelation of facts not generally known to the public. Although the public and the press generally have a presumptive right to court documents, that right may be trumped by the State's, as well as the public's, interest in preserving the investigation of a potentially serious crime, especially when the right to access does not serve as a check against an unjust conviction, excessive punishment, or the unwarranted taint of criminality.
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> ¶ 3. Accompanying the motion to seal, the State submitted affidavits describing particular facts not known to the general public that were discovered during the search of the putative victims' home and property. The State alleged that the release of those facts to the public could undermine its criminal investigation, which is still in its early stages with the putative victims still missing and no suspects in custody. If we were to deny the State's request for a stay, it would effectively preclude the State from appealing the criminal division's decision and potentially hamper its investigation. Under these circumstances, it is appropriate to stay the matter until the underlying legal issue is resolved. See *In re Sealed Documents*, 172 Vt. at 164-65, 772 A.2d at 528-29 ("In the event of an appeal from the court's decision, no access to the documents or sealed order and record shall be granted until the matter has been finally resolved."); cf. 1 V.S.A. § 317(c)(5) (making exempt from public inspection "records dealing with the detection and investigation of crime, including those maintained on any individual or complied in the course of a criminal or disciplinary investigation by any police or professional licensing agent").
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> ¶ 4. The dissent notes that the State is seeking to seal all of the search warrant documents when it could have simply redacted any information that posed a threat to its investigation. As the dissent acknowledges, however, in its motion to seal the State offered the possibility of redacting certain information or documents, but the court nonetheless denied the motion outright without providing the State any opportunity to redact. That is the decision that has been appealed—the only question before us at

> this particular juncture is whether we should stay pending appeal the wholesale denial of the motion to seal.

In re Search Warrants, 2011 VT 88, ¶¶ 2-4. Justices Dooley and Johnson dissented.

SUMMARY OF ARGUMENT

Chittenden County law enforcement agencies are actively investigating the disappearance of two residents of Essex, Vermont. At this time no one has been arrested or charged with any criminal offense related to the investigation. The State and the public have a substantial interest in safeguarding and promoting law enforcement's efforts to determine what happened to the Curriers.

There is no qualified First Amendment right of access to the search warrant materials at this stage of the investigation. There is also no qualified common law right of access to these materials. Finally, there is no right of access under any Vermont statutes. Where, as here, there is an active investigation at an early stage and no person has been arrested, indicted or otherwise subjected to adversarial proceedings by the State, the presumption should be that search warrant materials are not public.

Moreover, even assuming that a presumption in favor of disclosure is applicable prior to any arrest or indictment, the criminal division erred in finding that the State had not met its burden to establish good cause and exceptional circumstances warranting sealing or redacting the search warrant materials. Finally, the criminal division abused its discretion when it failed to hold a hearing on the State's request to seal or redact search warrant materials in this matter.

STANDARD OF REVIEW

Whether or not the press or the public have a qualified First Amendment right of access to search warrant materials during an active criminal investigation and prior to the arrest or indictment of a target is a question of law, and thus reviewed *de novo*. *Times-Mirror Company v. United States*, 873 F.2d 1210, 1213 (9th Cir. 1989) ("*Times-Mirror*"). The question of whether the common law provides the public with a qualified right of access to warrant materials under such circumstances is also a question of law, requiring *de novo* review. *Id.*

This Court has not yet articulated a standard of review for appeals from a decision to seal a record under § 7 of the Rules of Public Access to Court Records. The Rule states that, "an order may be issued under this section only upon a finding of good cause specific to the case before the judge and exceptional circumstances. In considering such an order, the judge shall consider the policies behind this rule." § 7. A decision on a motion to seal presents mixed questions of fact and law. Cf. *State v. Amler*, 2008 VT 1, ¶ 5, 183 Vt. 552, 944 A.2d 270 (describing the standard of review for good cause under 23 V.S.A. § 2305(h)). Findings of fact in a motion to seal are subject to a deferential standard of review and will be upheld unless clearly erroneous. *State v. Barron*, 2011 VT 2, ¶ 11, 16 A.3d 620, 625. A finding that the State has established good cause is discretionary. Such findings will be upheld absent an abuse of discretion. *In re Jones*, 2009 VT 39, ¶ 17, 185 Vt. 638, 640, 973 A.2d 1198, 1201 (mem.). An abuse of discretion is the failure to exercise discretion or its exercise on reasons clearly untenable or to an extent clearly unreasonable. *State v. Amler*, 2008 VT 1, ¶ 5. Application of the policies behind the rule is a question of law and is, therefore, subject to plenary non-deferential review. *State v. Sommer*, 2011 VT 59, ¶ 5.

