

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

In re: Certain Sealed Search  
Warrant Records  
Relating to Death of  
Yeardley Love

Case No.: CL 2010 158

FILED

2010 MAY 11 P 4:02

CIRCUIT CLERK'S OFFICE  
PAUL C. GARRETT, CLERK

DEPUTY CLERK

VERIFIED PETITION FOR WRIT OF MANDAMUS

*The Washington Post*, Media General Operations, Inc, t/a *The Daily Progress* and *Richmond Times-Dispatch*, and *The Associated Press* ("Petitioners"), by counsel, pursuant to Va. Code § 8.01-644, petition this Court for the issuance of a writ of mandamus directed to the Honorable Paul C. Garrett, Clerk of the Circuit Court for the City of Charlottesville ("Clerk"), and in support thereof state:

1. Petitioners are in the business of gathering news and publishing such news through media platforms that include newspapers and websites. All petitioners routinely cover developments in the Charlottesville and University of Virginia communities, and disseminate news content to audiences in the City of Charlottesville and the Commonwealth of Virginia.

2. Petitioners seek the issuance of a writ of mandamus directing the Clerk to make available to the public a sealing order and related judicial records, as more fully described below. As those materials are in the custody of the Clerk, Petitioners are proceeding by mandamus to compel the Clerk to release the judicial records. *See Smith v. Richmond Newspapers, Inc.*, 261 Va. 113, 540 S.E.2d 878 (2001).

3. George W. Huguely, V ("Huguely"), has been charged with first degree murder in connection with the death of Yeardley Love. The criminal prosecution is

styled *Commonwealth of Virginia v. George Wesley Huguely, V*, Case No. GC10003225-00 (General District Court, City of Charlottesville).

4. On the day that Huguely was arrested, May 3, 2010, a detective with the Charlottesville Police filed with the Clerk affidavits for at least three search warrants. The affidavits had been presented to a magistrate judge to establish probable cause for the issuance of warrants to search two apartments and to collect DNA samples from Huguely.

5. On May 5, 2010, *The Daily Progress* reported that the police had filed documents in this Court listing items seized during a search of Huguely's apartment. The report was based on a return for one of the search warrants. *The Daily Progress* also posted hyperlinks to copies of the May 3, 2010, search warrant affidavits.<sup>1</sup>

6. Later that day, a reporter for the *Post* visited the Clerk's Office to inspect the public record and confirm *The Daily Progress'* account of the search warrant records. Upon requesting the search warrant records, the reporter was informed by the Clerk's Office that the search warrant records, including records that had already been posted on *The Daily Progress'* website and discussed in its published report, had been sealed. In a subsequent discussion, the Clerk's Office reaffirmed that a sealing order had been entered and that all search warrant records were sealed and not available to the public. The Clerk's Office advised further that the sealing order itself had been sealed.

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<sup>1</sup> The three affidavits remain available on the *Daily Progress'* website at [http://static.mgnetwork.com/cdp/core/media\\_path/pdf/huguely\\_affidavit\\_search\\_warrant\\_101.pdf](http://static.mgnetwork.com/cdp/core/media_path/pdf/huguely_affidavit_search_warrant_101.pdf); [http://static.mgnetwork.com/cdp/core/media\\_path/pdf/huguely\\_affidavit\\_search\\_warrant\\_201.pdf](http://static.mgnetwork.com/cdp/core/media_path/pdf/huguely_affidavit_search_warrant_201.pdf); and [http://static.mgnetwork.com/cdp/core/media\\_path/pdf/huguely\\_affidavit\\_search\\_warrant\\_301.pdf](http://static.mgnetwork.com/cdp/core/media_path/pdf/huguely_affidavit_search_warrant_301.pdf).

7. The Commonwealth's Attorney has independently confirmed that the search warrant records, and the sealing order itself, have been sealed.

8. There is no record in the public domain of: (i) the date that the sealing order was entered, (ii) the scope and duration of the sealing order, (iii) the reasons supporting the entry of the sealing order, or (iv) whether the order was entered on the motion of the Commonwealth or defense counsel, or *sua sponte* by the Court.

