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 THE STATE OF VERMONT'S BRIEF IN REPLY TO THE BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VERMONT

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: **John Treadwell**
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-5512
jtreadwell@atg.state.vt.us

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Constitutional Provisions

ARGUMENT

Appellee has submitted no brief in this matter. Amicus Curiae the American Civil Liberties Union Foundation of Vermont ("ACLU") has briefed the matter and argues that the trial court properly denied the State's motions to seal. In support of its arguments the ACLU attempts to draws analogies to requests for access to records in civil litigation and to federal Freedom of Information Act ("FOIA") requests to federal executive branch agencies. These matters are not analogous.

I. The State's and the Public's Substantial Interests In Safeguarding And Promoting The Investigation Into The Disappearance Of The Curriers Substantially Outweighs The Public's Interest In The Details Of Documents Filed With The Court As Part Of That Investigation.

The State and the public share a common interest in safeguarding and promoting effective law enforcement consistent with the constitutional principles underpinning our system of government. The United States and Vermont Constitutions articulate explicit guarantees of the rights of individuals subjected to governmental scrutiny of possible criminal conduct. A primary guarantee of the rights of the individual can be found in the warrant requirement of the Fifth Amendment and Article 11. As this Court has noted,

> How often we hear the clamor of the moment that Article 11 is used as a barrier to effective law enforcement, and how often people forget that Article 11 is the balance struck between liberty for the individual (privacy and a sense of security) and the convenience of unchecked crime detection. That balance requires authorities to have good cause to invade privacy and to filter decisions through a judicial process. When legitimate exigencies make the judicial process impractical (not merely inconvenient), common sense dictates reasonable accommodations. But the exigencies and assessment of what sense of privacy is at stake must be real, not legal figments or fictions designed to mask the values and purposes of Article 11.

State v. Savva, 159 Vt. 75, 91-92, 616 A.2d 774 (1991). Article 11 was a response to general warrants that provided "unchecked discretion in agents of the state to search,

seize and arrest." *State v. Record*, 150 Vt. 84, 86, 548 A.2d 422 (1988). The warrant requirement exists to ensure that neutral magistrates review applications to invade protected privacy interests of individual citizens. The warrant requirement is not, and has never been, a vehicle for public review of the work of law enforcement and the judiciary.

The public has a significant interest in effective law enforcement. *Branzburg v. Hayes*, 408 U.S. 665, 690-91, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). More specifically, in this matter, the public and law enforcement share an interest in the resolution of the Curriers' disappearance. *In re Search Warrants*, 2011 VT 88, ¶ 2. Where a court is faced with request for access to search warrant materials for an active investigation and there has been no arrest and no resolution of the matter, this interest in effective law enforcement must be paramount.

The ACLU presents this matter as a question of the balance between the government's interest in confidentiality and the public's interest in open government. This is not an accurate reflection of the interests at issue. The details of the investigation set forth in the search warrant materials provided the reviewing judges the necessary information for the issuance of warrants. The materials describe the information available at the time of each of the four applications and describe what was, or was not, retrieved as a result of the search. This information provides critical evidence regarding the State's investigation. The public's interest is best served by maintaining the confidentiality of the details of this investigation.

II. The State's Interests Are Broader Than "The Corroboration Of Tips."

The ACLU asserts that the State has a limited single interest in maintaining the confidentiality of information. See Brief at 3; 4; 6; 9. This is not the case. The details of any investigation provide critically important evidence in the reconstruction of the historical record. Thus, for example, it may be of substantial interest to a perpetrator what the State's investigators know, and what they do not know, at any given point in time.

III. The Burlington Free Press Seeks Access To Search Warrant Materials Relating To Four Search Warrants Executed As Part Of The Investigation Into The Disappearance Of The Curriers.

