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

JOYCE HOLLEY, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H:10-2394
	§	
ANDREW T. BLOMBERG,	§	
	§	
Defendant.	§	

PROTECTIVE ORDER

Pending is Defendant Andrew T. Blomberg's Motion for *In Camera* Review and Motion for Protective Order (Document No. 7), in which Defendant Raad Hassan has joined in support, and to which Plaintiff Joyce Holley, Individually, and as Next Friend of Chad Holley, a Minor, have responded in opposition. In addition, the District Attorney of Harris County, Patricia Lykos, and Houston Police Department Officers P. Bryan and D. Ryser have also expressed their support of Blomberg's Motion; and a number of the news media, namely Post-Newsweek Stations, Houston, Inc., Hearst Newspapers, LLC d/b/a The Houston Chronicle, KHOU-TV, L.P., KTRK-TV Houston, Inc., and KRIV-TV have variously filed Motions to Intervene and made responses in opposition to Defendant Blomberg's motion.

Plaintiffs filed this suit against Blomberg, and a similar case against Defendant Hassan, alleging that they used excessive and unreasonable force against Chad Holley in effecting his arrest

on or about March 23, 2010, and that they beat Holley in connection with his arrest, which beating caused him to suffer serious injuries. Plaintiffs seek a recovery of damages in the millions of dollars, together with attorney's fees, under 42 U.S.C. §§ 1983, 1982, and 1988. The arrest of Holley occurred adjacent to a private storage facility, which for its own security purposes operated surveillance videos, and the event that is the subject matter of this suit was fortuitously captured on two surveillance videos.

According to Defendant Blomberg, the Harris County Grand Jury indicted four Houston Police Department officers, including Blomberg, for official oppression and violation of civil rights and, according to media reports, eight H.P.D. officers were relieved of duty as a result of the incident, three of whom were fired. Blomberg and the other indicted officers and the Harris County District Attorney agreed to protective orders in which the court ordered counsel in the pending state criminal cases not to release or disseminate to any other person or entity certain items, including the subject surveillance videos, except insofar as such is required by defendants' counsel and reasonably necessary in connection with preparing their clients' defenses, preparing trial witnesses and expert witnesses, and engaging legal consultants acting in Defendants' behalf. Under the state orders, any duplication, disclosure, or dissemination of the surveillance

videos is otherwise prohibited under threat of punishment for contempt of court.

Plaintiffs' respected counsel, while opposing Blomberg's Motion in this case, has submitted to the Court under seal a copy of the surveillance videos, which were copied onto one DVD, for the Court to review *in camera*, and Plaintiffs' counsel quite appropriately and voluntarily agreed not to disclose the same in order to permit the Court first to rule on Blomberg's pending motion. Plaintiffs procured the surveillance videos through the power of this Court by the use of a subpoena and, as such, it is discovery material that is subject to protection by order of this Court. *See* Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2207 (1984) ("[P]etitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. . . . A litigant has no First Amendment right of access to information made available only for purposes of trying his suit." (citing Zemel v. Rusk, 85 S. Ct. 1271, 1280-81 (1965)).

The Court has examined *in camera* the surveillance video, as requested by the parties.[1] The Court expects that it will be a significant and central exhibit in evidence at the criminal trials

[1] Because the Court examined copies of both surveillance videotapes by the playing of the one DVD filed under seal by Plaintiffs' counsel, the surveillance video is often referred to in the singular in this Order. All such references are intended to include, however, *both* surveillance videotapes and all copies thereof, whether or not combined into one DVD or other format.

and the civil trial. Presumably, the criminal trial(s) will proceed first. Defendant Blomberg, supported by the District Attorney and Blomberg's fellow accused defendants in state court, are concerned that their Sixth Amendment constitutional rights to a fair trial and an impartial jury "would be irrevocably violated by [the] public disclosure" of this surveillance video. Defendant Blomberg requests in the interest of comity, that this Court enter a protective order solely with respect to the use and dissemination of the surveillance video in order to preserve the defendants' right to a fair trial by impartial jurors. Although a conventional gag order is not being sought here--Defendants instead seek only a protective order regarding this item of evidence--it is to that body of law that the Court turns to evaluate the constitutional importance of avoiding the kind of pretrial publicity that may taint a jury panel and result in a jury that is biased toward one party or another. An excellent summary of one's Sixth Amendment rights and their tension with First Amendment rights is found in United States v. Brown:

> Intense publicity surrounding a criminal proceeding-what Justice Frankfurter referred to as "trial by newspaper"-poses significant and well-known dangers to a fair trial. *See* Pennekamp v. Florida, 328 U.S. 331, 66 S. Ct. 1029, 1043, 1047, 90 L.Ed. 1295 (1946) (Frankfurter, J., concurring) ("[I]t is indispensable . . . that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence."); *see also* Bridges v. California, 314 U.S. 252, 62 S. Ct. 190, 197, 86 L.Ed.

