IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOYCE HOLLEY, et al.,	§	
Plaintiff,	§	
	§	
V.	§	**CIVIL ACTION NO. 4:10-CV-02394**
	§	
ANDREW T. BLOMBERG,	§	
Defendant	§	

ANDREW T. BLOMBERG AND PATRICIA LYKOS'S
MOTION FOR *IN CAMERA* REVIEW AND
MOTION FOR PROTECTIVE ORDER

TO HONORABLE UNITED STATES DISTRICT JUDGE EWING WERLEIN, JR.:

COME NOW DEFENDANT ANDREW T. BLOMBERG ("Blomberg"), AND INTERESTED THIRD PARTIES HARRIS COUNTY DISTRICT ATTORNEY PATRICIA LYKOS ("District Attorney") AND HOUSTON POLICE DEPARTMENT OFFICERS RAAD HASSAN,[1] P. BRYAN, AND D. RYSER and move that this Court: (1) conduct an *in camera* review of any video recording obtained from Uncle Bob's Self Storage pursuant to a subpoena issued by counsel for the plaintiff; and (2) enter an agreed protective order pertaining to those materials.

I.
Statement of Facts

Complaint. On July 6, 2010, Joyce Holley ("Holley") filed an original complaint against Houston Police Department Officer Andrew Blomberg, alleging causes of action under 42 U.S.C. §§ 1982, 1983 and 1988 as well as a claim to loss of consortium.[2] *See* Document 1.

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[1] Hassan's counsel has transmitted a letter joining this motion. *See* Exhibit A (letter).

[2] Ms. Holley has also filed a complaint as next friend for C.H., a minor. References to "Holley" in this motion necessarily refer to her in both her capacity as an individual plaintiff and as next friend to C.H.

On August 4, 2010, Holley filed a first amended complaint, amending allegations of fact and withdrawing her claims against Blomberg in his official capacity. *See* Document 5.

Subpoena in Question. On or about August 16, 2010, Uncle Bob's Self Storage was served with a subpoena duces tecum, directing that entity to produce the following at the offices of Holley's counsel on August 26, 2010:

1. All video recordings of the incident involving Chad Holley on March 24, 2010.

2. True and correct copies of all video recordings of the beatings of any suspects by Houston Police Department officers on your property on March 24, 2010.

3. True and correct copies of all video recordings of any Houston Police Department activity on March 24, 2010.

See Exhibit B (subpoena).[3]

Upon information and belief, Uncle Bob's Self Storage has produced to Holley's counsel a video recording responsive to the subpoena duces tecum, depicting the alleged mistreatment of C.H. by Houston Police Department officers. In this motion, the video recording will be referred to as the "Uncle Bob's video." Counsel for Holley has agreed to embargo the Uncle Bob's video until this motion for protection is resolved.

Parallel Criminal Proceedings. On June 23, 2010, a Harris County grand jury indicted four Houston Police Department officers, including Blomberg, ("HPD defendants") for various misdemeanor charges of official oppression and violation of

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[3] Notably, this subpoena was issued *prior* to the parties' case-management conference under Federal Rule of Civil Procedure 26(f) without first obtaining a court order. *See* FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.")

civil rights. *See* Exhibit C (indictments). These indictments are currently pending trial in the 180th District Court of Harris County, Texas.

The Uncle Bob's video is central to both the prosecution and defense of the state criminal charges. The District Attorney and the HPD defendants believe that public disclosure or public dissemination of the Uncle Bob's video would likely infringe upon the Sixth Amendment rights of the HPD defendants to receive a fair trial in Harris County. In deference to that interest, counsel for the indicted officers have agreed to adhere to a protective order in state district court forbidding them from disclosing or publicly disseminating the Uncle Bob's video.

II.
Motion for In Camera *Review*

Effective consideration of this motion for protection requires this Court to view the Uncle Bob's video *in camera*. Accordingly, Blomberg, the District Attorney, and the HPD defendants move that this Court order counsel for Holley to produce any video recordings produced by Uncle Bob's Self Storage to the Court under seal for *in camera* review.

III.
Motion for Protective Order

Blomberg, the District Attorney, and the HPD defendants move for issuance of a protective order against public display or dissemination of the Uncle Bob's video.

