

Essex Police Search Home of Missing Couple

Mike Donoghue
Burlington Free Press
June 10, 2011 at A1

ESSEX — A late-night search of a missing couple's Colbert Street home failed to turn up any clues as to where they might be, Essex police said Thursday night.

William Currier, 49, who works at the University of Vermont, and his wife, Lorraine Currier, 55, who works for Fletcher Allen Health Care, were last seen by their respective co-workers as they left work at about 5 p.m. Wednesday, police said. They were reported missing Thursday after co-workers and family members became concerned about their whereabouts.

"It's a real puzzler," Lt. George Murtie said at about 11:30 p.m. "We're treating the home like a crime scene." The search was ongoing as of 7 a.m. today.

Police found freshly broken glass from a window in an area of the residence connecting the living area to an attached garage, he said. Murtie also said the couple's dark green Saturn sedan with Vermont registration ABF-818 was unaccounted for as of 11:30 p.m.

This morning, members of the Vermont Department of Public Safety's mobile crime lab will arrive at the residence to conduct a more exhaustive search for clues, Murtie said. Authorities will also search the couple's telephone and bank records, which is a natural step in a missing persons' case, he said.

The Curriers uncharacteristically failed to show up at their jobs Thursday morning, police said. Co-workers became increasingly concerned as the day wore on. Because of the concern over Lorraine Currier's whereabouts, a call was made from Fletcher Allen to UVM, where officials reported that William Currier also did not report for work and had not contacted his office.

William Currier's sister eventually reported the couple missing to Essex police, who responded to a welfare check at their home on Colbert Street, Cpl. Chris Ashley said. The neighborhood is in the Susie Wilson Road section of the town. "Circumstances at the house lead police to believe the couple's disappearance is suspicious," Ashley said in a dinner-hour news release.

Later, Essex police obtained a search warrant to enter the house, which they did at about 10 p.m. Police are maintaining control of the house overnight, which Murtie said allows the search warrant to remain valid.

Randi Tomczak, who lives across the street, said Thursday night she did not know the couple well. She said they put much energy into decking the house around the holidays, including piping Christmas music outside.

"They're pretty well decorated," Tomczak said.

When a next-door neighbor pulled up to her home in the 10 p.m. hour, a police officer approached her and began interviewing her.

Both of the Curriers have medical conditions that require daily medication, which adds urgency to the situation. William Currier is described as a white male, 6-feet, 220 pounds. Lorraine Currier is a white female, 5-feet-3 inches, about 160 pounds with brown hair.

“We want to do everything we can to locate them,” Acting Police Chief Brad LaRose said. He said investigators were checking all possible leads. He urged anybody with any information on the couple, the missing car or seeing anything suspicious to contact Essex Police at 878-8331.

Still No Sign Of Missing Vermont Couple

Jack Thurston

New England Cable News

June 13, 2011 (available at <http://www.wptz.com/news/28223574/detail.html>)

ESSEX, Vt. -- "It's just weird," Nicole Roberge sighed, standing in her family's front yard. Roberge is one of many in Essex, Vt. completely puzzled by the news that her quiet neighbors, Bill and Lorraine Currier, are nowhere to be found.

The couple's well-kept suburban home was silent Monday. It was a stark contrast to the swarm of investigators that descended on the street last week. The Curriers were last seen Wednesday evening, June 8. Coworkers reported them missing Thursday when neither showed up to their jobs. Police call the disappearance suspicious, but have not said if they believe foul play was involved.

"Please keep Bill and Lorraine in your prayers," a tearful Diana Smith told reporters Sunday. Smith is Bill Currier's sister. Reading a brief prepared statement, she told the media, "Please call the police if you know anything."

Detectives have revealed few details about their case, but did say a window was broken in the Curriers' home, they left apparently without bringing critical medications, and their car was discovered abandoned near an apartment complex dumpster a short drive away. Area businesses provided police with surveillance video. Investigators are going through that tape hoping to catch a glimpse of the Curriers, and to answer some of the big questions in this case, like, were they alone that night?

Nicole Roberge and her neighbors just want Bill and Lorraine Currier to return okay. "That's what we're all hoping for," Roberge said.

Anyone with information on the case is asked to call the Essex, Vt. Police Department at 802-878-8331. Investigators are particularly interested in information on the Curriers' travels late Wednesday.

Police Still Reviewing Video, Records In Missing Couple Case

Jill Glavan

WTPZ News

June 20, 2011 (available at <http://www.wptz.com/news/28297455/detail.html>)

COLCHESTER, Vt. -- There was little new information to report in the case of a couple missing from their Essex Junction home, a detective said Monday.

Det. Lt. George Murtie said he and others at the Essex Police Department were still going through a great deal of surveillance video and various records related to the case.

Bill and Lorraine Currier were reported missing June 9 when neither of them showed up for work. Friday, family members offered a \$10,000 reward for information leading to a break in the case.

Also Friday, Linda Pratt, an old friend of Lorraine Currier, said that she had run into Currier two months ago. She said Currier told her she was afraid of a man in her life who may have been stalking her. Police confirmed that they were following up on Pratt's information but did not go into more detail.

Anyone with information pertaining to the case has been asked to call Essex Police at 802-878-8331.

Vt. Police Say Chance Of Finding Couple Dwindling

Associated Press

June 24, 2011 (available at <http://www.wptz.com/news/28344233/detail.html>)

ESSEX, Vt. -- Vermont police say the chances of finding an Essex couple alive are dwindling.

Bill and Lorraine Currier were last seen on June 8 when they left their jobs.

Essex acting police Chief Brad LaRose says "as time goes on, the concern that one or both of them may no longer be alive increases."

Police say a series of ground searches in Essex and neighboring towns on Friday did not turn up any evidence.

LaRose tells the Burlington Free Press police are unsure if a third party is responsible for the Curriers' disappearance.

Police say the couple's phone, bank and computer have shown no activity since June 8. Investigators have reviewed video surveillance, carried out 11 search warrants and issued three subpoenas.

The Curriers' family has offered a \$10,000 reward.

Foul Play Suspected In Currier Disappearance

Jill Glavan

July 18, 2011

WPTZ News (available at <http://www.wptz.com/news/28583793/detail.html>)

ESSEX JUNCTION, Vt. -- Police investigating the mysterious disappearance of a Vermont couple provided minimal updates Monday, now saying they suspect foul play and still need the public's help.

Bill and Lorraine Currier, of Essex Junction, have been missing since June 8. Their car was found several days later, and police have gathered forensic evidence from it and from their home.

In a briefing Monday, police Capt. Brad LaRose said that police suspected foul play in their disappearance. LaRose said they had not ruled out the possibility of third-person involvement in the case, but that there was no immediate danger to the public.

"We do believe it's an isolated incident, specific to the Curriers," LaRose said.

Police are exploring the idea of potential public searches, saying they could consider enlisting members of the public for help.

Lorraine Currier's friend, Linda Pratt, said she and likely many others would be very interested in helping with the investigation.

"I certainly would try to get a group of people together ... (because) we have to solve this case," Pratt said.

LaRose said the department would be meeting to discuss potential public involvement and in the meantime would continue to search themselves.

Anyone with information or who sees something that might look suspicious is asked to call Essex Police at (802) 878-8331.

Mystery in Essex

Matt Ryan and Mike Donoghue

Burlington Free Press

July 19, 2011 at A1

ESSEX — Six weeks after Bill and Lorraine Currier disappeared, the mystery surrounding their vanishing is deepening. For the first time, authorities are using the phrase "foul play" to describe what they believe happened to the Curriers — an escalation from previous statements that went as far as terming the case a "suspicious disappearance" but stopped there.

Police have yet to determine whether a third party abducted the couple from their home last month, or if one of the Curriers harmed the other, acting Essex Police Chief Brad LaRose said at a news conference Monday morning. "I can tell you at this time that foul play in the Currier case is suspected," LaRose said during the briefing — the first news conference about the couple's disappearance since June 12. "We also believe that this is an isolated incident."

But police aren't saying why they believe the incident is, as LaRose termed it, "specific to the Curriers." That's just one of many things authorities aren't saying, explaining that they can't provide more information lest they jeopardize the investigation. Among the questions police won't answer:

- Why is foul play now suspected?
- What types of forensic evidence are being analyzed?
- How many additional search warrants or subpoenas have been issued since the 11 warrants and three subpoenas that police disclosed last month?

Also curious: LaRose said police now doubt the credibility of a composite sketch drawn of a man whom a witness reportedly saw with the Curriers in their green Saturn on Pearl Street on June 9, the day a relative reported the couple missing. However, police still believe the witness saw the Curriers' car that day. Police suspect someone — perhaps the perpetrator or perpetrators, or an associate — has information about the case, LaRose said. "Somebody knows something," he said. "The longer time goes on since their disappearance, the more concerned we are that they may not be alive." A \$10,000 reward for information, which the Curriers' relatives announced at that June 12 news conference, has failed to break the silence.