ARGUMENT

The press seeks access to certain search warrant materials filed with the Chittenden Criminal Division related to the law enforcement investigation into the disappearance of William and Lorraine Currier. This is an active criminal investigation but no person has been arrested or otherwise subjected to adversarial proceedings by the State as part of the investigation. Under these circumstances, there is no constitutional, common law or statutory right of access to the search warrant materials in question. Therefore, as a matter of law the public and the Burlington Free Press were not entitled to access to the search warrant materials in this active pre-arrest investigation. Moreover, even assuming that there is some right of access, the trial court erred in denying the motion to seal, erred in denying the request to redact and erred in denying the State a hearing on the motion.

I. There is no First Amendment or common law right of access to search warrant materials in an active pre-arrest investigation.

Persuasive authority establishes that there is no qualified First Amendment or common law right of access to search warrant materials pre-arrest or pre-indictment during an active criminal investigation. There is, thus, no constitutional or common law right of access to the search warrant materials in the Currier investigation.

Two tests have been identified for determining whether a qualified First Amendment right of access extends to particular judicial records. First, the public has a right of access to judicial records (1) that "have historically been open to the press and general public," and (2) where "public access plays a significant positive role in the functioning of the particular process in question." *In the Matter of the Application of the New York Times Company to Unseal Wiretap and Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009) ("*NYT Wiretap*") (citing *Press–Enterprise Co. v. Superior*

Court, 478 U.S. 1, 8–9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). Additionally, courts have held that the First Amendment protects access to judicial records that are "derived from or a necessary corollary of the capacity to attend the relevant proceedings." *NYT Wiretap*, 577 at 409. Under either test there is no qualified First Amendment right of access to search warrant materials under these circumstances. Search warrant materials have not historically been open to the press or the public at this stage of an investigation. Similarly, public access plays no significant positive role in an active criminal investigation. Finally, since search warrant proceedings are *ex parte* access to the materials in question is not linked to a proceeding to which the public has a right of access.

Numerous courts have rejected requests for access to search warrant materials prior to the initiation of criminal proceedings. *In re San Francisco Chronicle*, 2007 WL 2782753, * 2 (E.D.N.Y. 2007); *Times-Mirror*, 873 F.2d at 1213 (applying *Press-Enterprise* and noting "we know of no historical tradition of public access to warrant proceedings"); *Seattle Times Co. v. Eberharter*, 713 P.2d 710, 715 (Wash. 1986) (applying the *Press-Enterprise* test). See also, *United State v. Loughner*, 769 F.Supp.2d 1188, 1191 (D.Ariz. 2011) (applying *Times-Mirror* and noting that members of the public have no "First Amendment right to obtain warrant materials while a criminal investigation is ongoing and before indictments have been returned"); *In re Sealed Documents*, 172 Vt. 152, 772 A.2d 518 (2001) ("The great weight of authority holds that pre-indictment search warrant materials have not historically been open to the press and general public, ... and therefore access is not compelled under the First Amendment"). There is no qualified First Amendment right of access to the materials in question under the circumstances presented in the matter before this Court.

In *Times-Mirror* the Ninth Circuit considered and rejected a claim of a qualified common law right of access to pre-indictment search warrant materials. The court noted that a common law right of access could not be found absent a history of access and "an important public need justifying access." *Times-Mirror*, 873 F.2d at 1219. The court concluded that

> Under this important public need or "ends of justice" standard, appellants' claim must be rejected. We believe this threshold requirement cannot be satisfied while a pre-indictment investigation is ongoing. As we explained in our discussion of appellants' First Amendment claim, the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a pre-indictment investigation into suspected criminal activity.

