

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO. 08-10345-DPW
)	
DIANNE WILKERSON)	
and)	
CHARLES "CHUCK" TURNER)	

**GOVERNMENT'S SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF PROTECTIVE ORDER**

The United States of America, by and through Assistant United States Attorney John T. McNeil, submits this supplemental memorandum in support of its motion for a protective order.

The proposed protective order serves two important purposes. First, it permits the government to disclose discovery material substantially in advance of its obligations under law without significant concern that prospective jurors will be influenced, or that witnesses will be intimidated or manipulated in advance of their trial testimony or otherwise influenced by the selective public release of the discovery.¹ Second, the order prohibits the defendants from using the criminal discovery for purposes other than the legal defense of the instant criminal case. This second purpose is in close keeping with Local Rule 83.2A which seeks to ensure a fair and impartial trial through restrictions on the release of information in pending criminal cases.²

¹The government makes no claim that either defendant intends to directly influence or pressure potential witnesses. However, given that the defendants are public figures with some standing in the community, individuals who view this prosecution unfavorably have a strong incentive to exercise either direct or indirect pressure on potential witnesses to undermine evidence of guilt. Moreover, the wide dissemination of selective portions of discovery may alter witnesses's recollections of events and cause some witnesses to resist testifying in order to avoid negative publicity.

² Local Rule 83.2A reads in pertinent part:

No lawyer or law firm shall release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with the pending or imminent criminal litigation with which he or

The wisdom of entering a protective order such as that proposed in this case has been recognized by numerous sessions of this Court as well as by skilled defense counsel who have regularly assented to such motions. For instance, similar orders were entered in United States v. Thomas M. Finneran, Crim.No. 05-10140-RGS (Doc.No. 8)³, United States v. Roberto Pulido, Carlos Pizarro, and Nelson Carrasquillo, Crim.No. 06-10284-WGY (Doc.No. 67), United States v. Jerome Coleman, Crim.No. 06-10239-RCL (Doc.No. 29), and United States v. Justin Ficken, Crim.No. 07-10427-PBS (Doc.No.15), among others. The benefits of these protective orders are particularly apparent in cases in which there has been extensive media coverage, the defendants are current or former public officials, and many of the likely trial witnesses are public officials. See Local Rule 83.2B (providing for special procedures in widely publicized cases); In re Special Proceedings, 373 F.3d 37, 40 (1st Cir. 2004)(outlining terms of protective order entered by district court regarding recordings in public corruption case); In re Providence Journal Company, Inc., 293 F.3d 1, 14 (1st Cir. 2002) (noting that “political corruption cases tend to attract wide-spread media attention” and “a high-profile criminal case may impose unique demands on the trial court, and require the court to establish procedures for dealing effectively, efficiently and fairly with recurring issues.” The First Circuit approved a trial court’s order designed to safeguard rights before they were violated) (quotations and citations omitted).

The need for a protective order in this case is particularly compelling. Defendant Turner has made clear through his public statements that he intends to press his case in the media prior to trial and to act as “his own lawyer” in that regard. Mr. Turner has held a series of press conferences and rallies since he was charged in this matter, aimed in part at bolstering his

the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

³The protective order in United States v. Finneran was subject of a challenge by a number of media companies. That challenge was rejected in a written opinion by Judge Stearns. See United States v. Finneran, at Doc.No.22 (“In the absence of assurances that [protective orders for discovery material] are valid and enforceable, the flow of pretrial discovery from the government to defendants in sensitive cases would simply come to a stop”).

character and attacking the government's motives for seeking an indictment against him from the grand jury.⁴ It can fairly be inferred that Mr. Turner will continue such press conferences and rallies in the future and, in the absence of a protective order, he will selectively use discovery provided by the government as part of his media campaign.⁵

The selective release of discovery in advance of trial by one defendant in a two defendant case will have substantial negative impacts on the administration of justice in this matter, as well as on Ms. Wilkerson's right to a fair trial. Among other things, witnesses may be indirectly intimidated from testifying, witnesses may be influenced to alter their testimony, prospective jurors may be unfairly influenced, persons whose names appeared in the investigation but who have not been charged may be unfairly exposed, personal privacy information of witnesses and

⁴Many of Mr. Turner's public statements regarding this matter, including his intention to press his case in the media by acting as his own lawyer, can be found on the Internet site <http://supportchuckturner.com>. His public statements have also been widely reported in the *Boston Globe*, the *Boston Herald*, and the *Boston Metro*, among other media outlets.