The news conference Monday came the same day a divided Vermont Supreme Court ruled, 3-2, against releasing to the public search warrants and related documents in the Currier investigation. The couple's family has declined to comment.

A gun the Curriers kept in their home remains missing; authorities have declined to reveal the weapon's make or model. Video surveillance taken from Essex businesses has yielded no useful information. A search of a Dumpster near where the Curriers' car was abandoned turned up empty, LaRose said. Investigators have sent forensic evidence collected from inside the couple's home, and elsewhere, to the Vermont Crime Lab for analysis, LaRose said. The window of an

interior door connecting the garage to the house was smashed, scattering bits of broken glass inside the garage. Belongings the couple likely would have taken on a vacation remained at the house. Searches of the area have turned up little.

LaRose said police intend to conduct additional ground searches for the Curriers. "We've made some progress," he said. "I'm confident that the investigative efforts that have been put forward thus far have been appropriate." Essex police and the Vermont State Police are working together on the case and have consulted the FBI and the U.S. Marshals Service, LaRose said.

Co-workers of the couple told police they last saw the Curriers leaving their jobs at about 5 p.m. June 8. Evidence suggests the couple made it to their ranch-style house on Colbert Street that evening, police have said. The Curriers failed to report to work the following morning, alarming colleagues and relatives. Later that day, Bill Currier's sister reported the couple missing to Essex police. Authorities found their car June 10 parked outside an apartment building at 241 Pearl St., less than a mile from the Curriers' house and a short walk from a bus stop.

Bill Currier, 49, works as an animal care technician at the University of Vermont. Lorraine Currier, 55, works in patient financial services for Fletcher Allen Health Care in Burlington.

Unanswered questions

Monday's news conference shed little light on the mysterious disappearance of William and Lorraine Currier from their Colbert Street home in Essex on June 8. "Please understand it's still an active investigation, and I can't get into specifics" Essex acting Police Chief Brad LaRose said. "I can only share limited information." Among the items LaRose would not discuss were:

- Why police believe this is an isolated incident specific to the Curriers.
- When ground searches will resume and how the public can help.
- Why no efforts have been made to use Champlain Valley Crime Stoppers to get leads in the case.
- When the last time was that Essex police solved a whodunit-type case.
- What criminal complaints to Essex police have taken a back seat to the Currier investigation.

Essex OKs outside DNA test

Mike Donoghue
Burlington Free Press
July 20, 2011 at A1

ESSEX — The Essex Selectboard has approved spending up to \$15,000 for advanced DNA testing in the case of a missing couple, William and Lorraine Currier, who disappeared last month.

Essex acting Police Chief Brad LaRose declined to say whether it was blood, hair or some other evidence that needed to have advanced DNA testing. "As time goes on I think I will be able to say more about what that is for," LaRose told the Burlington Free Press on Tuesday. LaRose also confirmed that a Massachusetts State Police dog trained in locating bodies was brought in Thursday to assist in the investigation.

William Currier, 49, who works at the University of Vermont, and his wife, Lorraine Currier, 55, who works at Fletcher Allen Health Care, were last seen at their Colbert Street home at about 7 p.m. June 8. When they failed to appear for work the next morning, a relative called Essex police about 10 a.m. Their car was found two days later about three-quarters of a mile away at an apartment complex at 241 Pearl St.

Police said this week they suspect foul play.

LaRose said the needed types of DNA tests are not offered through the Vermont Department of Public Safety lab. LaRose would not say which lab is doing the work, but because the testing is occurring out of state, the town is expected to pay for the time necessary to complete the work. Some preliminary testing has been done, LaRose said. "The secondary stages will be done in the near future," he said. "We hope to hear back within perhaps two to three weeks. I don't know; it may be longer."

The special testing will be done without taxpayer money, with the money coming from drug dealers who have forfeited cash or property in criminal cases. LaRose said the town receives a share of forfeited assets because Essex has a detective assigned to the local branch of a federal Drug Enforcement Administration task force. The money is placed in the town's Equitable Sharing Fund, which requires Selectboard approval for spending.

The disclosure of the DNA tests and the dog search came one day after Essex police announced they were treating the disappearance as a case of foul play. "It's the totality of the circumstances overall. The investigation has progressed," LaRose said Tuesday. "We have received leads that we've followed up on."

LaRose encouraged the public to continue to call police with any information no matter how minute it might seem. He said police believe some people have information and need to come forward. A \$10,000 reward has been offered by members of the Currier family to encourage witnesses to speak with police.

LaRose said the entire department remains committed to the case. "We are setting priorities to manage the case load beyond the Currier case, but the Currier case remains the department's No. 1 priority," he said.

LaRose said more searches are planned, with dogs and with the help of the Vermont State Police Search and Rescue Team. He said New England K-9, a volunteer search organization that covers Vermont and New Hampshire, had participated earlier in the Currier case.

Police Discuss Warrants Used in Search for Couple

Mike Donoghue
Burlington Free Press
July 27, 2011 at B1

ESSEX -- Essex police have used 13 search warrants and 18 subpoenas in their effort to learn more about the mysterious disappearance of an Essex couple seven weeks ago.

Acting Police Chief Brad LaRose said Tuesday that investigators continue to sort through information obtained from the 31 secret court orders to try to determine what might have happened to William S. Currier, 49, and his wife, Lorraine Currier, 55, of Essex.

He said investigators continue to encourage people with information to call the department with any possible tips. LaRose said the case remains a priority, and the department's four detectives continue to chase leads. He said police also are using the Vermont State Police for help each day.

The Curriers last were seen at their Colbert Street home between 7 and 8 p.m. June 8, LaRose said. Co-workers became concerned when William Currier, who works at the University of Vermont, and Lorraine Currier, who works for Fletcher Allen Health Care, did not report to work June 9. By 10 a.m. that day, Essex police had heard from a family member about the missing couple. "It's not like they just left and didn't tell anybody," LaRose said.

LaRose said the search warrants include three for the house. He said officers have returned to seek additional items as needed. As scientific evidence is analyzed, he said, police are given new leads or are asked to try to find additional items that might not have been considered earlier.

Police also obtained search warrants for the couple's car, which was found June 10 next to a Dumpster at an apartment complex at 241 Pearl St., less than a mile away from the house. A search warrant also was obtained for the Dumpster, LaRose said.

He said the subpoenas center mostly on phone, computer and financial records for the Curriers. LaRose said he expected more warrants and subpoenas will be sought.

Most of the details about the search warrants remain under wraps. The Burlington Free Press had asked to see the affidavits police used to persuade a judge to grant the first 11 search warrants. Two Vermont Superior Court judges rejected three requests from the Chittenden County State's Attorney's Office to keep the warrants secret, but prosecutors filed an appeal.

The Vermont Supreme Court ruled 3-2 that the public did not need to know the reasons police cited to force entry into the Currier home and to obtain other possible evidence. Authorities said disclosing such information would jeopardize the investigation; the Superior Court judges determined there was nothing overly sensitive in the warrant material, but the high court overruled them.

Mystery Still Surrounds Missing Vermont Couple

Jack Thurston

New England Cable News

Aug 4, 2011 (available at http://www.necn.com/08/04/11/Mystery-still-surrounds-missing-Vermont-/landing_newengland.html)

Essex, Vt. - It was a hot day on the job Thursday for border collie Sadie and her handler, Mike Halpin. The duo from New England K-9 Search and Rescue was looking for clues in fields and woods.

"It's a rewarding thing to be out there and helping," Halpin said.

The team was trying to track down Bill and Lorraine Currier. The Essex, Vt. couple vanished in early June and police suspect foul play. "Other folks have referred to this as a 'whodunnit,'" said Essex Police Capt. Brad LaRose. "And I follow that up with 'who done what?'"

Loved ones have tied yellow ribbons around a tree outside the Curriers' home, and a cash reward remains in place for information. Police say tips from the public are drying up. "But rest assured we are following up on every single lead or tip that does come in," LaRose said.

Investigators have been able to figure out the couple's car may have as many as 40 miles on it that the Curriers didn't drive themselves. Did someone take them away in it before ditching the vehicle? Other questions may be answered from specialized DNA tests. They are so advanced that an out-of-state lab needed to run them. They may point to someone who may have been in the Curriers' home or car.

The Currier search is the second volunteer assignment for Sadie and Mike Halpin this week. They also joined the effort in northern New Hampshire looking for Celina Cass, the Stewartstown girl found dead Monday. Both cases have seen local, state, and federal authorities teaming up. "The outpouring of assistance was tremendous," LaRose said of his case.

