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August 23, 2011

Cathy Gattone  
Supreme Court Docket Clerk  
109 State Street  
Montpelier, VT 05609-0801

Re: In re Appeal of Application for Search Warrant, Docket No. 2010-479

Dear Cathy:

Pursuant to V.R.A.P. 28 (i), I would like to call the Court's attention to the following pertinent authority: Investigation, privacy at odds in Vermont search case, Burlington Free Press, (Aug. 22, 2011). Available at <http://www.burlingtonfreepress.com/article/20110822/NEWS03/108220301/1/7daysarchives/Investigation-privacy-odds-Vermont-search-case> (last visited August 23, 2011). Attached here as Appendix 1.

Pertinent parts of the article include:

1. "Burlington police investigated the case, and Detective Michael Warren [search warrant applicant] acknowledged last week that he long ago gathered enough evidence to bring charges against the alleged culprit."
2. "Warren executed the warrant and apparently found the evidence he was seeking, but the law-enforcement community was so unhappy with what it saw as Kupersmith's intrusion into their investigative procedures that it appealed the matter to the Vermont Supreme Court."
3. "The computer used by the suspect was located in a home owned by Eric Gulfield[...] Gulfield is not a suspect in the case, Warren said."

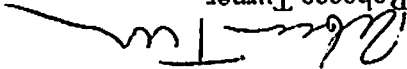
The article supports Amicus' arguments that the conditions set by Judge Kupersmith did not adversely affect law enforcement and that the search warrant targeted innocent persons. Defender General's brief at 18-19, 27, 34-36.

Thank you.

Cc: Andrew Strauss, Esq.  
David Tartier, Esq.  
Dan Barrett, Esq.  
Catherine Crump, Esq.  
Hanni Fakhoury, Esq.

Appellate Defender

Rebecca Turner



Very truly yours,

Appendix 1



August 22, 2011

## Investigation, privacy at odds in Vermont search case

*Sam Hemingway, Free Press Staff Writer*

John A. Kacur is frustrated.

Last summer, the 84-year-old resident of Lyon Mountain, N.Y., discovered that someone in Burlington had obtained his Social Security number and other personal information and was applying for credit cards under his name.

Burlington police investigated the case, and Detective Michael Warren acknowledged last week that he long ago gathered enough evidence to bring charges against the alleged culprit.

"Charges will be filed," Warren said.

That hasn't happened, and it's possible the case will remain in limbo for months to come.

The reason for the delay?

Burlington police and the state of Vermont are in a legal showdown with the state Defender General's Office and the American Civil Liberties Union regarding the search warrant that Warren used to seize a computer during the investigation.

The issue: A set of conditions Vermont Superior Court Judge Michael Kupersmith attached to the warrant that limited how extensively the police could pore through data contained in a home computer that

was the prime focus of the police investigation.

Warren executed the warrant and apparently found the evidence he was seeking, but the law-enforcement community was so unhappy with what it saw as Kupersmith's intrusion into their investigative procedures that it appealed the matter to the Vermont Supreme Court. Defender General Matthew Valerio and the ACLU are defending Kupersmith's actions.

The legal dispute is important because it could reset the parameters in Vermont for police search and seizure conduct in the digital age. Meanwhile, because the high court has yet to rule on the issue, the criminal case has been stuck in a holding pattern.

"If we charge and for some reason the person walks through the door and pleads guilty, the whole issue would become moot," Warren said. "So we're waiting for a decision."

Kacur, who is in failing health, said he fears the police have taken their eye off what should be their primary focus: solving crimes.

"I told them who it was, their address, phone number, email," he said. "They could have acted on this, but they haven't. I don't get it."

Kacur learned somebody was trying to gather credit cards under his name when he received a call from a credit card monitoring service in July 2010 asking him if he lived at 145 Pleasant St. in Burlington's New North End.

He didn't. Kacur's hometown, Lyon Mountain, is a hamlet of 423 people in the northern reaches of the Adirondack Park near Dannemora.

It turned out, he said, that a person had succeeded in obtaining his Social Security number, the maiden name of his long-dead mother -- all the information a person would need to steal Kacur's identity and obtain credit cards in his name.