A. Standard of Review

The decision to enter a protective order under Federal Rule of Civil Procedure 26(c) is within the court's discretion. *Thomas v. Int'l Business Machines*, 48 F.3d 478, 482 (10th Cir. 1995). As the Third Circuit observed in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994):

> Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of [confidentiality] orders and the unnecessary denial of confidentiality for information that deserves it....

Id. at 789 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 HARV. L. REV. 427, 492 (1991)).

Under Rule 26(c), a party seeking a protective order must show "good cause" by demonstrating how specific prejudice or harm will result if no protective order is granted. *Phillips v. General Motors Corp.,* 307 F.3d 1206, 1211 (9th Cir. 2002). This requirement of showing "good cause" to support the issuance of a protective order indicates that "the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998).

This "good cause" standard equally applies with respect to a motion for an order to make discovery materials non-public:

> Generally, the public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order is necessary. . . . .
>
> For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted. If a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary.

Phillips, 307 F.3d at 1210 (citations omitted).

B. Prejudice from Public Disclosure

The parties in interest with respect to this motion are the State of Texas and the four HPD defendants. They seek protection in this matter to preserve their interest in a fair trial and impartial jury. Blomberg also asserts an individual right to protect his interest to a fair trial and impartial jury in this civil action – Civil Action No. 4:10cv2394 – in which he is the sole named defendant.

1. Prejudice in State Criminal Proceedings

The HPD defendants are individuals prejudiced by the subpoena of the video recording because their Sixth Amendment constitutional right to a fair trial and an impartial jury would be irrevocably violated by its public disclosure.

In the interests of comity, this Court should ensure that its civil proceedings do not unnecessarily interfere with pending state criminal proceedings, especially if the proceedings in this Court would have an irreparable impact on the defendants' constitutional rights. *Cf. Younger v. Harris,* 401 U.S. 37, 43 (1971) (in context of request for federal injunction against state criminal prosecution, recognizing "longstanding public policy against federal court interference with state court proceedings").

The right being asserted herein is extraordinarily important. Criminal trials must be decided by impartial jurors who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1070 (1991). This right to trial by an impartial jury is a constitutional right of the highest priority. *See id.* ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors. . . .") The State of Texas shares this interest in vindicating the defendants' constitutional rights. *See, e.g., Singer v. United States,* 380 U.S. 24, 36 (1965) (holding that "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction

is warranted are tried before a tribunal which the Constitution regards as most likely to produce a fair result.")

To that end, a trial court is empowered to take appropriate measures to protect a criminal defendant's rights. *See, e.g., Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979) ("To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary."); *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 553 (1976) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."). These measures may be pre-emptive. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (holding that, when considering how to "cure" effects of pretrial publicity, trial court's overriding objective must be to institute "those remedial measures that will prevent the prejudice at its inception").

After *in camera* review, the Court should recognize that the subject matter of the Uncle Bob's video, if displayed in public prior to jury selection, would foreclose the State of Texas and the HPD defendants from empanelling a jury that could view the video recording in court without preconceptions and without having formulated an opinion about the guilt or innocence of the defendants.

Any after-the-fact alternatives to a protective order would be ineffective. Given the national interest that such a recording would generate, it is likely that a change of

venue would be ineffective to remedy the effect of the pretrial publicity.[4] "Emphatic" jury instructions may be at best an imperfect filter, and would also fail to address the threat of a "carnival atmosphere" around the trial. *United States v. Brown*, 218 F.3d 415, 431 (5th Cir. 2000). Moreover, in complex cases, jury instructions are often difficult to formulate and highly detailed. Because of their detail, these instructions may serve to improperly highlight precisely those issues that the jurors are being instructed not to consider. *United States v. Simon*, 664 F. Supp. 780, 793 (S.D.N.Y. 1987), *aff'd sub nom. In re Dow Jones & Co.*, 842 F.2d 603 (2nd Cir.), *cert. denied sub nom. Dow Jones & Co. v. Simon*, 488 U.S. 946 (1988); *see generally* Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561 (1977) (characterizing aforementioned after-the-fact remedies for pretrial publicity as "totally inadequate").