The support helps police navigate these often complex and emotional cases. New England K-9 is glad to help whenever it's needed. "When you make a find," Halpin said, "Even if it's not the best news, we've made the find and the family is very grateful."

Finding Bill and Lorraine Currier remains the top priority of the Essex, Vt. Police Department. People with information on the Curriers' travels in early June are asked to call the Essex, Vt. police at 802-878-8331.

Essex Police Widen the Net

Matt Ryan

Burlington Free Press

August 5, 2011 at A1

ESSEX — While searchers scoured the woods beside Essex's back roads Thursday for evidence or the bodies of Bill and Lorraine Currier, the town's police chief said detectives have unearthed new information in the case, but he must withhold those details from the public.

Police have received from a crime lab preliminary test results of DNA samples collected by investigators, acting Chief Brad LaRose said. He said he could not disclose the types of samples or the nature of the testing in order to protect the integrity of the investigation.

"When I'm able to tell you what that is, it will make perfect sense to people," LaRose said. "There's no conspiracy. There's no botched investigation." In the nearly two months since the Curriers vanished from their suburban home, police have guarded many specifics of the case, such as the DNA samples. "How valuable that information is at this point, we don't know," LaRose said of the DNA evidence. "The lab's going to have to do more work."

Teams of five or six officers from several law-enforcement agencies expanded the search Thursday for the Curriers. Targeting 10 swaths of rural Essex, they fanned out roughly 100 yards on either side of half-mile sections of road — "the likely places where a body may be, or evidence thrown out a window," LaRose said. One hundred yards is about "the distance that somebody could drag a body." Bill Currier, 49, weighs about 220 pounds, and Lorraine Currier, 56, weighs about 160 pounds, police have said. They were reported missing June 9, a day after they last were seen.

One team comprised of a Vermont state trooper and officers from Burlington and Essex tramped through brambles beside McGee Road, a dead end off Lost Nation Road near Indian Brook Reservoir. After about six hours, the teams turned up no evidence, and police called off the search. "Although we think we've cleared them, the investigation may bring us back to them," LaRose said, referring to the search locations.

40 missing miles

Police located the Curriers' green Saturn sedan June 10 about three-quarters of a mile from their Colbert Street home, and officers set out to determine how far the car had traveled since the couple disappeared, LaRose said. Detectives started with the mileage recorded on the vehicle's odometer, and subtracted from that figure the car's mileage logged June 4 in a service receipt. Detectives then subtracted from that total the mileage of known trips the Curriers made since June 4 — to and from work, to the market, to visit a relative — and accounted for all but 40 miles.

Presumably, police said, the car could have traveled about 20 miles one-way from where police found the vehicle, outside an apartment complex on Pearl Street. "That opened up a whole new dimension for us," LaRose said.

Detectives made the 40 mile determination about 10 days after finding the car, LaRose said. Since then, police have been strategizing on where best to throw their efforts within that wide of a radius, he said. Flooding the entire area with ground searchers was imprudent, LaRose said.

"The primary focus is on chasing down leads, but we knew we had to do searches in the early stages, and we did that," LaRose said. Police looked within one mile of the Curriers' home and around where an officer located their car. Following up on leads, they also searched areas outside those zones on June 20 and July 14.

Since the start of the investigation, some 30 detectives have pursued about 120 leads, LaRose said. "We've had an enormous amount of help with this case, throughout," LaRose said, especially from the Vermont State Police and Burlington police. "We have accepted all the resources state police has offered us, and it's been tremendous."

New details

LaRose also revealed some new details Thursday about the investigation:

- A driver who told police he saw the Curriers' car being driven by a man other than Bill Currier made note of the vehicle's license plate because he nearly collided with the Saturn. Given how quickly the two vehicles passed each other, police no longer consider credible the witness' description of the man driving the Curriers' car. "We're fairly certain that the sighting of the car was credible," LaRose said.

- Police are conducting a forensic search of a computer seized from the Curriers' home, "to figure out anybody who might have made any connection to the Curriers," LaRose said.

- Detectives have sent details of the case to FBI agents specializing in victimology so they can profile the Curriers and offer insight into what might have happened to them.

Previously, police have said a gun the Curriers kept in their home remains missing; authorities are withholding the weapon's make and model. The window of an interior door connecting the garage to the house was smashed, scattering bits of broken glass inside the garage. Belongings the couple likely would have taken on a vacation re mained at the house.

Police suspect foul play in the Curriers' disappearance. Co-workers of the couple told police they last saw the Curriers leaving their jobs at about 5 p.m. June 8. Evidence suggests the couple made it to their ranch-style house that evening, police have said. The Curriers failed to report to work the following morning, alarming colleagues and relatives. Later that day, Bill Currier's sister reported the couple missing to Essex police.

For Opinion See [772 A.2d 518](#)

Supreme Court of Vermont.
In re: SEALED DOCUMENTS.
No. 2001-103.
April 5, 2001.

On Appeal from the District Court of Vermont Unit I, Orange Circuit

Brief of Appellee

State of Vermont, [William H. Sorrell](#), Attorney General, By: [John Treadwell](#), Assistant Attorney General, 109 State Street, Montpelier, VT 05609-1001, Stephanie Ilberg, Assistant Attorney General, 109 State Street, Montpelier, VT 05609-1001.

STATEMENT OF THE ISSUES

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Statement of the Case

On January 27, 2001, the police responded to a 911 call at 115 Prescott Road in Hanover, New Hampshire; the residence of Half and Susanne Zantop. Printed Case (henceforth "PC") at 3. The police discovered Mr. and Mrs. Zantop's deceased bodies in the home. *Id.* An autopsy was conducted on January 28, 2001, and the Deputy Medical Examiner ruled both deaths as homicide. *Id.*

On February 16, 2001, the Vermont Attorney General's Office applied for four search warrants to search for evidence of the commission of a criminal offense based upon information provided by New Hampshire law enforcement authorities. PC at 4. The State filed a motion to seal the application, the affidavits in support of the search warrant, the search warrant and the inventory with each search warrant application. *Id.* The State noted that there was

... a specific need to seal the particular warrant[s] based upon the existence of an ongoing criminal investigation and potential concerns for the safety of the public and potential witnesses should the details of the investigation set forth in the application and supporting paperwork be released at this time.

Id. On February 16, 2001, the Honorable M. Kathleen Manley issued the warrants and granted the State's motions to seal. *Id.*

On February 17, 2001, the Vermont Attorney General's Office applied for five search warrants to search for evidence of the commission of a criminal offense based upon information developed by Vermont law enforcement authorities and provided by New Hampshire law enforcement authorities. PC at 5-7. The State filed a motion to seal the application, the affidavits in support of the search warrant, the search warrant and the inventory with each search warrant application. *Id.* On February 17, 2001, the Honorable M. Kathleen Manley issued the warrants and granted the State's motions to seal. *Id.*

On February 19, 2001, two suspects in the homicides, James Parker and Robert Tulloch, were arrested in Indiana pursuant to warrants issued in New Hampshire. While both suspects have been returned to New Hampshire, neither has been indicted at this time, nor has either entered a plea.

On February 21, 2001, Intervenor David Mace filed a motion in the Vermont District Court, Unit I, Orange Circuit. Intervenor Mace sought access to all materials sealed by this court related to search warrant applications that were made on or about February 15, 2001.

On or about February 22, 2001, Intervenor-Appellant The Rutland Herald, the Times Argus and WCAX, Inc.,^[FN1] filed a motion in Vermont District Court, Unit I, Orange Circuit. Intervenor sought access to “all court records, documents, supporting materials, and any other items filed, lodged or deposited with the Court” in connection with search warrants obtained and executed with respect to Robert Tulloch and James Parker.

FN1. Another television news organization, WPTZ, intervened in this matter as well.

On February 22, 2001, Intervenor Appellant Associated Press filed a motion in Vermont District Court, Unit I, Orange Circuit. Intervenor's motion made substantially broader claims than the motion filed on or about February 21, 2001. The motion sought access to documents in addition to those sealed by the court; the request included, in effect, an order barring sealing of further documents, access to numerous documents the existence of which are unknown to the Office of the Attorney General, and attorney's fees.

On February 21, 2001, the New Hampshire Attorney General's Office released a redacted version of the affidavit of Sgt. Bruno of the New Hampshire State Police. The New Hampshire Attorney General's Office has objected to the disclosure of any further sealed material and has litigated the issue in New Hampshire courts.