9. Petitioners are aware of no public notice being given that a sealing order was about to be, or had been, entered in connection with the search warrant records.

10. Virginia has long recognized the public's qualified right to access judicial records. The right was guaranteed at common law, *see Shenandoah Pub. House, Inc. v. Fanning*, 235 Va. 253, 262 n. 3, 368 S.E.2d 253, 257 n. 3 (1988) ("There is no question that the press and the public jointly possess a common-law right to inspect and copy judicial records and public documents."); it has been enshrined in statute by the General Assembly, *see* Va. Code § 17.1-208 ("Except as provided by law, any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person ...."); and it has been repeatedly and consistently protected by the Supreme Court of Virginia. *Accord Lotz v. Commonwealth*, 277 Va. 345, 351, 672 S.E.2d 833, 837 (2009) (affirming circuit court's refusal to seal mental health evaluations); *Perreault v. Free Lance-Star*, 276 Va. 375, 666 S.E.2d 352 (2008) (affirming circuit court's refusal to seal financial terms of wrongful death settlement).

11. To ensure the public's right of access, the Supreme Court has imposed procedural guidelines for sealing judicial records. *Shenandoah Pub. House, Inc.*, 235 Va. at 257-259, 368 S.E.2d at 255-256. The procedural guidelines governing the sealing of

records are the same as those governing the closure of judicial proceedings. *Id.* at 259, 368 S.E.2d at 256 (“We adopt the procedural guidelines announced in [*Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 590, 281 S.E.2d 915, 924 (1981)].”). These guidelines include notice to the public, an opportunity to be heard in opposition to closure, and on-the-record, specific factual findings to support the closure of the records and permit meaningful judicial review. *Perreault*, 276 Va. at 390, 666 S.E.2d at 360.

12. These requirements protect the public’s presumptive access right by preventing the arbitrary or routine granting of motions to seal. *See Id.*; *see also, In re Washington Post Co.*, 807 F.2d 383, 392 (4th Cir. 1986) (“A blind acceptance by the courts of the government’s insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.”). This requirement also protects the public’s right by ensuring that a record exists by which the appropriate appellate court can review the trial court’s decision. *See In re Washington Post Co.*, 807 F.2d at 392 (vacating trial court’s sealing order and remanding with instructions that the trial court “support its decision with a clear statement of reasons, accompanied by specific findings and a discussion of possible alternative choices.”).

13. Search warrant records are judicial records.<sup>2</sup> The public has a presumed right of access to those records, which it may assert under the statutory, common law and constitutional principles that govern access. *Shenandoah Pub. House, Inc.*, 235 Va. at 258-259, 368 S.E.2d at 256 (citation omitted).

14. In order to evaluate and, if appropriate, assert its access right, the public is entitled to a process that allows its rights to be evaluated. Public notice of sealing, an opportunity to be heard in opposition to sealing, and an opportunity to understand and evaluate the reasons that have been relied on for the sealing of a judicial record are fundamental, as the cases cited above teach. *See Richmond Newspapers, Inc.*, 222 Va. at 590, 281 S.E.2d at 924; *Commonwealth v. Schwartz*, 59 Va. Cir. 195, 197 (Loudoun Cir. Ct. 2002). The sealing of the very order that accomplishes the closing of the judicial record defeats that process, and removes the public's substantive and presumptive right of access before it can be evaluated, much less asserted, in a particular case.

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<sup>2</sup> Although the Supreme Court of Virginia has not addressed the issue, the Fourth Circuit has held that search warrant papers constitute "judicial records" for purposes of the public's right of access. *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 63-64 (4th Cir. 1989). The Fourth Circuit based its decision on the federal judiciary's pervasive role, dictated under the federal rules and the federal constitution, in the issuance, and subsequent appellate review of the issuance, of search warrants. *Id.* The Fourth Circuit's reasoning applies to the Virginia judiciary, which plays an equally involved role under Virginia law. *See* Va. Code § 19.2-54 (judiciary must certify and issue search warrants); *Morke v. Commonwealth*, 14 Va. App. 496, 500, 419 S.E.2d 410, 413 (Va. Ct. App. 1992) ("The requirements of the Virginia statutes controlling the issuance of search warrants have been interpreted to impose the same search warrant requirements as the fourth amendment.") (citing *Kirby v. Commonwealth*, 209 Va. 806, 808, 167 S.E.2d 411, 412 (1969)). Further, the controlling Virginia statutes require that search warrant records be filed in the office of the clerk of court and be subject to public inspection. Va. Code §§ 19.2-54-56.