"They also put in a change of address form at our post office," Kacur said last week. "The postmistress called me up and asked me, 'Why didn't you let us know you were moving?' I said, 'Well, we're not

moving."

Kacur provided police in New York with the information about the alleged identity theft, including the name of the woman he was told was behind the scheme.

Last week, Kacur also gave the woman's name to the Burlington Free Press. The newspaper was unable to confirm independently her involvement in the case. Warren declined to identify the target of his investigation.

Warren said New York State Police sent the case to him Dec. 1, and he began work on it right away. The computer used by the suspect was located in a home owned by Eric Gulfield that accessed the Internet via an open WiFi network owned by a neighbor of Gulfield, according to an affidavit written by Warren.

Gulfield is not a suspect in the case, Warren said. Efforts to contact Gulfield for comment last week were unsuccessful.

On Dec. 22, Warren sought and obtained a search warrant to seize the computer at Gulfield's home.

"I believe someone utilizing a computer from the Gulfield residence at 145 Pleasant Avenue is using the open wireless connection," Warren's affidavit stated. "Probable cause exists to believe the residence ... contains evidence of the crime of identity theft."

The search warrant application authorized Warren to seize any computers or "electronic media" that might have been used in the alleged crime, as well as any related letters, credit cards, credit-card applications or other documents in the home.

Kupersmith, in the conditions attached to his approval of the search warrant, wrote that the police could not seize any "digital evidence relating to criminal matters other than the identity theft offenses."

"Inspection and investigation of the subject computer must be done by either an independent third party or specially trained computer personnel who are not involved in the investigation while staying behind a firewall, that is, in the absence of other agents of the state," the judge wrote.

Boiled down, the law-enforcement community's argument is that it is counterproductive and unconstitutional for judges to act as Kupersmith did in the Kacur case.

"Creating out of whole cloth a new framework -- abrogating the plain view doctrine and allowing the judicial officer to restrict ... how the search may be conducted -- is error," Chittenden County Deputy State's Attorney Andrew Strauss wrote in legal papers filed with the court.

"This new framework actually impedes legal development, by allowing judicial officers to define reasonableness without the actual facts and based on limited precedent," Strauss wrote.

Burlington Detective Lt. Kristian Carlson, director of the Chittenden Unit for Special Investigations, which handles sex-crime cases, said investigators can't know in advance what files to open while searching for the criminal evidence, so it's wrong for judges to preordain how police do that work.

He gave the example of a police investigator discovering child pornography while looking through digital images for photos connected to identity theft.

"There isn't software that can analyze in advance what's in a digital image," Carlson said. "It's an argument for the plain-view doctrine. If we find that stuff, we know we have to shut down the investigation and apply for an additional search warrant."

Under the "plain view doctrine," a police officer investigating one crime may, under certain circumstances, obtain evidence of another crime if it is discovered in "plain view" while a search is under way.

Valerio and the ACLU, in briefs filed with the Supreme Court, disagreed.

"Unlike a storage place for tangible things, a computer retains information in a manner that does not reflect the intention of its user and records and stores information without the user's express instruction to do so," wrote Dan Barrett, staff attorney for the Vermont ACLU.

Valerio, in an interview, said computers can't be treated the same way that a home might be when it comes to search warrants and the plain-view doctrine.

"If you get a search warrant to search a bedroom for evidence of a crime, and you see something while walking to the bedroom, that's plain view," he said. "But you can't use the warrant to just go into the cellar or the garage. But a computer is like a house with no walls. Once you're in you get to look at the whole thing. There needs to be limits on what they are asking to look for."

Kupersmith did not respond to a message seeking comment left with a court clerk last week.

The Supreme Court, which heard arguments in the case this year, has yet to issue a ruling.

*Contact Sam Hemingway at 660-1850 or e-mail at [shemingway@burlingtonfreepress.com](mailto:shemingway@burlingtonfreepress.com). Follow Sam on Twitter at [www.twitter.com/SamuellHemingway](http://www.twitter.com/SamuellHemingway).*

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