192 (1941) ("Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."); Patterson v. Colorado, 205 U.S. 454, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). Paramount among these dangers is the potential that pretrial publicity may taint the jury venire, resulting in a jury that is biased toward one party or another. "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 2745, 115 L.Ed.2d 888 (1991).

Accordingly, trial courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." Gannett Co. v. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 2904, 61 L.Ed.2d 608 (1979); *see also* Chandler v. Florida, 449 U.S. 560, 101 S. Ct. 802, 809, 66 L.Ed.2d 740 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); United States v. Noriega, 917 F.2d 1543, 1549 (11th Cir.) (*per curiam*), *cert. denied sub nom.* Cable News Network v. Noriega, 498 U.S. 976, 111 S. Ct. 451, 112 L.Ed.2d 432 (1990). The beneficiaries of this duty include not only the defendant in a given trial, but other defendants as well, such as co-defendants in the same case or defendants in related cases (as there are here), whose fair trial rights might be prejudiced by the extrajudicial statements of other trial participants. The vigilance of trial courts against the prejudicial effects of pretrial publicity also protects the interest of the public and the state in the fair administration of criminal justice.

This duty comports with the constitutional status of all First Amendment freedoms, which are not absolute but must instead be "applied in light of the special characteristics of the [relevant] environment." Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 89 S. Ct. 733, 736, 21 L.Ed.2d 731 (1969). Indeed, "[a]lthough litigants do not 'surrender their First

> Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise" in the context of both civil and criminal trials. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 2207-08 n. 18, 81 L.Ed.2d 17 (1984). "[O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." Id. There can be no question that a criminal defendant's right to a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps. *See* Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 1632, 14 L.Ed.2d 543 (1965) ("We have always held that the atmosphere essential to the preservation of a fair trial--the most fundamental of all freedoms--must be maintained at all costs."); Pennekamp, 66 S. Ct. at 1047 (Frankfurter, J., concurring) ("In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries.").

United States v. Brown, 218 F.3d 415, 423-424 (5th Cir. 2000) (footnotes omitted).

In Brown, the Court of Appeals affirmed a gag order that the district court had directed at trial participants, and not the press. Id. at 425. It found that extrajudicial commentary by the parties and/or their lawyers "would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Id. at 427. The Court held:

> If the district court determines that there is a "substantial likelihood" (or perhaps even merely a "reasonable likelihood," a matter we do not reach) that extrajudicial commentary by trial participants will undermine a fair trial, then it may impose a gag order on the participants, as long as the order is also narrowly tailored and the least restrictive means available. This standard applies to both lawyers and parties, at least where the court's overriding interest is in preserving a fair trial and the potential prejudice caused by

> extrajudicial commentary does not significantly depend on the status of the speaker as a lawyer or party.

Id. at 428.

In this case, Defendant Blomberg does not seek to restrain speech by the parties and their attorneys,[2] but rather, to prevent the parties and their counsel from releasing to the public the surveillance video in advance of the criminal trial(s). The question, therefore, is whether the release of this item of evidence would create a substantial likelihood of potential prejudice such as to undermine a fair trial for the criminal defendants in their state cases and for Blomberg and Hassan in this case. In evaluating the prejudice that the release of the video may have, the Court takes judicial notice of a column published in the September 29, 2010 edition of The Houston Chronicle, one of the media advocating release of the video. The columnist is Bill King, who reports that he has talked to several people who have seen the video, and based upon the reports of others, King writes in part as follows:

> While normally such surveillance tapes are made up of grainy, black-and-white images, this incident, which occurred in the daylight, was captured on high-quality digital video. The common term used to describe the scene by those who have seen the video is "nauseating."

---

[2] Indeed, as the Fifth Circuit observed, "[a]n attorney's ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not." Brown, 218 F.3d at 428.