15. The ability to assess the basis for the sealing order that has been identified to Petitioners has heightened significance in this case. First, three search warrant affidavits relating to the death of Yeardeley Love are already in the public domain. Second, significant information regarding the results of at least one search is also in the public domain. Third, this is a straightforward homicide investigation where the suspect is in custody; it does not appear to be a case where there is a plausible argument that secrecy is required to prevent the loss of evidence. However, until the sealing order and the basis for its entry can be made public and understood, the substantive arguments in opposition to sealing cannot fairly be offered.

16. As members of the public, Petitioners have a clear right under Va. Code § 17.1-208 and principles of common and constitutional law to seek the relief requested herein.


17. The Clerk has a legal duty under Va. Code § 17.1-208, common law, and the Constitution of Virginia to make available at the Clerk's Office for public inspection the sealing order, as well as any motion, order or pleading relating to the entry of the sealing order.

18. Petitioners have no adequate remedy at law.

Wherefore, Petitioners respectfully pray that this Court issue a writ of mandamus directing that the Clerk, forthwith, unseal and make available for public inspection and copying the order sealing the search warrant records relating to the investigation into the death of Yeardeley Love, and all motions, memoranda, briefs or records of any kind whatsoever relating to the entry of the sealing order.

VERIFICATION

I verify under penalty of perjury that the factual allegations set forth in the foregoing Verified Petition for Writ of Mandamus are true and correct to the best of my knowledge.

  
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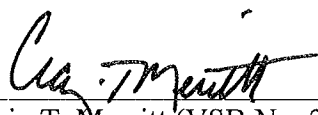
By: McGregor McCance  
Managing Editor  
Media General Operations, Inc.  
*t/a The Daily Progress*

Dated: May 11, 2010.

Respectfully submitted,

The Washington Post  
Media General Operations, Inc.  
The Associated Press

By counsel

  
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*Counsel for*  
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Media General Operations, Inc.  
*t/a The Daily Progress*  
*Richmond Times-Dispatch*  
*The Associated Press*

Certificate of Service

I hereby certify that a true copy of the foregoing Verified Petition for Writ of Mandamus was served by first-class mail and facsimile this 11th day of May, 2010, on:

Warner D. Chapman, Esq.  
Commonwealth's Attorney  
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Charlottesville, Virginia 22902  
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Francis McQ. Lawrence, Esq.  
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*Attorney for the Commonwealth*

*Counsel for George W. Huguely, V*

And by hand delivery on:

The Honorable Paul C. Garrett, Clerk  
City of Charlottesville Circuit Court  
315 East High Street  
Charlottesville, VA 22902

  
\_\_\_\_\_  
Counsel

#1045398

May 17, 2010

VIA FACSIMILE ONLY (434) 972-4071

Honorable Cheryl V. Higgins  
Presiding Judge, Chief Judge  
Albermarle Circuit Court  
Albermarle County Courthouse  
Court Square  
501 East Jefferson Street  
Charlottesville, VA 22902-5110


Re: Certain Sealed Search Warrant Records  
Relating to the Death of Yeardeley Love  
Case No. CL 2010 158

Dear Judge Higgins:

Please find attached to this correspondence Respondent's Motion to Dismiss Petition for Writ of Mandamus. It is requested that the Court consider the Motion to Dismiss before addressing the merits of the Petition.

If there are any questions with regard to the attached document, please do not hesitate contact undersigned counsel.

