

December 4, 2009

I am formally requesting a copy of the compact disc that has been entered as evidence in the civil case of Ronald L. Whitaker II et al v. Springettsbury Township Police Dept. et al. According to court documents available on PACER, the CD contains the police surveillance video from July 7, 2007, and the deposition of defendant Gary Utter, and I am requesting a full copy of both such sections. Also according to the documentation on PACER, which contained filings dated up to 12/3/09, there have been no motions to seal this evidence filed, nor had the judge ordered such an action. Because evidence in trials is presumptively public according to the U.S. and Pennsylvania Constitutions, I believe I am within my rights to request and receive a copy of this evidence.

I thank the court for its time

and attention in this matter.

Sincerely,

Amy S. Gulli

for the York Daily Record/Sunday News

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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|--------------------------------------|---|-----------------------------------|
| RONALD T. WHITAKER, SR., et al. | : | |
| Co-Administrator of the Estate of | : | NO. 1:08-CV-627 |
| Ronald Taylor Whitaker, Jr., et al., | : | |
| | : | (Judge Christopher C. Conner) |
| Plaintiffs, | : | |
| | : | (Magistrate Judge Martin Carlson) |
| v. | : | |
| | : | |
| SPRINGETTSBURY TOWNSHIP, et al., | : | |
| | : | |
| Defendants. | : | Filed Electronically |

**UNOPPOSED MOTION TO PLACE
VIDEOTAPED EVIDENCE UNDER SEAL**

Defendants hereby move this Honorable Court, *nunc pro tunc*, for an Order placing the video of the underlying incident, which was filed as Exhibit A to Plaintiffs' Brief in Opposition to Defendants' Summary Judgment Motions (Doc. No. 68) and as Exhibit 1 to Defendants' Reply Brief (Doc. No. 70), and the video of Officer Utter's discovery deposition, attached as Exhibit 7 to Defendants' Reply Brief (Doc. No. 70), under seal, and for a protective order preventing Plaintiffs from producing the videos to the media or the public. Plaintiffs' will not oppose Defendants' Motion. In support of their Motion, Defendants state as follows:

1. On April 8, 2008, Plaintiffs Ronald T. Whitaker, Sr. and Dalea Lynn, filed a federal civil rights action under 42 U.S.C. § 1983 against Defendants based upon the July 7, 2007 death of Ronald Whitaker, Jr. (“Whitaker”). *See* Compl. (Doc. No. 1).

2. The underlying incident at Springettsbury Police Department (“SPD”), and the resulting death of Whitaker, was captured on surveillance video.

3. Defendants produced a copy of the SPD video to Plaintiffs during the course of discovery.

4. Plaintiffs’ former counsel filed a Motion for Leave to Withdraw as Counsel (Doc. Nos. 43, 44), indicating that the evidence obtained during discovery, including the SPD video, did not support Plaintiffs’ claims against Defendants.

5. On September 3, 2009, Defendants filed Motions for Summary Judgment with Supporting Briefs. *See* Doc. Nos. 49-53.

6. On November 12, 2009, Plaintiffs filed a Brief in Opposition to Defendants’ Motions for Summary Judgment, to which Plaintiffs attached a copy of the SPD surveillance video as Exhibit A. *See* Doc. No. 68.

7. On November 16, 2009, the Court ordered Defendants to make a copy of the SPD video available to the Court. *See* Doc. No. 69.

8. On November 25, 2009, Defendants filed a Reply to Plaintiffs' Brief in Opposition and attached a compact disc containing the SPD video, which was marked as Exhibit 1. *See* Doc. No. 70.

9. The compact disc filed by Defendants also contained a portion of the videotaped discovery deposition of Defendant Gary Utter, which was marked as Exhibit 7 to Defendants' Reply Brief. *See* Doc. No. 70.

10. The portion of the Utter deposition video (Exhibit 7) depicts portions of the SPD video of the incident. *See id.* at Ex. 7.

11. On December 4, 2009, a member of the news media requested a copy of the compact disc containing both the SPD video and the portion of the videotaped discovery deposition of Defendant Gary Utter. *See* Doc. No. 77.

12. Defendants respectfully request that the Court deny the media's request for the videos and that the Court further issue an Order placing both the SPD video and the portion of Utter's videotape deposition, which depicts the SPD video, under seal and precluding Plaintiffs from producing copies of the videos to the media or the public.

13. While, "courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents . . . the right to inspect and copy judicial records is not absolute [, and] . . . [e]very

court has supervisory power over its own records and files.” *Nixon v. Warner Communications*, 435 U.S. 589, 598 (U.S. 1978).

14. “[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.” *Id.* at 599.

15. “Videotapes are subject to a higher degree of potential abuse than transcripts. They can be cut and spliced and used as ‘sound-bites’ on the evening news or sports shows.” *Felling v. Knight*, No. IP 01-0571-C-T/K, 2001 U.S. Dist. LEXIS 22827, *1, *9 (S.D. Ind. Dec. 21, 2001) (attached as Exhibit A).

16. The *Felling* Court also ruled that the potential embarrassment that would result from publication of the deposition videos warranted protection. *Id.*

17. Defendants request that these videos be placed under seal for several reasons.

18. First, publication of the videos will negatively impact Defendants’ right to a fair trial, because the SPD video is incomplete – namely, due to the fact that the SPD video 1) is silent (i.e., does not have sound) and 2) was recorded at only 3 or 4 frames per second, as opposed to 30 frames per second, at which the average home-use video camcorder records, and thus the video from the incident appears choppy, rather than fluid, and only a fraction of the action was recorded. As such, the video could be misleading if viewed out of context and without

Utter's explanation of the events as they unfolded, and, thus, Defendants would be prejudiced by its dissemination. *See Felling*, 2001 U.S. Dist. LEXIS 22827 at *9.