On February 23, 2001, a hearing was held in Vermont District Court, Unit III, Washington Circuit, on Intervenor's motions to unseal. Transcript (henceforth “Tr”) at 2-96. Intervenor's counsel for James Parker's family, the State of New Hampshire and the State of Vermont appeared at the hearing. At the conclusion of the hearing the court concluded that Intervenor's had not demonstrated that a First Amendment or statutory right of access existed to the documentation in question. Tr at 86-91. The court concluded that a qualified common law right of access existed. *Id.* at 91-92. The court informed the parties that it would issue a decision by close of business on February 26, 2001, on whether the State had met its burden to demonstrate that the sealing order should continue. *Id.* at 92-93.

On February 24, 2001, the Vermont Attorney General's Office applied for a search warrant to search for evidence of the commission of a criminal offense based upon information developed by Vermont law enforcement authorities and provided by New Hampshire law enforcement authorities. PC at 7-8. The State filed a motion to seal the application, the affidavits in support of the search warrant, the search warrant and the inventory with each search warrant application. *Id.* On February 24, 2001, the Honorable M. Patricia Zimmerman issued the warrants and granted the State's motions to seal. *Id.*

On February 26, 2001, the court issued an order denying Intervenor's motions. *In re: Sealed Documents*, (Vt., Orange Dist. Ct., Feb 26, 2001) (Zimmerman, J.) (PC at 1-9). The court made a number of findings of fact based upon a review of the sealed documents and the documents submitted by Intervenor's. The court found that

... evidentiary item(s) sought pursuant to the search warrants, physical evidence which has been seized and submitted to the New Hampshire State Police Forensic Laboratory for analysis, and laboratory analysis of items of evidentiary value by the New Hampshire State Police Forensic Laboratory as set forth in the sealed documents outlined above exceed information which the Intervenor's argue they have already received from law enforcement officials.

PC at 8. The court noted that

... based on its review of the sealed documents in this case, and relying on its Findings of Fact, this is an on-going investigation. The issuance of successive warrants is based on continuing investigation, laboratory analysis of seized evidence, continuing laboratory analysis from the crime scene, and items observed in the places to be searched not previously requested in an application for a search warrant. This court concludes that the items requested in the series of search war-

rants clearly indicates a progression of information and analysis as part of an on-going investigation.

PC at 13. The court concluded that, under the facts of the case, there was no qualified First Amendment right of access to the materials in question. PC at 10. The court did, however, find a common law right of access but noted that "... the State makes a strong argument against such a conclusion." PC at 12. The court then balanced this right of access against the State's interests in non-disclosure and concluded that the State's interests outweighed the presumption of access. PC at 11-14. The court also concluded that no statutory right of access existed under 4 V.S.A. §693. PC at 14-17. The court, therefore, denied Intervenor's motions.

Intervenor's filed a Notice of Appeal within the deadline established by the trial court. PC at 19; Tr at 94-96.

New Hampshire law enforcement authorities have indicated that they continue to regard the investigation as ongoing at this time and have also stated that they believe that disclosure of the search warrants and other documentation at this time may seriously compromise the on-going investigation.

*6 ARGUMENT

Intervenor's assert that the trial court erred in finding no First Amendment or statutory right of access, erred in finding that the State's interests in non-disclosure outweighed the right of access under the common law, and abused its discretion in not limiting the length of the sealing order. The State disagrees.^[FN2]

FN2. Before the trial court, Intervenor's asserted a right to intervene pursuant to *State v. Tallman*, 148 Vt. 465 (1987). As the State noted in the Memorandum in Opposition and at the hearing, it is not at all clear that this court's ruling in *Tallman* with respect to the ability to raise a collateral constitutional claim in a criminal proceeding is applicable where there is no criminal proceeding pending in this court. PC at 135; Tr at 7. Intervenor's moved to intervene in a "proceeding" that did not exist. The State submits that review of the decision to seal could be had through a petition for extraordinary relief. Cf. *State v. Saari*, 152 Vt. 510, 513 (1989) ("Extraordinary relief provides the proper avenue for redress where no other relief exists.")

I. Standard of Review

The decision of the trial court involved questions of law, findings of fact and determinations committed to the discretion of the trial court. Several standards of review, therefore, apply. With respect to the questions of law, review is de novo. *State v. Pollander*, 167 Vt. 301, 304 (1997). Findings of fact will be upheld if there is any credible evidence in the record to support them. *N.A.S. Holdings, Inc. v. Pafundi*, 169 Vt. 437, 438 (1999). Discretionary determinations of the trial court will be upheld unless "...there has been an abuse of discretion, or a failure to exercise discretion." *State v. McCann*, 149 Vt. 147, 151 (1987) (quoting *Ohland v. Ohland*, 141 Vt. 34, 39 (1982)). In applying an abuse of discretion standard, this court will not reverse a decision "... because another court ... might have reached a different conclusion." *Ohland*, 141 Vt. at 39 (citation omitted). "The burden of demonstrating abuse or failure to exercise discretion is upon the party asserting it." *Id.* (citation omitted).

*7 II. Search Warrants

Chapter I, Article 11 of the Vermont Constitution states that
... the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his,

her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Vt. Const., Ch. I, Art. 11. This court has noted that “[t]he primary evil sought to be avoided by Article Eleven was the issuance and enforcement of general warrants. *State v. Record*, 150 Vt. 84, 85 (1988).^[FN3] In interpreting Article 11, this court has stated that

FN3. The common law of England, adopted by this State pursuant to 1 V.S.A. §271, may bar general warrants as well. See *State v. O'Brien*, 106 Vt. 97 (1934); *Entick v. Carrington*, 95 Eng.Rep. 807, 817 (C.P. 1765). But see *Comstock's Admr. v. Jacobs*, 89 Vt. 510 (1915).

Article 11 protects persons “from unreasonable, warrantless governmental intrusions into affairs which they choose to keep private.” *State v. Zaccaro*, 154 Vt. 83, 91 (1990). The first and foremost line of protection is the warrant requirement. Requiring advance judicial approval before subjecting persons to police searches represents a balance in which an individual's privacy interest outweighs the burdens on law enforcement in obtaining a warrant. [*State v. Savva*, 159 Vt. 75, 85-86 (1992)]¹.

State v. Morris, 165 Vt. 111, 115 (1996). The judge's role in the search warrant process is as a neutral evaluator of the State's request to intrude upon a protected privacy interest.^[FN4] The search warrant application process is an *ex parte* process that acts as a check on governmental action. Contrary to *8 Intervenors' assertions, it is not an adversarial process. *United States v. United States Dist. Court for the Eastern Dist. Of Mich., Southern Division*, 407 U.S. 297, 321 (1972) (“... a warrant application involves no public or adversary proceedings: it is an *ex parte* request before a magistrate or judge”) (emphasis added).

FN4. The State would note that procedures exist to allow persons aggrieved by searches and seizures pursuant to a warrant to challenge the validity of the warrant. See V.R.Cr.P. 41(e) and (f).

Search warrants in Vermont are governed by the provisions of Rule 41 of the Vermont Rules of Criminal Procedure. Rule 41(a) enumerates who may apply for a search warrant. Rule 41 (b) sets forth those things that can be sought with a search warrant. Rule 41(c) establishes the procedures and grounds for issuance of a warrant and sets forth limitations on the execution of warrants. Rule 41 (c) also notes that “[t]he warrant shall designate the court to which it shall be returned.” Rule 41 (d) governs execution of the warrant and returns with the inventory and provides that a copy of the warrant “shall [be] give[n] to the person from whom or from whose premises the property was taken” *Id.* The rule also provides that

[t]he return shall be made promptly and shall be accompanied by a written inventory of any property taken.... *The clerk of the court to which the warrant was returned shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.*

Id. (emphasis added).^[FN5] See also V.R.Cr.P. 41 Reporter's Notes (indicating that “process” should be filed, where process clearly means the warrant itself). The *9 return of the warrant and the inventory constitute confirmation to the court of the execution of the warrant and the character and extent of the judicially sanctioned invasion of protected privacy and property rights.^[FN6] Rule 41(e) governs motions for the return of seized property and Rule 41 (f) governs motions to suppress.^[FN7] Rule 41(h) addresses applications for search warrants by fax. There are no statutory provisions mandating the filing of the application and supporting documentation with the clerk of the court.^[FN8] Indeed, the rationale behind providing a copy of the affidavit and application to the court must be that no claim can then be made at later court hearings that the State has somehow altered the documents that support the application.^[FN9] Under these circumstances, the submission by the State of the warrant materials to the court must be *10 understood to have a different motivation and different rationale than the filing requirements related to the commencement of civil or criminal proceedings.