Id.[7] See also *Loughner*, 769 F.Supp.2d at 1191 (the public has no common law right to obtain warrant materials while a criminal investigation is ongoing and before indictments have been returned); *In re Motion for Release of Court Records*, 526 F.Supp.2d 484, 490 (Foreign Intel. Surv. Ct. 2007) (There is no common law right of access to documents that have "traditionally been kept secret for important policy reasons" or "when the ends of justice would be frustrated, not served, if the public was allowed access").

The press seeks access to materials reflecting the details of an on-going criminal investigation. There is no one under arrest, under indictment or facing criminal charges at this time. The ends of justice would not be served by allowing press access to the search warrant materials at this time. In sum, there is no common law right of access to these pre-arrest search warrant materials.

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[7] The Ninth Circuit's analysis of a common law right is substantially similar to First Amendment analysis under the *Press Enterprise* test. Other courts have concluded that the rights of access under the First Amendment and common law are parallel. See, e.g. *Skolnick v. Altheimer and Gray*, 730 N.E.2d 4, 16-17 (Ill. 2000).

II. Pursuant to its authority over court records, this Court should rule that there is no public right of access to pre-arrest search warrant materials in active investigations

In *In re Sealed Documents*, 172 Vt. 157, 772 A.2d 518 (2001), this Court concluded that 4 V.S.A. § 693[8] rendered documents filed in connection with obtaining a search warrant judicial records absent "any superseding legal requirement that they be kept confidential." *Id.*, 172 Vt. at 159. The matter before the Court is factually and legally distinguishable from *Sealed Documents*. At this time the location of the Curriers is unknown. No suspects have been arrested, indicted, charged by information, arraigned or otherwise subjected to adversarial proceedings by the State. Following the Ninth Circuit's formulation, "the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a pre-indictment investigation into suspected criminal activity." *Times-Mirror*, 873 F.2d at 1219. The common law recognizes that public access under such circumstances is not allowed.[9]

Sealed Documents involved search warrants in a matter in which the government had initiated proceedings against individuals who had committed a serious and heinous crime. This Court noted that "the presumptive right of access to court records, including pre-indictment search warrant materials, may be overcome only by a showing that ... a substantial threat exists to the interests of effective law enforcement, or individual

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[8] 4 V.S.A. § 693 was repealed as part of judicial restructuring. See 2009, No. 154 (Adj. Sess.), § 238. However, 4 V.S.A. § 652(4), as amended, incorporates substantially similar language. In Illinois a substantially similar statute is interpreted as providing a right of access that is equivalent to rights under the First Amendment and the common law. See *In re Gee*, 2010 WL 5143888, * 3 (Ill. Ct. App. Dec. 8, 2010). The 2010 judicial restructuring bill explicitly recognized that records could also be made confidential by rule. See 4 V.S.A. § 740; 2009, No. 154 (Adj. Sess.), § 43.

[9] Recent amendments to the Rules of Criminal Procedure support such a conclusion that disclosure of materials during an on-going investigation is disfavored. See V.R.Cr.P. 41(d)(4)(B) (a court may allow a delay in making the return upon a warrant to seize a conversation if the State certifies that an investigation related to the warrant is on-going).

privacy and safety. ... " *Id.*, 172 Vt. at 161. To the extent that this Court was suggesting that there exists a presumptive right of access under the circumstances presented by the Currier investigation, *Sealed Documents* should be revisited.

There are a variety of persuasive reasons why *Sealed Documents* should not be regarded as binding precedent in this matter. First, the extension of the *Sealed Documents* analysis to *all* pre-arrest search warrants was dicta, was overbroad, and should, therefore, be reconsidered and clarified. Secondly, that case is factually distinguishable. While this Court characterized *Sealed Documents* as addressing "pre-indictment" search warrant materials it did note, repeatedly that two individuals were under arrest. See *id*, 172 Vt. at 154-55, 161 n. 7, 163 n. 10. Unlike the Currier investigation, adversarial proceedings were underway in *Sealed Documents*. Thirdly, the policies underlying disclosure when adversarial proceedings have been commenced support confidentiality when there are no such proceedings. As this Court has noted "[t]he punitive purpose of criminal proceedings raises First Amendment issues.... [P]ublic access serves as a check against unjust conviction, excessive punishment and the undeserved taint of criminality." *In re J.S.*, 140 Vt. 458, 466, 438 A.2d 1125 (1981). See also, *Loughner*, 769 F.Supp.2d at 1193-1194.[10] Where, as here, no adversarial

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[10] The *Loughner* court noted that

> These authorities establish that there is as much historical basis for disclosure of search warrants at this stage as there is for non-disclosure, with the more recent authority recognizing a right of access once the investigation has concluded and the indictment has issued. Given the critical importance of the public's right to be fully informed in high profile case like this one, as well as the need for robust protection of a free press, this Court opts to be guided by the more recent authority. The Court is persuaded by the clear trend among the states during the past 30 years that experience supports finding a qualified First Amendment right of access to search warrant materials once the investigation has concluded and a final indictment has issued.