Very truly yours,

  
Alexander Francuzenko

AF/lck

Attachment

cc: Craig T. Merritt, Esq.  
Warner D. Chapman, Esq.  
Francis McQ. Lawrence, Esq.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

IN RE: CERTAIN SEALED :  
SEARCH WARRANT : Case No. CL 2010 158  
RECORDS RELATING TO :  
DEATH OF YEARDLEY :  
LOVE :  
:

**MOTION TO DISMISS PETITION  
FOR WRIT OF MANDAMUS**

COMES NOW the Respondent, The Honorable Paul G., Garrett, Clerk of the Circuit Court for the City of Charlottesville (hereinafter referred to as "Clerk"), by and through his counsel, Alexander Francuzenko, Esq., and the law firm of Cook Kitts & Francuzenko, PLLC, and files this Motion to Dismiss the Verified Petition for Writ of Mandamus filed by *The Washington Post*, Media General Operations, Inc., t/a *The Daily Progress* and *Richmond Times-Dispatch*, and *The Associated Press* (hereinafter referred to as "Petitioners"), and states the following:

1. Mandamus is an extraordinary remedy and one that may be used to compel a government official to perform a ministerial duty. Earley v. Landside, 257 Va. 365, 369, 514 S.E.2d 153, 155 (1999). Gannon v. State Corp. Commission, 243 Va. 480, 481-482, 416 S.E.2d 446, 447 (1992).
2. A fundamental element necessary for a litigant to seek the issuance of a Writ of Mandamus is that that litigant has no adequate remedy at law. Hertz v. Times World Corporation, 259 Va. 599, 608, 528 S.E.2d, 458, 463 (2000). "One of the fundamental principles underlying the entire jurisdiction is that Mandamus never lies where the party aggrieved has

another adequate remedy at law, by action or otherwise.” Hall v. Stuart, 198 Va. 315, 324, 94 S.E.2d 284, 290 (1956).

3. The Petition for Writ of Mandamus does not indicate that the Petitioners filed a Motion or Petition to Intervene in the criminal proceeding to challenge the Circuit Court’s ruling to seal the requested information.

4. The Virginia Supreme Court has recognized a news agency’s right to intervene in criminal cases for the sole purpose of challenging a Court’s ruling with regard to closing some portion of the criminal proceedings. Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 590, 281 S.E.2d 915, 923-924 (1981).

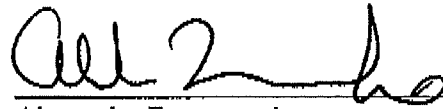
5. The Virginia Supreme Court has held that a Motion to Intervene in the criminal proceeding is the proper vehicle to address the relief being sought in Petitioner’s Petition for Writ of Mandamus. In Hertz, the Virginia Supreme Court reversed the Circuit Court’s ruling issuing Writs of Mandamus because the news agency Petitioners had an adequate remedy at law, that being an opportunity to intervene in the criminal proceeding, and that they failed to do so. Hertz v. Times World Corporation, 259 Va. 599, 609-610, 528 S.E.2d 458, 463-464 (2000). The Virginia Supreme Court held that a Writ of Mandamus was not the proper vehicle to address the sealing of criminal proceedings and that the news agencies had an adequate remedy at law. Id.

6. Applying the principles set forth by the Virginia Supreme Court in the Hertz case, this Court must dismiss the Verified Petition for Writ of Mandamus directed to the Honorable Court, Paul C. Garrett, Clerk of the Circuit Court for the City of Charlottesville.

WHEREFORE, based on the foregoing and any argument held on May 18, 2010, it is respectfully requested that this Honorable Court grant the Motion to Dismiss filed on behalf of the Honorable Paul C. Garrett, Clerk of the Circuit Court for the City of Charlottesville, and

dismiss the Verified Petition for Writ of Mandamus with prejudice.

Respectfully submitted,



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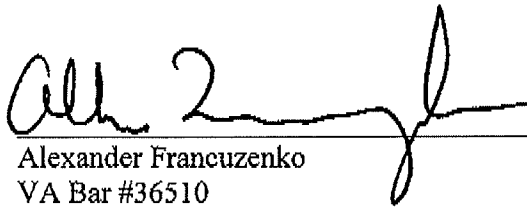
**CERTIFICATE OF SERVICE**

I HEREBY certify that a copy of the foregoing Motion to Dismiss Petition for Writ of Mandamus was sent via facsimile, this 17th day of May, 2010 to the following:

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