19. Second, in light of the nature of the incident, both the incident and the subsequent civil lawsuit have garnered significant media attention, and several newspaper articles have been published and television broadcasts have been aired regarding the incident. As such, publication of the silent, stop-frame SPD video – out of context and without Utter's narration – by the news media¹ to the jury pool will taint the jury pool and severely prejudice the Defendants. *See United States v. Weed*, 184 F. Supp. 2d 1166, 1176-77 (N.D. Okla. 2002) (“Given the nature of the crime alleged in this case, the media interest in this case has been significant Numerous newspaper articles and television stories have been broadcast . . . , from which any potential *venire* will be drawn. It is, therefore, likely that the contents of the tape, or at least a summary of its contents would be widely reported in this community. The government's ability to obtain a fair trial would be compromised because the community of potential jurors would have been exposed to only one piece of the otherwise complex puzzle The Court finds that avoiding the prejudice caused by such a one-sided doling out of evidence prior to trial provides a substantial reason for sealing the videotape prior to trial. The Court finds that

¹ Although to date only print media has requested copies of the videos, Defendants anticipate that, given the sensational aspect of the videos, television media outlets will also likely seek copies of the videos, which would in all likelihood be shown on television and the internet throughout the Middle District and beyond.

sealing the videotape until trial is essential to preserve the government's right to a fair trial.").

20. Third, the content of the SPD video (and the Utter deposition video, which depicts the SPD video) is highly sensitive in nature in that it depicts the death of Whitaker, which was an extremely traumatic event for Utter and, Defendants assume, would be equally traumatic for Whitaker's family.

21. For these reasons, Defendants respectfully request that the Court issue an Order placing the videos under seal and precluding Plaintiffs from making available or providing copies of the videos to the media or the public.

22. Contrary to the prejudice faced by Defendants by the release of the videos, neither the media nor the public will be prejudiced by sealing the videos, given that significant information regarding the incident, including the investigation reports of the Pennsylvania State Police and the text of deposition transcripts, has been made publically available.

23. The Court has the option of placing the videos under seal for a limited amount of time, namely until this litigation (including any appeal) is fully and finally concluded.

24. Plaintiffs' counsel has advised defense counsel that Plaintiffs will not oppose the present Motion.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|-----------------------------------|
| RONALD T. WHITAKER, SR., | : | No. 1:08-CV-0627 |
| | : | |
| Plaintiff, | : | |
| | : | |
| vs. | : | (Judge Conner) |
| | : | |
| SPRINGETTSBURY TOWNSHIP, et al., | : | (Magistrate Judge Carlson) |
| | : | |
| Defendants. | : | |

AMENDED ORDER

This is a civil rights case arising out of a fatal shooting incident. This matter is now before the court on a summary judgment motion filed by the defendants. In connection with this summary judgement motion, the parties have submitted a police videotape of this incident for the Court's review.

On December 4, 2009, the York Daily Record, a York County media outlet, requested access to this videotape. (Doc. 77). On the same day, December 4, 2009, the defendants filed a motion for protective order which sought to seal this evidence. (Doc. 79.)

We recognize that there are strong public policies favoring openness in court proceedings. As the United States Court of appeals for the Third Circuit has aptly observed:

[The courts have long recognized] the public's common law right of access to judicial proceedings and records. The existence of such a right "is beyond dispute." Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1066 (3d Cir.

1984); see also Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978). Access means more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records. United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) (Criden I). The right, which antedates the Constitution, id. at 819, is based upon both "historical experience and societal utility," United States v. Smith, 776 F.2d 1104, 1114 (3d Cir. 1985) (Smith I). The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court. See 6 J. Wigmore, Evidence § 1834 (J. Chadbourne rev. 1976). As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness. See, e.g., Bank of America Nat. Trust v. Hotel Rittenhouse, 800 F.2d 339, 345 (3d Cir. 1986) (Bank of America).

Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. Pa. 1988) (footnotes omitted); See Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994).

This right to public access to records is embodied in the practices of this Court, in particular the practices and procedures relating to electronic case filing, adopted in Standing Order 05-06.

However, as noted by the defendants there are also significant fair trial rights which may be at stake in this case, which involves a fatal shooting incident. Moreover, there are also privacy interests for the family of the decedent which may be implicated by the release of a video depicting this incident.

When presented with sealing requests of this type, we are called upon to balance these various and competing interests. See Pansy v. Borough of Stroudsburg,

23 F.3d 772 (3d Cir. 1994). In order to conduct this balance in a fully informed fashion, we will direct the parties to submit memoranda of law relating to the release of this information.

AND NOW this 8th day of December, 2009, upon consideration of the motions for access to (Doc. 77), and sealing of (Doc. 79), these videotapes, it is hereby **ORDERED** that the movant York Daily Record and the parties shall submit memoranda of law in support these respective motions, on or before **December 21, 2009**. The movant and the parties shall then file briefs in opposition to the competing motions no later than **January 4, 2010**. Any final reply briefs shall then be submitted on or before **January 14, 2010**. It is further **ORDERED** that a copy of this order will be served on movant York Daily Record.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

Dated: December 8, 2009