769 F.Supp.2d at 1193 (citing, *inter alia*, *Times-Mirror, United States v. Inzunza*, 303 F.Supp.2d 1041 (S.D.Cal. 2004) and *In re Application of New York Times Co. for Access to*

proceedings have been initiated and the investigation is active, policy reasons strongly support maintaining the confidentiality of the process. See, *Times-Mirror*, 873 F.2d at 1215-1216; *Petition of State (Bowman Search Warrants)*, 781 A.2d 988, 991-94 (N.H. 2001). [11]

The Rules for Public Access to Court Records are not inconsistent with a presumption that pre-arrest search warrant materials are not accessible. The Rules for Public Access to Court Records, effective shortly after the *Sealed Documents* decision, provide "specific guidance as to the scope" of the right of access under Vermont statutes. *Shahi v. Ascend Financial Services, Inc.*, 2006 VT 29, ¶ 17, 179 Vt. 434, 441-442, 898 A.2d 116 (2006). The Rules define record to "include all evidence received by the court in a case." See § 3(a).

> The purpose of these rules is to "provide a comprehensive policy on public access to Judicial Branch records." Rules for Public Access to Court Records § 1. The general policy established by those rules is that "all case and administrative records of the Judicial Branch shall be open to any member of the public for inspection or to obtain copies." *Id.* § 4. Therefore, "all case records" are open to the public unless they fall into the exceptions set forth in § 6(b). *Id.* § 6(a).

Certain Sealed Court Records, 585 F.Supp.2d 83 (D.D.C. 2008)). The *Loughner* court also noted that

> Irrespective of whether disclosure is associated with a discrete criminal proceeding such as a suppression hearing, *post-investigation, post-indictment public access to search warrants fulfills important societal objectives and benefits the criminal process.* To reiterate the point made by *Richmond Newspapers,* the benefits include: providing awareness that society, through its law enforcement function, has responded appropriately to a matter of great public concern; avoiding public suspicion of the criminal justice system; and demonstrating the appearance of justice. All of these considerations are implicated in this case, and underscore the logic of granting public access to the search warrant materials *at this point.*

Loughner, 769 F.Supp.2d at 1195 (emphasis supplied).

[11] Should all search warrant materials be presumptively public no matter how early in the investigation, there may be a perverse incentive for law enforcement agencies to either (1) where possible, conduct searches without warrants or (2) delay making the return upon a warrant. Neither alternative should be favored. The warrant requirement is a fundamental protection of the rights of citizens. Similarly, the prompt filing of a return signals that the State has exercised authority to seize property pursuant to a court order.

State v. Whitney, 2005 VT 102, ¶ 9, 178 Vt. 435, 439, 885 A.2d 1200 (2005). Section 6 provides access unless the record falls within one of the 35 exceptions. Pursuant to § 6(b)(15), "The public shall not have access to the following judicial branch records: ... records of the issuance of a search warrant, until the date of the return of the warrant, unless sealed by order of the court." The section is silent on any standard for sealing. While the Reporter's Notes to § 6(b)(15) reference *Sealed Documents* the standards articulated therein should not apply to the matter before the Court for the reasons set forth above. Thus, pursuant to its inherent authority and the common law, this Court should provide guidance to the trial courts, the public and law enforcement and adopt a standard for sealing pre-arrest search warrant materials in active investigations. That standard should be that such records are sealed or, at the very least, are presumptively sealed.