FN5. The Federal Rules of Criminal Procedure place further filing requirements upon the court. [F.R.Cr.P. 41\(g\)](#) The rule states that [t]he federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

Id. This provision has been part of the Federal Rules for at least 50 years. See 3. Wright, *Federal Practice and Procedure*, at 571 n.1 (1982 main volume) (referring to substantially identical language in the 1949 version of [F.R.Cr.P. 41\(f\)](#)); *Id.*, §672. This provision has never been part of the Vermont Rules of Criminal Procedure. It is well-settled that it is inappropriate to read something into a statute that is not there, unless that interpretation is necessary in order to make the statute effective. *State v. Fuller*, 163 Vt. 523, 528 (1995) (citation omitted). Under the circumstances, the decision not to incorporate the requirements of [V.R.Cr.P. 41\(g\)](#) must be understood as an affirmative choice not to require that supporting documentation be filed with the court.

FN6. The State is obligated to return property, other than contraband, to the person from whom it was seized once the State's interest in that property is concluded. *State v. Crannell*, No. 99-407, at 2 (Vt., Dec. 6, 2000) (mem.).

FN7. At least one court has concluded that the filing of a motion pursuant to [F.R.Cr.P. 41 \(e\)](#) does not entitle the movant to access to the sealed documentation submitted in support of the search warrant. *In re Search Warrant Executed February 1, 1995*, 1995 WL 406276 (S.D.N.Y. 1995).

FN8. A review of prior law governing search warrants does not indicate that a filing requirement has ever been part of Vermont law. 13 V.S.A. §§4701-4702 (1959) (prior law); 9 V.S. ch. 112 §§2447-2449 (1947); 9 V.P.L. ch. 102 §2416-2419 (1933); 12 P.S.V. ch. 111 §§2315-2318 (1906); 6 G.S.V. ch. 12 §17 (1863); 15 G.S.V. ch. 31 §§14-16 (1863); 11 R.S.V. ch. 27 §§69-71 (1839); L.O.V. ch. 30, §8(1816).

FN9. Such a conclusion is in accord with the recently promulgated Rules Governing Public Access to Judicial Records. Rules, §6(b)(15).

III. First Amendment Right of Access to Judicial Proceedings and Documents

Intervenors have asserted a constitutional right of access to the documents. The State submits that an analysis of the parameters of the First Amendment right of access does not lead to a conclusion that the documents are subject to such a right.

The Vermont Supreme Court has addressed the right of access to judicial proceedings in a number of decisions. In addressing the rationale for public access to criminal proceedings this court has noted that [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 (1981).^[FN10] Generally, this court has noted that there is a preference for public and press access to judicial proceedings absent some compelling reason to forego such access.^[FN11]

FN10. The State notes that the search warrant process cannot result in unjust conviction or excessive punishment. The “undeserved taint of criminality” could flow from the publication of documents filed in support of search warrants.

FN11. *Sunday v. Stratton Corp.*, 136 Vt. 293, 306 (1978) (“... the general rule is that trials should be public, with chamber proceedings the exception rather than the rule”); *Herald Association, Inc. v. Ellison*, 138 Vt. 529, 534 (1980) (noting state policy of open judicial proceedings and that any restrictions on open proceedings must “... be limited in scope by its justification”).

In *State v. Tallman*, 148 Vt. 465 (1987), this court addressed a trial court order sealing an affidavit of probable cause and a suppression hearing. In reversing the trial court's decision, the court applied the standard identified by *11 the United States Supreme Court for First Amendment rights of access to judicial proceedings. This court noted that [i]n *Press-Enterprise Co. v. Superior Court of California*, 106 S.Ct. 2735 (1986) (*Press-Enterprise II*), the Court identified two complementary considerations that must be examined in cases involving a claimed First Amendment right of access to criminal proceedings: first, the Court considered whether the place and process had historically been open to the press and general public, *id.* at 2740; second, the Court inquired whether public access played a “significant positive role in the functioning of the particular process in question.” *Id.* Thus, “[i]f the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.” *Id.* at 2741.

Tallman, 148 Vt. at 469-470. This court concluded that there was a qualified First Amendment right of access to suppression hearings. This court particularly noted that such hearings were generally open to the public, that there was a presumption of openness of court proceedings, and noted the “cleansing effects of exposure and public accountability.” *Id.* at 470-472. With respect to the affidavit of probable cause filed by the court in support of an information, this court found a common law and statutory basis for access but noted that orders temporarily sealing such documents may be warranted under the particular circumstances of a case. *Id.* at 472-473. This court noted that prior to filing, such documents were agency records that were exempted from the provisions of the Access to Public Records Act. *Id.* at 472. See also V.R.Cr.P. 5(c). This court also noted that [t]o recognize a constitutional right of access to pretrial proceedings and documents is not to create an absolute right. ... This is especially true when the defendant's Sixth Amendment right to trial by an impartial jury might be jeopardized by public disclosures prior to trial.

*12 *Id.* at 473 (citations omitted).^[FN12] Thus, this court recognized that the First Amendment right of access was a qualified right and could be limited in the appropriate circumstances.

FN12. The court did not reach the question of whether the filed affidavits were subject to the provisions of the Vermont Access to Public Records statute. Intervenors' assertions that the *Tallman* court concluded that the Vermont Access to Public Records statute did not apply to documents filed in the District Court does not find support in the decision.

In *Greenwood v. Wolchik*, 149 Vt. 441 (1988), this court addressed an appeal by a defendant in a criminal case from a decision of the trial court refusing to continue an order to seal the affidavit of probable cause. This court again applied the *Press Enterprise II* test it had adopted in *Tallman* and concluded that “[t]he press and public have a qualified right of access to affidavits of probable cause, which must be balanced with the defendant's Sixth Amendment right to a fair trial.” *Greenwood*, 149 Vt. at 445 (citing *Tallman*, 148 Vt. at 473).

In *State v. Schaefer*, 157 Vt. 339 (1991), *cert. denied*, 112 S.Ct. 982 (1992), this court again addressed an order sealing an affidavit of probable cause in a pending criminal case. A divided court, applying the *Press Enterprise II* standard articulated in *Tallman*, concluded that the sealing order was unwarranted under the circumstances of the case. *Schaefer*, 157 Vt. at 350-353 (Dooley, J., with one justice concurring and one justice concurring in the result).

In *State v. Densmore*, 160 Vt. 131 (1993), the court addressed a request for access to a psycho-sexual examination filed

for use in a sentencing hearing. The court applied the *Press Enterprise II* test and concluded that a qualified First Amendment right of access existed with respect to documents filed in *13 conjunction with sentencing hearings. *Densmore*, 160 Vt. at 137. The court specifically noted that the qualified First Amendment right of access could be overcome ... only if (1) closure serves a compelling interest; (2) there is a “substantial probability” that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest.

Id. at 138 (citations omitted). The court also noted that “a decision to deny access cannot be based on conclusory statements but, rather, must be supported by specific factual findings.” *Id.* (citations omitted). The court concluded that the defendant had not made the requisite showing to support an order of closure and that the court had not made adequate findings to support such an order.

In *State v. LaBounty*, 167 Vt. 25 (1997), this court addressed an appeal from two trial court orders declining to release pre-sentence investigation reports (PSIs). In upholding the trial court's decisions, the court noted that [t]he United States Supreme Court has recognized a qualified First Amendment right of access to criminal proceedings, and has developed a two-part test for determining whether the right attaches to a particular proceeding. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*). The qualified right attaches if, first, “the place and process have historically been open to the press and general public,” and second, “public access plays a significant positive role in the functioning of the particular process in question.” *Id.* at 8. Although the Supreme Court has not extended this right to include documents submitted in connection with criminal proceedings, the federal courts of appeal have generally applied the same analysis to documents. See, e.g., [*United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989)]; [*in re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir.1986)].

LaBounty, 167 Vt. at 29-30. The court noted that PSIs were historically and *14 statutorily confidential and concluded that the first prong of the *Press Enterprise II* test was not met. *LaBounty*, 167 Vt. at 30.

Thus, applying the *Press Enterprise II* test, a qualified First Amendment right of access to a search warrant and the documents filed in support thereof may exist if such documents have historically been open to the press and general public and if public access would play a significant positive role in the functioning of the search warrant application and execution process.

a. There is no qualified First Amendment right of access to search warrant materials

This court has not addressed whether a qualified First Amendment right of access to search warrants and supporting documentation exists. However, applying the *Press Enterprise II* test and considering the better reasoned authority from other jurisdictions, it is apparent that no such right of access exists.