By contrast, Holley will not be prejudiced in the slightest by a protective order directing her and her counsel to maintain this video recording in confidence until the criminal case is tried. The proposed protective order would permit Holley's counsel to use the video recording as necessary to prepare for trial. It would only foreclose him from publicly displaying or disseminating the video recording or characterizing its contents. Such public display or dissemination could only serve one purpose: to materially prejudice the pending criminal proceedings against the HPD defendants or the

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[4] The Supreme Court has recognized that local communities and judicial systems have an interest in settling disputes locally: one locale should not be permitted to unburden its own system by shifting cases to other locations. *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947). Such a change of venue would be a very costly undertaking in the instant case, a highly publicized official oppression case with four co-defendants.

Moreover, in highly publicized criminal cases, such as the instant case, prejudicial information is likely to be disseminated nationally. As a result, in these cases, a change of venue will have no meaningful effect. *See Gentile*, 501 U.S. at 1075 (noting that with "increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements" by trial participants).

civil proceedings currently pending in the Southern District. *Compare* TEX. DISCIPLINARY R. PROF. COND. 3.07(a) (forbidding counsel from extrajudicial statements that "will have a substantial likelihood of materially prejudicing an adjudicatory proceeding").

Skilling v. United States, ___ U.S. ___, 130 S.Ct. 2896 (2010), does not alter this conclusion. In *Skilling*, the Supreme Court rejected Skilling's claim to a Sixth Amendment violation due to pretrial publicity by distinguishing Skilling's claims from other Supreme Court cases in which prejudice was presumed. *Id.,* 130 S.Ct. at 2912-2917. The Court based its decision, in part, on the fact that the pretrial publicity "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.,* 130 S.Ct. at 2916. The Court concluded that Skilling's news coverage was distinguishable from the "dramatically staged admission of guilt" in *Rideau v. Louisiana*, 373 U.S. 723 (1963), which "was likely imprinted indelibly in the mind of anyone who watched it." *Skilling,* 130 S.Ct. at 2916. By that standard, the Uncle Bob's video is more akin to *Rideau* than to *Skilling*, as an *in camera* review will establish.

For these reasons, this Court should enter the attached order of protection for the benefit of the parties in the pending state criminal prosecution.

2. Prejudice in Federal Civil Proceedings

Additionally, Blomberg asserts his individual interest in preserving his right to a fair trial by impartial jurors in the pending civil complaint in this Court.

The above briefing applies with equal and direct force in the instant case. Public disclosure of the Uncle Bob's video will have an irreparable impact on the ability of this Court to empanel a jury that can fairly consider his civil defenses without having formulated a predisposition as to his liability. No remedial measures will be effective to remedy the

pervasive publicity that will inevitably result from public disclosure or dissemination of the video recording. This Court should exercise its discretion to manage the discovery in this case, particularly given that the discovery of this video recording occurred before the entry of a case management plan in which these issues could have been preemptively resolved.

ACCORDINGLY, the District Attorney, Blomberg, and the other HPD defendants respectfully request that the Court grant the agreed protective order pertaining to the use and dissemination of the March 24, 2010 video recording of the events occurring at Uncle Bob's Self Storage.

Respectfully submitted,

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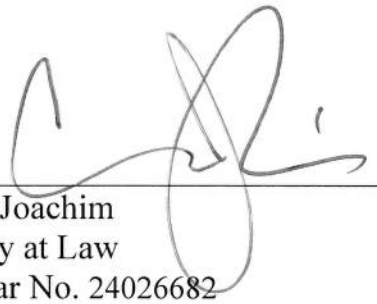

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CERTIFICATE OF SERVICE

This is to certify that, on August 27, 2010, a true and correct copy of the foregoing instrument was transmitted by facsimile to counsel for the plaintiff, Benjamin Hall, at 713-942-9566 and transmitted to him by electronic filing.

SCOTT DURFEE
Assistant District Attorney
Harris County, Texas

CERTIFICATE OF CONFERENCE

This is to certify that Assistant District Attorney Scott Durfee conferred with counsel for the Plaintiffs, Benjamin Hall, to determine whether he was agreed or opposed to the motion for protection. After several discussions on August 24 and August 25, 2010, Mr. Hall ultimately stated that he could not agree to the entry of a protective order with respect to the Uncle Bob's Self Storage video recording.

SCOTT DURFEE
Assistant District Attorney
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