In considering what standard to adopt, this Court may wish to consider, as matter of comity, the Public Records Act [PRA]. This Court has stated that "it is doubtful that the [PRA] applies at all to judicial records in view of the specific statutes in the trial courts and the power of the judicial branch over its records." *Herald Ass'n, Inc., v. Judicial Conduct Board*, 149 Vt. 233, 240, n.7, 544 A.2d 596 (1988). See also *In re Sealed Documents*, 172 Vt. at 157, n. 3 (same). This conclusion is supported by the constitutional underpinnings of the PRA. 1 V.S.A. § 315 sets forth a statement of policy referring specifically to Vt. Const. Ch I, Art. 6, that provides

> That all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, *whether legislative or executive*, are their trustees and servants; and at all times, in a legal way, accountable to them.

Id. (emphasis supplied). A recently enacted statute recognizes the authority of the judiciary to adopt rules making records confidential and, thus, not subject to public disclosure. See 4 V.S.A. § 740 (amended by Act 154, § 43 (2009 Adj. Sess.)). The PRA does not control access to judicial branch records. However, as a matter of comity, the Court in adopting or applying its rules may consider the policy choices made by the Legislature. See *Killington, Inc. v. Lash*, 153 Vt. 628, 641 572 A.2d 1368 (1990) (recognizing the appropriateness of inter-branch comity); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1444 (11th Cir. 1987) (recognizing the "principles of comity that inform the relationships between the branches of government" and citing, *inter alia*, *The Federalist* No. 47 (J. Madison)). Thus, the Court may consider the Legislature's policy choice in exempting records "dealing with the detection and investigation of crime," 1 V.S.A. § 317(c)(5), when determining the public's access to judicial records under § 6 and § 7.

For these reasons, this Court can and should decide that as a matter of law the records in cases such as these should be sealed.

III. In the alternative, the Chittenden Criminal Division erred in denying the State's motion to seal or redact the search warrant materials.

Applying the standards articulated for post-arrest access to search warrant materials, the trial court erred in denying the State's motion to seal and abused its discretion in failing to consider the State's request to redact the search warrant materials.

This Court has noted that "[u]nder § 7(a) of the [R]ules for Public Access to Court Records], the purpose of ... a motion is to 'seal from public access a record to which the public otherwise has access' or to 'redact information from a record to which the public

has access.' The motion can be granted on a finding of case-specific 'good cause' and 'exceptional circumstances.'" *Whitney*, 2005 VT 102, ¶ 8, 178 Vt. at 438-439 (quoting § 7(a)). The Reporter's Notes make particular reference to a variety of decisions of this Court addressing access to different documents or proceedings and the procedures and standards set forth in those decisions in considering motions to seal under § 7.

As noted above, *Sealed Documents* identified four factors to be considered in sealing search warrant materials. The State must show a substantial threat exists to the interests of effective law enforcement, or individual privacy and safety. The showing of harm must be made with specificity with respect to each document. The trial court must determine whether these interests might be served by redaction. And, in rendering a decision, the court must examine each document individually, and make fact-specific findings with regard to why the presumption of access has been overcome. *In re Sealed Documents*, 172 Vt. at 161-62 (citations and quotations omitted). Application of these standards to the present matter establishes that the Chittenden Criminal Division improperly denied the State's request to seal or redact the search warrant materials.

A. There would be a substantial threat to effective law enforcement if the non-public information in the search warrant materials were released.

As noted above, the State is investigating the disappearance of the Curriers. At this time there is no one under arrest and the criminal investigation into the disappearance is active and continuing.

Criminal investigations involve a detailed fact-finding process whereby historical fact is determined from a variety of sources including evidence found at a crime scene and elsewhere, the absence of evidence in certain locations, and statements of witnesses and suspects. Corroboration of statements with physical evidence is critical to ensure

the reliability of those statements and the reliability of the ultimate conclusions drawn by the law enforcement agency. Inbau, *Criminal Interrogation and Confessions*, at 432 (4th ed. 2004) ("Proper corroboration of a confession has been emphasized throughout this chapter, as it represents the best measure of the trustworthiness of a confession.") Thus, keeping certain information out of the public domain has enormous value in criminal investigations. Three obvious examples include:

- Using non-public information to identify a perpetrator: there may be information that could be known only to law enforcement and the person who committed the crime.[12]

- Using non-public information to corroborate tips: law enforcement agencies receive large numbers of tips in high profile and notorious cases. The ability to quickly confirm the reliability or unreliability of a tip through comparison to non-public information is critical in determining whether to follow up on the information.[13]

- Using non-public information for exculpatory purposes: it is not uncommon for persons to voluntarily confess to notorious crimes that they did not commit.[14] Non-public information can be used to quickly eliminate such false confessions.

The significant and detailed information in the State's sealed pleadings and affidavit provides ample support for the conclusion that the search warrant materials should be sealed or redacted as the State requested. The trial court, therefore, erred in denying the State's motion.

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[12] This is often referred to as dependent corroboration; that is "information that is purposefully withheld from all suspects and the media." Inbau, *supra*, at 432. As noted in Det. Lawton's affidavit and the search warrant affidavits, there are details regarding the investigation, the scene and the evidence recovered that are not public. Any or all of these facts could be used to identify a potential perpetrator.

[13] As noted in Det. Lawton's affidavit and the search warrant affidavits, there are details regarding the investigation, the scene and the evidence recovered that are not public. Any or all of these facts could be used to confirm the apparent reliability or unreliability of a tip.

[14] Conti, *The Psychology of False Confessions*, The Journal of Credibility Assessment and Witness Psychology, Vol. 2, No. 1 at 20-21. See also Garrett, *Judging Innocence*, 108 Colum.L.Rev. 55, 88-91 (2008) (identifying cases of false confessions). As noted in Det. Lawton's affidavit and the search warrant affidavits, there are details regarding the

In denying the motion the trial court noted that, "although the State has argued that disclosure poses a 'substantial risk to the investigation,' the possibility of a risk is not the same as the existence of 'substantial threat to the interests of effective law enforcement.'" PC at 3; RPC at 3. The trial court's reasoning is hyper-technical. The State asserted that sealing was warranted under *Sealed Documents*. The trial court, however, suggests that the state's concern about a "substantial risk" to the criminal investigation into the disappearance of the Curriers is "not the same" as a "substantial threat to the interests of effective law enforcement." Contrary to the criminal division's assertion, these phrases are functionally synonymous.[15] It was an abuse of discretion to deny the motion to seal on this ground.

B. The State made a sufficient showing of harm with respect to each document and offered, in the alternative, to redact non-public information from the search warrant materials.

As noted above, the State described with specificity the information that was contained in the records that it sought to keep confidential. The criminal division concluded that the State had made only general allegations of harm. The record does not support such a conclusion. The State specifically identified information in the search warrant materials that was not public. As noted above, it is well recognized that effective law enforcement and criminal investigative techniques require control over information – information that can be used to inculpate or exculpate. The State respectfully disagrees with the position taken by the dissent from the ruling on the stay – that the State is in a position to exclude information from a warrant in order to prevent it

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investigation, the scene and the evidence recovered that are not public. Any or all of these facts could be used for exculpatory purposes.

[15] Roget's 21st Century Thesaurus (3d. ed. 2009) identifies "risk" as a synonym for "threat."

becoming public. Law enforcement officials are encouraged to include all information that is potentially relevant to the finding of probable cause or the particularity requirements in a search warrant affidavit. When an investigation is at an early stage it is not possible to be certain about what information is relevant, inculpatory or exculpatory. The exclusion of potentially exculpatory information may have consequences for subsequent litigation on the validity of the warrant. See e.g. *United States v. Stanert,* 762 F.2d 775, 781 (9th Cir.1985), *amended,* 769 F.2d 1410 (9th Cir.1985) ("By reporting less than the total story, an affiant can manipulate the inference a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning"). The State should not be penalized for fully and completely describing the state of the evidence at the time of the search warrant applications.

In addition to identifying the non-public material in the search warrant materials, the State specifically indicated that it might be possible to redact these materials.[16] The trial court apparently discounted this possibility. The court abused its discretion when it failed to consider the possibility of redacting the search warrant documents.