The first prong of the *Press Enterprise II* test considers whether such documents have historically been open to the public. F.R.Cr.P. 41(g) mandates that search warrants issued by the federal courts be filed by the issuing magistrate at the time the return is made. No similar provision exists in V.R.Cr.P. 41; there is no statutory or rule-based requirement that the warrant and supporting documentation be filed with the court. The provisions of 12 V.S.A. §1, noting that “the rules thus prescribed or amended shall not abridge, enlarge or modify any substantive rights of any person provided by law,” would preclude the creation of an obligation to file under Rule 41 if no such obligation previously existed pursuant to the laws of Vermont. Furthermore, to the extent that courts have cited F.R.Cr.P. 41 (g) as grounds for finding a right of access to filed *15 documents, the lack of such language in V.R.Cr.P. 41 militates against finding such a right in Vermont. The Vermont Statutes do not contain any requirement that the documentation submitted in support of an application for a search warrant be filed and made available for public inspection. Similarly, the laws relating to the powers and duties of

the clerks of courts do not require that search warrants and supporting documentation submitted to the courts be made available for public inspection. See 4 V.S.A. §652(4)^[FN13] and 4 V.S.A. §693.^[FN14] There is no basis for a conclusion that the laws or courts of Vermont have historically regarded search warrant documentation as being open to the public.

FN13. The same provision also requires that "... the clerk shall not disclose the filing of an action or release any records, proceedings, or minutes pertaining to it until service of process has been completed; nor shall he disclose any materials or information required by law to be kept confidential." 4 V.S.A. §652(4).

FN14. These provisions are inapplicable to the documentation submitted in support of a search warrant application because such a procedure is not a "cause" within the plain meaning of that term in the statute. Nor are these documents "records of the court." See *infra*.

In *Seattle Times Co. v. Eberharter*, 713 P.2d 710 (Wash. 1986), the Supreme Court of Washington addressed a claim of a First Amendment right of access to a search warrant affidavit in an unfiled criminal case. The court noted that "... the deeply-rooted historical tradition and the role of public access in furthering the process itself ... are not present in the probable cause determination [for the issuance of search warrants]." *Id.* at 715. The court concluded that there was no qualified First Amendment right of access to the search warrant affidavits. *Id.*

In *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Division of the District Court Department*, 531 N.E.2d 1261 (Mass. 1988), the Supreme Judicial Court considered an appeal from an order sealing the affidavit *16 offered in support of a search warrant. The court noted that the search warrant affidavit "... has no integral relationship with any particular pretrial proceeding to which the public enjoys a First Amendment right of access." *Id.* at 635. The court then noted that

[t]wo courts have addressed the issue of a First Amendment right of access to search warrant affidavits, and have come to opposite conclusions. In *Seattle Times Co. v. Eberharter*, 713 P.2d 710 (Wash. 1986), the plaintiff sought access to a search warrant affidavit filed with the court. The Supreme Court of Washington held that a common law and not a First Amendment standard governed the sealing of a search warrant affidavit in a case where a criminal complaint had yet to be filed. *Id.* at 711. Applying the two-part test to determine whether a First Amendment right of access exists, the court ruled: (1) "Unlike trials, the historical record reveals no English or American tradition of public access to search warrants," and (2) "review will occur when the [prosecution attempts to introduce, at trial, evidence obtained as a result of this probable cause determination ... [and] immediate public access is not required for the effective functioning of the process itself." (footnote omitted) *Id.* at 714. On the other hand, the Eighth Circuit recently divided on the question while upholding the judgment of the District Court denying access to a search warrant affidavit. (footnote omitted) *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988). We think that the opinion of the Supreme Court of Washington hews more closely to the principles enunciated by the Supreme Court.

Newspapers of New England, 531 N.E.2d at 1266. The court concluded that there was no First Amendment right of access and that the District Court had not abused its discretion in denying access to the affidavit offered in support of the search warrant.

In *In the Matter of 2 Sealed Search Warrants*, 710 A.2d 202 (Del. Super. Ct. 1997), the court considered a claim by a newspaper of a First Amendment *17 right of access to pre-indictment search warrants and their supporting documentation. The court applied the *Press Enterprise II* test and concluded that neither prong had been met and that there was, therefore, no qualified First Amendment right of access. In addressing the first prong the court noted that the cases cited by the newspaper

... do not establish an historic practice of such clarity, generality and duration as to justify the pronouncement of a constitutional rule. ... Nor has [the newspaper] demonstrated an expectation of a right of access. ... The Court concludes that [the newspaper] has not carried its burden of establishing that the search warrant process has historically been open to the public.

Id. at 208 (citations and quotations omitted). With respect to the second prong, the court considered a number of factors including

promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; serving as a check on corrupt practices by exposing the judicial process to public scrutiny; enhancement of the performance of all involved; and discouragement of perjury.

Id. at 209 (citation omitted). The court concluded that the factors "... would not be enhanced by requiring that all pre-indictment search warrant applications be made open to the press and the public." *Id.* at 211. A number of other courts have concluded that search warrants and the search warrant process are not subject to a First Amendment right of access. See *State v. Cummings*, 546 N.W.2d 406, 413 (Wis. 1996) ("search warrants and their supporting materials do not meet the first prong of the *Press Enterprise II* test..."); *In re Documents 1, 2 and 3 the Search Warrant and Supporting Affidavits relating to Kaczynski*, 1996 WL 343429 (D.Mont. 1996) ("... in the Ninth Circuit there is no qualified First *18 Amendment right of access to sealed search warrant documents"); *In the matter of the Search of Office Suites for World and Islamic Studies*, 925 F.Supp. 738 (M.D.Fla. 1996) ("... it is not unreasonable to conclude that, generally speaking, there is no constitutional right of access to warrant proceedings"); *Times Mirror v. United States*, 873 F.2d 1210, 1214 (9th Cir. 1989) ("... the experience of history implies a judgment that warrant proceedings and materials should not be accessible to the public, at least while a pre-indictment investigation is still going on ...").^[FN15] But see, *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572-574 (8th Cir. 1988) (a divided court finding a qualified First Amendment right of access but upholding order to seal on grounds that closure was essential to preserve higher values and was narrowly tailored).

FN15. See also, Comment, [Does a Denial of Access to Search Warrant Affidavits Abridge the First Amendment Rights of the Press?](#), 55 Alb.L.Rev. 495 (1991), which notes that "... there is no evidence to substantiate the idea that search warrant affidavits were traditionally open to the public. Therefore, there is no tradition of historical access." *Id.* at 528 (footnotes omitted). The Comment also notes that the second prong of the *Press Enterprise II* test also fails with respect to search warrant affidavits. *Id.* at 528-529.

For Intervenor to establish a qualified First Amendment right of access to the search warrant documentation in question, Intervenor must demonstrate that the documentation in question has historically been open to the press and general public and that public access plays a significant positive role in the functioning of the search warrant process. See *LaBounty*, 167 Vt. at 29. Intervenor cannot demonstrate that search warrant affidavits have historically been subject to public access. The reasoning of the Washington Supreme Court in *Seattle Times Co. v. Eberharter*, 713 P.2d 710 (Wash. 1986), clearly demonstrates that this is not the case. See also, *19 *United States v. Sealed Search Warrants*, 1999 WL 1455215, *5 (D.N.J. 1999) ("It cannot be disputed that the process by which a search warrant is obtained has historically been a closed one"). Additionally, in light of the ongoing nature of the investigation in question and given the nature of the offenses being investigated it is hard to imagine a circumstance in which disclosure of the affidavits at this time would "play a significant positive role in the functioning of the process." Considering those factors enumerated by the Delaware Superior Court in *In the Matter of 2 Sealed Search Warrants*, 710 A.2d at 209, there are no significant benefits to disclosure at this stage of the criminal proceedings. Furthermore, the exact posture of this case militates against disclosure.

The State submits that, given the sensitive information contained in the warrants and supporting documentation, and given the preliminary nature of the criminal proceedings against the two suspects, no qualified First Amendment right of access can be found under the facts of this case at this time.

For the reasons set forth above, the State would respectfully request that this court conclude that, under the facts of this case, there is no qualified First Amendment right of access to the materials in question.

b. Even if a qualified right of access exists, the facts of this case mandate continuation of the sealing order at this time

Assuming, *arguendo*, this court finds a qualified First Amendment right of access, this court should continue the order to seal at this time. As the Vermont Supreme Court stated in *Densmore, supra*, a qualified right can be overcome if ... (1) closure serves a compelling interest; (2) there is a “substantial probability” that, in the absence of closure, that compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect that compelling interest.

*20 *Densmore*, 160 Vt. at 138 (citations omitted). Under the circumstances of this case there is clearly a compelling interest served by maintaining the order to seal the documentation; the integrity of an ongoing double homicide investigation. In *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d at 574, the Eighth Circuit found that an ongoing investigation constituted a compelling state interest that supported sealing of search warrant documentation that, in the court's opinion, was subject to a qualified First Amendment right of access. Similarly, in discussing the consequences of disclosure in *In the Matter of 2 Sealed Search Warrants, supra*, the court noted that [a]t this stage of the investigation, when the law enforcement officials themselves are unsure of the facts attending the [incident], media coverage can provide grist for the rumor mill and harm individuals in the process. Such harm, which serves no public interest, can easily be avoided by sealing the warrants until a clearer factual picture emerges or until after an indictment is filed.