The matter before this Court is an appeal by the State from a denial of a motion to seal search warrant materials regarding *four* search warrants that were executed related to the Currier investigation. This is not an appeal regarding all the executed warrants in this investigation.[1]

On June 15, 2011, a reporter from the Burlington Free Press submitted requests for copies of search warrant materials filed with the court as part of the Currier investigation. Printed Case ("PC") at 35; Redacted Printed Case ("RPC") at 4. The State

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[1] The ACLU submitted a supplemental printed case containing 10 separate press articles regarding the Currier investigation and the State's brief from *In re Sealed Documents*, 172 Vt. 152, 772 A.2d 518 (2001). None of these materials are extracts from or part of the "original papers and exhibits filed in the superior ... court." V.R.A.P. 10(a) and 30(a). Indeed, of the articles submitted only three predate the filing of the notice of appeal in this matter. The contents of the articles are not evidence for purpose of this proceeding nor would the contents be admissible at a proceeding in the superior court. These stories stand only for the proposition that there has been some press interest in the disappearance of the Curriers. This is not in dispute, however.

The authority of the ACLU to submit a supplemental printed case is unclear. This Court's order of August 11 directs that the ACLU submit a brief. Similarly, V.R.A.P. 29(a) addresses the filing of a "brief" by amicus curiae. V.R.A.P. 30 addresses the filing of a printed case by appellant and a supplemental printed case by appellee. See, e.g., *Jones v. Ashland Chem. Co.*, 740 N.E.2d 288 (Ohio 2000) (Ohio Supreme Court strikes, *sua sponte*, a supplement filed by an amicus).

subsequently filed returns and inventories on four warrants and sought to seal those search warrant materials. PC at 8-9; 16-17; 24-26; 33-34. The issue before the Court is a narrow question – whether the trial court erred in denying the motion to seal based upon the facts presented to the court. The issue is whether the details of the investigation should be part of the public domain.

IV. The ACLUs Citation To Cases Addressing Claims Of Privilege In Civil Proceedings Are Not Persuasive.

The ACLU analogizes to cases evaluating claims of executive or law enforcement privilege in civil law suits in arguing the State has failed to adequately establish that sealing was required in this matter. The analogy is false. The interests of the parties to a civil law suit – whether a civil rights action or a personal injury action – are entirely distinguishable from the public's interest in the documents filed regarding an ex parte search warrant application prior to any arrest or charge. The more general public interest in access asserted by the ACLU is not the equivalent of the interests of a plaintiff in a civil rights action brought by the family of an individual shot by the police.

V. The ACLUs Citation to FOIA Cases Are Not Persuasive Since FOIA Does Not Apply To The Courts.

The ACLU cites numerous federal FOIA cases in support of an argument that the State's did not adequately justify sealing the search warrant materials. All of these cases involve requests to executive branch agencies or independent executive agencies. Put another way, none of these case involves a request for judicial branch records. FOIA does not apply to the federal judiciary. 5 U.S.C. § 551(a) ("'agency' ... does not include ...

(B) the courts of the United States"); *Brown v. Gomez*, 19 Fed.Appx. 513, 514 (9th Cir. 2001) ("the judiciary is exempt from FOIA.")[2]

VI. The ACLUs Citation to Post-Arrest Cases Are Not Persuasive – Such Cases Are Clearly Distinguishable.

The ACLU argues that the public's right of access to the search warrant materials is an important component of public oversight of governmental action – whether by the executive or judicial branches. In support of these arguments the ACLU cites various cases which involve *post-arrest* access to judicial records. Such cases are readily distinguishable. The initiation of adversarial proceedings by the State provides a logical line that can be drawn to distinguish this matter from *In re Sealed Documents* and the cases cited by the ACLU.

[2] [2] Similarly, as this Court has noted, "it is doubtful that the [Public Records Act] 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).

CONCLUSION

For the reasons set forth in the State's earlier brief and in this brief, 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: September 12, 2011

STATE OF VERMONT

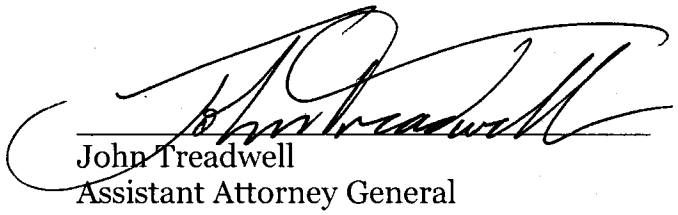
WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____

John Treadwell
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-5512
jtreadwell@atg.state.vt.us

CERTIFICATE OF COMPLIANCE

John Treadwell, Assistant Attorney General and Counsel of Record for the Appellant, 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 1,538 words.



John Treadwell
Assistant Attorney General