⁵While Mr. Turner may have a right to speak about the pending charges, neither Mr. Turner nor the public has a constitutional right to the dissemination of discovery material provided by the government. See *Alderman v. United States*, 394 U.S. 165, 185 (1969). Many courts – including this Court – have concluded that the public does not have a cognizable right of access to documents obtained by a party solely through discovery afforded by applicable civil or criminal rules, when those documents have not become part of the judicial record. See, e.g., *United States v. Salemme*, Crim.No. 04-10323-RGS (D.Mass. August 22, 2005) *Order on Continued Sealing of an FBI Report Dated October 7, 2004* at fn.2 (“... there is no First Amendment right of public access to the criminal discovery process in a pending case.”); *United States v. Finneran*, Crim.No. 05-10140-RGS (D.Mass 2005) (Doc.No.22)(noting that “[a] federal defendant has no constitutional right to pretrial discovery in a criminal case” and “there [is no] . . . right of public access to documents obtained through discovery that are not part of the judicial record”); *In re Boston Herald, Inc.*, 321 F.3d 174, 180 (1st Cir. 2002)(“Both the constitutional and the common law rights of access have applied only to judicial documents.”); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (“[P]retrial depositions and interrogatories are not public components of a civil trial . . . restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information”); *In re Associated Press*, 162 F.3d 503, 512 (7th Cir.1998) (“it is well established that discovered but not-yet-admitted evidence is not ordinarily within the scope of press access”); *United States v. Wolfson*, 55 F.3d 58, 60 (2d Cir. 1995) (no public right of access to documents submitted to court *in camera* as part of discovery dispute); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir.1994) (“until admitted into the record, material uncovered during pretrial discovery is ordinarily not within the scope of press access.”); see also *Public Citizen v. Liggett Group*, 858 F.2d 775, 780 (1st Cir.1988) (“Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants.”).

the co-defendant may be released, and grand jury material may be released. Among the many items which the government intends to produce to the defendants under a protective order are video recordings containing images of undercover officers, information regarding cooperating witnesses and other sources, grand jury materials including transcripts and exhibits, documents containing names of other individuals who were or are subjects of criminal investigations, financial and tax records of the defendants, reports of interviews of multiple witnesses who may or may not be called by the government at trial, and personal privacy information of potential witnesses.

Protective orders entered under Rule 16 are designed to prevent just the type of unrestricted use of discovery material that is likely to occur in this case. See Alderman v. United States, 394 U.S. at 185 (“the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect. See Fed.Rule Crim.Proc. 16(e). We would not expect the district courts to permit the parties or counsel to take these orders lightly.”). In particular, the potential for witness intimidation has long been recognized as a proper basis for entering such orders. See e.g. United States v. Richter, 488 F.2d 170, 175 (9th Cir. 1973)(highlighting the Advisory Committee Notes to Rule 16 which call for protective orders to prevent witness intimidation).⁶

The Court should also consider the potential prejudice to Ms. Wilkerson from Mr. Turner’s unrestricted use of the discovery material. Co-defendants often have divergent interests. In this case, the charges currently pending against Ms. Wilkerson are more substantial than those faced by Mr. Turner and the evidence more extensive. Moreover, the manner in which the defendants have responded to the charges could hardly have been more different. Absent a protective order, Mr. Turner could release recordings and other materials which would substantially inculcate Ms. Wilkerson and impinge on her right to a fair trial and an impartial

⁶ Congress has since provided an additional mechanism for protecting witnesses: orders under 18 U.S.C. §1514. See United States v. Lewis, 411 F.3d 838, 843 (7th Cir. 2005).

jury.

Finally, it should be noted that under a protective order both defendants will receive more discovery earlier in the process than otherwise required by the relevant rules. The restrictions imposed by the proposed order simply ensure that the discovery material is used in the context of the criminal case, rather than in some other forum. Ultimately, the protective order is likely to enhance the defendants' abilities to defend themselves in court.

For the reasons set forth in this memorandum and in the Partially Assented-to Motion for Protective Order, the government respectfully requests that the Court enter the proposed protective order with respect to both defendants.

Respectfully Submitted,

MICHAEL J. SULLIVAN
UNITED STATES ATTORNEY

By: /s/ John T. McNeil
JOHN T. McNEIL
Assistant U.S. Attorney
(617) 748-3252

Dated: January 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

January 5, 2009
Date

/s/ John T. McNeil
JOHN T. McNEIL
Assistant United States Attorney