Id., 710 A.2d at 211. New Hampshire authorities have indicated that they believe disclosure may compromise their investigation. Furthermore, disclosure is merely being delayed by this process. At the time that the investigation is complete, any compelling state interest in preventing disclosure will have been severely diminished.

Under the circumstances of this case, should this court find a qualified First Amendment right of access, the State submits that the findings of the trial court support a conclusion that disclosure at this time is unwarranted.

IV. Intervenors Cannot Demonstrate A Right of Access Under A Common Law Right of Access, the Vermont Access to Public Records Act, 1 V.S.A. §315, et seq., or 4 V.S.A. §693

Under the common law, the press and the public have a presumptive right *21 of access to public records and documents, including judicial documents and records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).^[FN16] Courts have noted that the right is not absolute. *Id.* at 598; *Times Mirror Company*, 873 F.2d at 1218. Furthermore, it has also been noted that not all documents filed with a court are judicial documents and records that are subject to the presumptive right of access. *United States v. Gonzales*, 150 F.3d 1246, 1255 (10th Cir. 1998). The United States Supreme Court has not ruled on a common law right of access to search warrant materials and the Courts of Appeals are split on the issue. Compare *Times Mirror*, 873 F.2d at 1218-1219 (no common law right of access), with *In re Application of Newsday, Inc.*, 895 F.2d 74, 78-79 (2d Cir. 1990) (common law right of access to warrant materials *after* conviction) and *In re Baltimore Sun v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989) (common law right of access once warrant is filed).^[FN17] An analysis of the purpose of warrants, the nature of the application process and the historical record does not demonstrate a common law right of access to the documents submitted to the neutral magistrate in support of a warrant

application. In light of a historical record that does not establish a right of access to warrant materials, it *22 is difficult to see how the common law can establish a right. Indeed, the Ninth Circuit recognized this particular problem and identified precedent for a common law right of access to documents in those limited cases where disclosure would serve the interests of justice. *Times Mirror*, 873 F.2d at 1219 (citing *United States v. Schlette*, 842 F.2d 1574, 1581 (9th Cir. 1988)). Under the circumstances, the State submits that, in light of the procedural posture of the case, no common law right of access to search warrant documentation exists. However, even those courts that have found a common law right of access have noted that

FN16. However, the Supreme Court has acknowledged, it is “difficult to distill ... a comprehensive definition of ... the common law right of access.” *Nixon*, 435 U.S. at 598-99. Furthermore, “the First Amendment generally grants the press no right to information about a trial superior to that of the general public.” *Id.* at 609.

FN17. The Fourth Circuit Court of Appeals appeared to find this common law right of access within the obligation to file the supporting documentation contained within F.R.Cr.P. 41(g). *Baltimore Sun*, 886 F.2d at 65. As noted above, no such requirement exists in the statutes or rules of Vermont, and a common law right of access cannot be premised upon a non-existent obligation to file documents with the court. See also, *United States v. Sealed Search Warrants*, 1999 WL 1455215, *5 (D.N.J. 1999) (rejecting argument that F.R.Cr.P. 41(g) creates a “... historical basis for public access...”).

[t]he common law qualified right of access is committed to the sound discretion of the judicial officer who issued the warrant.... The strong presumption of openness can be overcome only when the party seeking closure demonstrates that the factors opposing access outweigh those favoring it. ... Factors found to outweigh the presumption of access include a risk of harm to third parties, ... *and the integrity of the ongoing investigation into the crime.*

In the *Matter of 2 Sealed Search Warrants*, 710 A.2d at 211 (citations omitted) (emphasis added).^[FN18] Given the sensitive nature of the ongoing investigation, the district court correctly concluded that the documents should remain under seal at *23 this time.^[FN19]

FN18. The Delaware Superior Court found that “... executed and returned search warrants and supporting affidavits are judicial records.” *In the Matter of 2 Sealed Search Warrants*, 710 A.2d at 210. However, it is apparent that the State did not contest this point. *Id.* Furthermore, Rule 41(g) of the Delaware Superior Court Rules of Criminal Procedure states that

[t]he committing magistrate or judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory *and all other papers in connection therewith.* The committing magistrate shall file them with the clerk of the committing magistrate's court and the judge shall file them with prothonotary.

This provision, which appears to be the substantial equivalent of F.R.Cr.P. 41(g), has no equivalent in Vermont law. See, *supra*.

FN19. In *Seattle Times v. Eberharter*, 713 P.2d at 711-712, the court articulated a standard for sealing search warrants and supporting documentation. The court noted that

Id. (quoting *Cowles Publishing Co. v. Murphy*, 637 P.2d 966 (1981)). The State submits that the trial court did not abuse its discretion in finding that the State's interests in non-disclosure outweighed any right of access at this time. The trial court's decision finds substantial support in the findings of fact made by the court.

[t]he presumption of openness can be overcome, however, if the subject of the search, law enforcement officials,

or informants upon whose information the search warrant affidavit is based, can persuade the issuing judge that “a substantial threat exists to the interests of effective law enforcement, or individual privacy and safety.”

Similarly, the Vermont Supreme Court has recognized that “... the public has a ... common law right of access to court records and proceedings.” *Greenwood v. Wolchik*, 149 Vt. at 442 (quoting *State v. Tallman*, 148 Vt. at 472). See also, Rules for Public Access to Court Records, §4; §4 Reporter's Notes (“A presumption of public access to court records has been recognized under the common law and the United States and Vermont Constitutions”). It is well-settled in Vermont that

[t]he common law has established the right in all citizens to inspect the public records and documents made and preserved by their government when not detrimental to the public interest. *Clement v. Graham*, 78 Vt. 290, 315. The right is confirmed by statute with limited exceptions where considerations of public policy and necessity require some restraint. 1 V.S.A. §§ 311-314. See, *Rutland Cable T.V., Inc. v. City of Rutland*, 122 Vt. 1, 5.

Matte v. City of Winooski, 129 Vt. 61, 63 (1970). The State submits that documents submitted to a judge in support of search warrant applications are not public records. Furthermore, disclosure of those documents at this time would clearly be detrimental to the public interest; the just resolution of the investigation of the murders of the Zantops.

*24 In *State v. Tallman*, 148 Vt. at 473, the court concluded that “after [an affidavit of probable cause in support of a criminal charge] has been reviewed by a court, [it] ... becomes a public document,” and a right of access attaches. In reaching this conclusion the court looked at the provisions of 4 V.S.A. §693 relating to the record-keeping duties of clerks of the District Court. The statute states, in relevant part, that “all process, pleadings and papers relating to causes in the district court which, together with the records of the court, shall be subject to inspection...” *Id.* This court's conclusion was clearly warranted by the language of the statute and the rules governing the initiation of a criminal prosecution by information. See V.R.Cr.P. 5(c); *State v. Roy*, 169 Vt. 572 (1999) (“If probable cause is found, the information is filed and the criminal court process begins”) (emphasis added). The filing of the information and affidavit after the finding of probable cause constitutes the commencement of a cause; the criminal action against the defendant.^[FN20] Prior to the filing, no such cause exists and the provisions of 4 V.S.A. §693 do not apply.^[FN21] The finding of *25 probable cause to issue a search warrant creates no parallel filing requirement. Furthermore, such a finding does not create any “cause” such that the provisions of 4 V.S.A. §693 would mandate that any papers submitted to the court constitute a public record.^[FN22] Intervenors argue that search warrant application materials are part of the “records of the court” and are therefore subject to inspection. This interpretation ignores the plain meaning of the statute and is not congruent with the other language of the statute. A reasoned interpretation of the phrase “records of the court” indicates that the phrase refers to those records actually generated by the court, such as docket entries, and findings and orders of the court.^[FN23] Search warrant application materials, therefore, do not fall within the definition of “records of the court” and are not discoverable pursuant to 4 V.S.A. §693.

FN20. This interpretation of “cause” within 4 V.S.A. §693 as an adversarial civil or criminal proceeding is warranted by the plain meaning of the statute and the term itself. See, e.g., Blacks Law Dictionary (5th ed. 1979) (Cause means “[a] suit, litigation or action. Any question, civil or criminal, litigated or contested before a court of justice”); The Oxford Companion to Law (1980) (Cause means “[a] legal suit or action.”)