> Apparently when the young man was finally cornered, he fell on the ground with his hands behind his head. Notwithstanding his attempt to surrender, the officers proceeded to hold Holley down and take turns severely beating him. One of [the] people who had viewed the video told me that the violence is so brutal and graphic that it is comparable to the 1991 Rodney King-Los Angeles Police Department video.
>
> If the beating is as bad as it has been described to me, it will instantly become a national news story. The video will be plastered across the 24-hour cable news channels non-stop. It will go viral on the Internet, posted to YouTube and a dozen other sites, and be seen there by millions.
>
> The Rodney King tape, ancient by internet standards, has been viewed more than 1.5 million times. The Holley video will be a blemish on Houston's reputation that will be permanently preserved in cyberspace and engraved in the national consciousness.

Bill King, *Get ready for Houston's image to take a beating*, HOUS. CHRONICLE, Sept. 29, 2010, at B9.

After having viewed the videotape *in camera*, the Court--without commenting on the columnist's reported understanding of what is depicted--concludes that The Houston Chronicle columnist Bill King has presented a credible assessment of the kind of widespread pervasive exposure, and opinionated commentary, that in all likelihood will result if this item of evidence is released in advance of trial. The fact that a number of television stations have lined up to oppose the issuance of a suppression order directed only to the parties and lawyers in this case tends to corroborate the expectations of The Houston Chronicle columnist.

Plaintiffs argue that Skilling v. United States, 130 S. Ct. 2896 (2010), in which the Supreme Court denied a change of venue and affirmed the Fifth Circuit's ruling that Skilling received a fair trial notwithstanding pretrial publicity, dictates that Blomberg's motion should be denied. As the Supreme Court observed in Skilling, however, "news stories about Enron did not present the kind of vivid, unforgettable information we have recognized as particularly likely to produce prejudice, and Houston's size and diversity diluted the media's impact." Id. at 2916. Here, in contrast, the subject matter of the videotape is dramatically different from the subject matter of pretrial publicity associated with the prosecution of complex white collar business crimes. Moreover, Defendant Blomberg's request is only that the surveillance video--which the media itself expects to "be plastered across the 24-hour cable news channels non-stop," to be seen by millions of persons, and to be "engraved in the national consciousness"--be held under seal and protected until such time as fair and impartial juries can be chosen and the cases tried. There is no request to gag the press, or to restrict the public reporting of the event that is the subject matter of the criminal and civil cases. Indeed, the Court takes judicial notice that already there has been a substantial amount of media publicity about the arrest and its circumstances, the suspension and firing of H.P.D. officers, the criminal charges filed, the civil damages action

filed in this Court, and the like.[3] The Court is satisfied that "Houston's size and diversity," *see* Skilling, 130 S. Ct. at 2916, are sufficient to dilute the media's impact caused by its considerable news reporting of this event, and the Court expects that fair and impartial juries still can be seated. The Court finds from the submissions of the parties and its own review of the video, however, that if the surveillance videotape is released in advance of trial, with its "vivid, unforgettable information," *see*

---

[3] *See, e.g.*, James C. McKinley, Jr., *Texas: Seven Officers Are Fired for Beating*, N.Y. TIMES, June 24, 2010, http://www.nytimes.com/2010/06/25/us/25brfs-SEVENOFFICER_BRF.html; Brian Rogers and James Pinkerton, *4 charged, 7 fired, 12 disciplined in HPD*, HOUS. CHRONICLE, June 23, 2010, http://www.chron.com/disp/story.mpl/metropolitan/7076065.html; Bill King, *King: Get Ready for Houston's image to take a beating*, HOUS. CHRONICLE, Sept. 29, 2010, http://www.chron.com/disp/story.mpl/ editorial/outlook/7224284.html; *Teen sues ex-HPD officer for alleged beating caught on tape*, July 8, 2010, KHOU.COM, http://www.khou.com/news/ Teen-sues-ex-HPD-officer-for-alleged-beating-caught-on-tape-98042054.html; Rick Casey, *Commentary: Are videos best hope for justice?*, HOUS. CHRONICLE, May 2, 2010, http://www.chron.com/disp/story.mpl/metropolitan/casey/6986555.html; James Pinkerton, *Files shed more light on alleged HPD beating*, HOUS. CHRONICLE, July 3, 2010, http://www.chron.com/disp/story.mpl/ metropolitan/7092454.html; Rucks Russell & Courtney Zubowski, *Exclusive: Teen describes alleged beating by Houston police*, KHOU.COM, Apr. 28, 2010, http://www.khou.com/home/khou-houston-police-beating-92463334.html; *New Details in Houston police beating case*, AUSTIN STATESMAN, July 4, 2010, http://www.statesman.com/news/texas/new-details-in-houston-police-beating-case-785941.html?cxtype=rss_ece_frontpage; Cynthia Cisneros, *Suspensions dismissed for 5 officers in teen beating*, ABCLOCAL.GO.COM, Aug. 21.2010,http://abclocal.go.com/ktrk/story?section=news/local&id= 7621164; Andy Cerota, *Officers accused in beating make court appearance*, ABCLOCAL.GO.COM, July 23, 2010, http://abc local.go.com /ktrk/story?section=news/local&id=7571034; Alexander Supgul, *Beating Lawsuit Filed Against Officer*, MYFOXHOUSTON.COM, July 8, 2010, http://www.myfoxhouston.com/dpp/news/local/100708-lawsuit-filed-in-alleged-police-teen-beating; Jeremy Rogalski/11 News Defenders, *Chief's letters detail alleged police beating*, July 1, 2010, KHOU.COM, http://www. khou.com/home/HPD-Chief-Teen-viciously-stomped-on-by-police-97635884.html, http://images. bimedia.net/documents/BLOMBERG.pdf; http:// images.bimedia.net/documents/HASSAN.pdf; http://images.bimedia.net/documents/BRYAN.pdf.