C. The public's interest where there is an active investigation and no proceedings have commenced against any individual weights heavily in favor of confidentiality

The State submits that the existence of an active investigation and the lack of proceedings against any individual are factors to be considered when determining

[16] The dissent's suggestion that the State is at fault for creating an all-or-nothing request to seal misapprehends the State's motion. The State suggested that it might be possible to redact the non-public information from the affidavits of probable cause and the other search warrant

whether there is good cause and exceptional circumstances under § 7. There is a substantial public interest in open government. As noted above, public access plays a significant positive role in criminal proceedings against an individual. *In re J.S.*, 140 Vt. at 466. However, access does not enhance the early stages of an investigation. Indeed, the State submits that where, as here, the investigation is in its early stages and no arrest has been made, public access is not in the interests of justice and may, in fact, impede the truth-seeking law enforcement function as demonstrated by the affidavit of Det. Lawton, the State's motions to seal, and persuasive authority from other jurisdictions. See, e.g., *Times-Mirror*, 873 F.2d at 1215-1216; *Petition of State (Bowman Search Warrants)*, 781 A.2d 988, 991-94 (N.H. 2001). The public's interest in search warrant materials may be significantly different when charges have been filed. However, these are not the circumstances presented in the matter before the court. In considering whether to seal search warrant materials under the *Sealed Documents* analysis, the status of the investigation and the initiation of adversarial proceedings are factors that should be considered by the court in conducting analysis under § 7.

IV. The Chittenden Criminal Division erred when it failed to hold a hearing on the State's motion.

Section 7 of the Rules for Public Access to Court Records states, in relevant part, that

> the presiding judge by order ... may seal from public access a record to which the public otherwise has access or may redact information from a record to which the public has access. *All parties to the case to which the record relates, and such other interested persons as the court directs, have a right to notice and hearing before such order is issued, ...*

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materials. This would not result in blanket redaction of all search warrant materials. Information that was already in the public domain would be released.

Id. (emphasis supplied). The rule explicitly recognizes a right to a hearing on a motion to seal. The State proceeded in the Chittenden Criminal Division in accordance with the practice in that and other courts of the State. The criminal division, however, declined to hold a hearing and instead required the State to proceed by affidavit and a paper record. The State submits that this was an abuse of discretion and deprived the State of the opportunity to properly develop a *factual* or *legal* record or fully explain how the materials in question could be redacted. *State v. Amler*, 2008 VT 1, ¶ 5 (failure to exercise discretion is an abuse of discretion).

Motions to seal search warrants are *ex parte* proceedings. *In re Sealed Documents*, 172 Vt. at 163-64, 164 n.11. The opportunity to argue a closure motion "candidly and *ex parte*" is part of the process. *Id.* Pursuant to V.R.Cr.P. 47(b)(1), a court may dispense with a motion hearing when no opposition is filed. *In re W.M.*, 2006 VT 129, ¶ 7, 181 Vt. 551, 915 A.2d 784. In this matter, the Court was presented with a request by the press for access to the records and a motion by the State seeking sealing. Rather than holding a hearing, the court directed the State to file affidavits and pleadings. This was an abuse of discretion and, as such, is grounds for reversal of the order and a remand to the criminal division for further proceedings. *Amler, supra.*

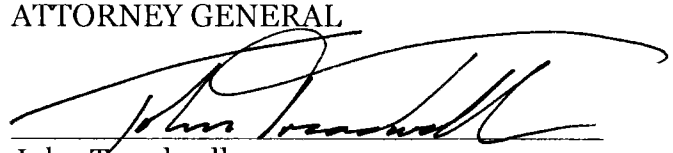
CONCLUSION

For the reasons set forth more fully above, the State respectfully requests that this honorable Court reverse the decision of the Chittenden Criminal Division finding that the search warrant materials regarding the Currier investigation be made public and remand the matter for further proceedings.

Dated at Montpelier, Vermont, this 12th day of August, 2011.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: 

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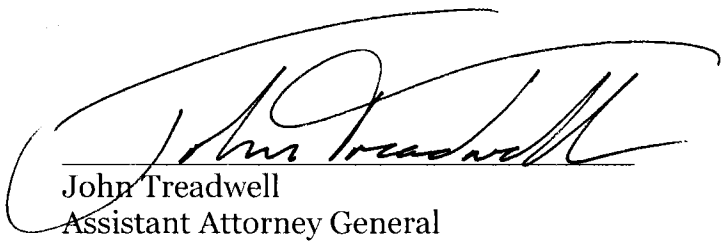
CERTIFICATE OF COMPLIANCE

John Treadwell, Assistant Attorney General and Counsel of Record for the appellant, the State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 7,486 words.



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