FN21. Intervenor points to the decision of the Vermont District Court in *In re: Ely*, (Vt., Cal. Dist. Ct., Jan. 19, 1993) (Suntag, J.) as persuasive authority for a right of access. PC at 57-62. *Ely* involved a motion to intervene after Mr. Ely filed a motion to quash a non-testimonial order issued pursuant to V.R.Cr.P. 41.1. The motion to quash clearly initiated adversarial proceedings sufficient to trigger the provisions of the “cause” language in 4

V.S.A. §693. No such cause or proceeding exists with the respect to the State's search warrant application. The motion to quash in *Ely* is the functional equivalent of a V.R.Cr.P. 41(e) motion in this matter. No such motion has been filed.

FN22. Compare V.R.Cr.P. 41(b) and (c) (grounds for seeking a warrant and probable cause for the issuance of a warrant) with V.R.Cr.P. 3(a) (probable cause for a warrantless arrest), V.R.Cr.P. 4(b) (probable cause for issuance of an arrest warrant or summons), and V.R.Cr.P. 5(c) (finding of probable cause at initial appearance).

FN23. The State's interpretation is in accord with prior Vermont law governing the duties of clerks of court. See, e.g., 9 V.S. ch. 64 §§1429, 1433 (1947); 9 V.P.L. ch. 56, §1395 (1933); 6 G.S.V. ch. 12, §71 (1863); 5 R.S.V. ch. 11, §63 (1839); *Perkins v. Cummings*, 66 Vt. 485 (1894).

In *Caledonian Record Publishing Co. v. Walton*, 154 Vt. 15 (1990), the Vermont Supreme Court addressed a claim of a common law right of access to citations issued pursuant to V.R.Cr.P. 3(c) by law enforcement authorities.^[FN24] The court interpreted the interplay of the common law right of access with the Vermont Access to Public Records statute; 1 V.S.A. §315, *et seq.* The court *26 stated that

FN24. The *Walton* court never addressed 4 V.S.A. §693.

[w]e start with the statement of legislative intent in the Act: “the provisions of this subchapter shall be liberally construed with the view towards carrying out the [stated] declaration of public policy.” 1 V.S.A. §315. Additionally, we note that the public interest clearly favors the right of access to public documents and public records. See, e.g., *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 184 (Wis. 1979). Thus, the common law protects “the right in all citizens to inspect the public records and documents made and preserved by their government when not detrimental to the public interest.” *Matte v. City of Winooski*, 129 Vt. 61, 63 (1970). Consistent with these policies, the exceptions listed in 317(b) should be construed strictly against the custodians of the records and any doubts should be resolved in favor of disclosure. See, e.g., *State v. Lancaster Police Dept.*, 528 N.E.2d 175,178 (Ohio 1988).

Caledonian Record, 154 Vt. at 20. The court concluded that the exception to the Access to Public Records Act applicable to the investigation of offenses did not apply in this case because citations were not investigatory. The court noted that [w]here a statute operates in an area formerly governed by the common law, we will find a change in the law only if the statute “overturns the common law in clear and unambiguous language, or if the statute is clearly inconsistent with the common law.” *State v. Francis*, 151 Vt. 296, 306 (1989) (quoting *Langle v. Kurkul*, 146 Vt. 513, 516 (1986)).

As indicated above, under our decision in *Matte v. City of Winooski*, 129 Vt. at 63, we have recognized a broad common law right of access to public records “when not detrimental to the public interest.” While we have never had occasion to interpret the right of access in a case dealing with arrest records, we are persuaded that we would find such a right of access.

Caledonian-Record, 154 Vt. at 23-24.

1 V.S.A. §316(a) states that “[a]ny person may inspect or copy any public record or document of a public agency....” 1 V.S.A. §317 states, in relevant part, that

(a) As used in this subchapter, “public agency” or “agency” means any agency, board, *department*, commission, committee, *branch*, instrumentality or authority of the state....

...

*27 (c) *The following public records are exempt from public inspection and copying:*

...

(5) records dealing with the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal or disciplinary investigation by any police or professional licensing agency; provided, however, records relating to management and direction of a law enforcement agency and records reflecting the initial arrest of a person and the charge shall be public.

Id. (emphasis added).^[FN25] Records that deal “...with the detection and investigation of crime” are thus exempt from the provisions of the statute. A search warrant is, necessarily a record that falls under this exception. [V.R.Cr.P. 41](#) states, in relevant part, that “[a] warrant may be issued under this rule to search for and seize any ... evidence of the commission of a criminal offense” [V.R.Cr.P. 41\(b\)](#). The State submits that the warrants and supporting documentation clearly fall within this exception, even if it is narrowly drawn. Furthermore, to the extent that the investigation is ongoing, the State submits that the documents remain within the provisions of this subsection.

FN25. The application of the Vermont Access to Public Records Act to the Judicial Department has not been resolved by this court. The State would note that legislative mandates compelling the release of judicial records may well raise separation of powers issues. However, the State would note that the statute, by its express terms, applies to branches or departments of the State and that this language could well be interpreted to include the Judicial Department. [1 V.S.A. §317\(a\)](#). Compare [1 V.S.A. §317](#) with [V.R.C.P. 75](#); *State v. Pfeil*, 147 Vt. 305, 308 (1986) (the District Court is not “an agency of the state or a political subdivision thereof..”). Additionally, any separation of powers issues are not implicated by the exceptions in [1 V.S.A. §317\(c\)](#). If this court finds that the Vermont Access to Public Records Act applies to judicial records, then the list of exceptions merely creates a list of documents that the court is authorized not to disclose. As noted above, should this court find a common law right of access, the State's interests in non-disclosure substantially outweigh any interests in disclosure at this time.

*28 Thus, the State submits that there is no common law or statutory right of access under the facts of this case as they exist at this time. Should this court find a common law right of access, the State submits that the substantial interests of the State outweigh any interests in disclosure at this time. Finally, the State notes that there is no right of access pursuant to the Vermont Access to Public Records statute.

V. This Court Has Stated That There Is No Right Of Access Pursuant To the Rules for Public Access to Court Records

On October 27, 2000, the Vermont Supreme Court promulgated Rules for Public Access to Court Records effective May 1, 2001. The Rules

...govern access by the public to the records of all courts and administrative offices of the Judicial Branch of the State of Vermont, whether the records are kept in paper or electronic form. They provide a comprehensive policy on public access to Judicial Branch records. They shall be liberally construed in order to implement the policies therein.

Rules, [§1](#). The Reporter's Notes to [§1](#) note that

[t]hese rules are intended to be comprehensive, reflecting all existing statutory and procedural rule provisions on public access to court records, as well as new provisions added in these rules. Where an existing procedural rule or statute establishes the law on public access to a particular record, these rules adopt it by reference so these rules are a complete inventory of access law, whatever its source.

Id. The Reporter's Notes indicate that prior to the adoption of these rules “[t]he Vermont judiciary ... has not had a comprehensive policy on public access to its records.” *Id.*

Section 6 of the Rules notes that, as a general rule, case records are open and subject to public inspection. Section 6(a)

and Reporter's Notes. However, the Rule states that

***29** [t]he public shall not have access to the following judicial branch records: ... *Records of the issuance of a search warrant, until the warrant is executed and ... property seized pursuant to the warrant is offered in a proceeding, or is subject to a motion to suppress;*

§6(b)(15) (emphasis added). The Reporter's Notes to §6 indicate that Section 6(b)(15) is an exception for records of the issuance of a search warrant. In any case, the records of the issuance of a search warrant will not become accessible before the warrant is executed. In the case of a warrant issued to search for property, *records of the warrant will become accessible only if property is seized pursuant to the warrant and the property is offered in a civil or criminal proceeding, or is subject to a motion to suppress its admission. ... No statute or court rule restricts access to records of the issuance of search warrants, but most courts deny access at least until a warrant is executed. The exception is broader than the current practice to ensure that public knowledge of a warrant, or application, does not interfere with an ongoing investigation.*

§6 Reporter's Notes (emphasis added). Thus, pursuant to the Rule effective May 1, 2001, Intervenors would have no right of access since the evidence seized has not been offered in a proceeding or been subject to a motion to suppress.

The State submits that it is illogical to allow access to the records in question given the existence of the Rule. Furthermore, in light of the lack of a right of access under the First Amendment, the common law or the Vermont Access to Public Records statute, the suggestion in the Rule that current practice may allow access to the documents in question is not a sufficient basis for granting the Intervenors access to the documents in question.

As noted in the Reporter's Notes to [Section 1](#), the Rules are intended to delineate the scope of any rights of access, whatever the source, and any limitations on those rights. The State submits that since the Rules specifically ***30** preclude access under the facts of this case, there is no right of access to the documentation in question.

Conclusion

For the reasons set forth above, the State respectfully requests that this court affirm the decision of the District Court.

In re: SEALED DOCUMENTS.

2001 WL 34788787 (Vt.) (Appellate Brief)

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