id., there is a substantial likelihood of prejudice to the parties involved in the state criminal prosecutions and in this civil litigation.

An Order that implicates a First Amendment freedom must be "no greater than is essential to the protection of the particular governmental interest involved." Brown, 218 F.3d at 429 (quoting Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 1811 (1974), *overruled on other grounds* by Thornburgh v. Abbott, 109 S. Ct. 1874 (1989). Consistent with that principle, the Order will be extremely narrow--limited to requiring that the parties and their attorneys not release or share the surveillance video with any persons other than their counsel, witnesses, and expert witnesses or consultants, and then only as needed to prepare their cases for trial. Moreover, the Protective Order will be limited only to the surveillance video itself and any copies or excerpts that have been made thereof.

Additionally, the Court must employ the least restrictive means possible when a First Amendment principle is implicated. If the Court were to allow Plaintiffs to disseminate the surveillance video, in all likelihood it will repeatedly be streamed on television and the Internet into every home and venue, seen by millions of persons, and become the subject of pervasive opinionated commentary. In other words, Plaintiffs' dissemination of the surveillance video would be tantamount to an "attempt to use

the media to influence the potential jury pool and create a prejudicial media atmosphere," the end result of which would be to "try this case in the press." *See* id. In the face of such "trial in the press," the alternative possibilities to secure a fair trial in *court* observed in Brown--such as change of venue, jury sequestration, "searching" voir dire, and "emphatic" jury instructions--would be wholly inadequate. Evidence that is "engraved in the national consciousness" is not the kind of evidence that one can put out of mind with "searching" voir dire, or "emphatic" jury instructions, nor does a change of venue provide a reasonable alternative to what will have "instantly become a national news story." After carefully considering alternative possibilities, the Court is persuaded that the least restrictive means to assure Defendants their Sixth Amendment rights and the impaneling of fair and impartial juries will be to maintain the surveillance video under seal and under a protective order.

Accordingly, and for the reasons set forth above, it is

ORDERED that Plaintiffs Joyce Holley, Individually and as Next Friend of Chad Holley, a Minor, and their attorneys, agents, representatives, employees, and all of those working in concert with them, shall RETAIN IN CONFIDENCE and UNDER SEAL the originals and all copies of the surveillance videos of the arrest of Chad Holley on or about March 23, 2010, and shall not release or disseminate the same or any copy thereof to any other person or

entity, and shall not permit any person to view or witness such surveillance videos in their possession or control except as may be required and reasonably necessary to prepare trial witnesses, expert witnesses, legal consultants, and others specifically assisting Plaintiffs' counsel in the preparation of this case for trial. This Protective Order shall remain in effect until the conclusion of the police officers' (Blomberg, Hassan, Bryan, and Ryser) criminal trial(s) and until further order of the Court.

Because the Court declines to consider the imposition of prior restraint upon any of the media, including those who have sought to appear in this case, Post-Newsweek Stations, Houston, Inc., Hearst Newspapers, LLC d/b/a The Houston Chronicle, KHOU-TV, L.P., KTRK-TV Houston, Inc., and KRIV-TV, their Motions to Intervene are DENIED AS MOOT.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 18th day of October, 2010.

EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE