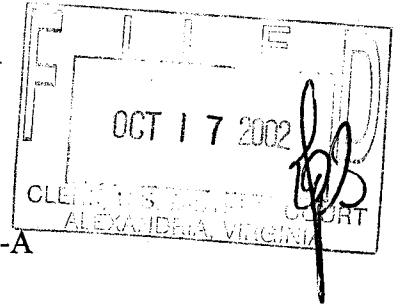


IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division



UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
ZACARIAS MOUSSAOUI )

**UNDER SEAL**  
Criminal No. 01-455-A

**RESPONSE TO MUKKARAM ALI'S MOTION  
FOR RELEASE FROM MATERIAL WITNESS WARRANT**

The Court has ordered the defendant and/or standby counsel to respond to Mukkaram Ali's ("Ali's") Motion for Release of Material Witness. In that response, the Court has ordered that the issue of "why a videotaped deposition will not adequately capture his testimony if he is unable [unavailable] to appear in person as a witness at trial" be explicitly addressed by the parties.

The substance of Ali's projected testimony and its relevance to the case is set forth in Attachment A hereto which has been submitted *ex parte* and under seal. As this Court previously observed, "live witness testimony is always preferable [to a videotaped deposition]. See Order of August 14, 2002. An additional problem with not having Ali as a live witness at trial is that Ali is a defense witness who had close and continuing contact with Mr. Moussaoui while Mr. Moussaoui was in the United States. Until we know the full scope of the government's case, it is impossible to determine all of the information we might want to elicit from Ali as a witness. Facts which might now seem innocuous and irrelevant may turn out not to be so once the government's case has been presented. Thus, not only is live testimony preferable even if the content would be identical to that presented on videotape, here there is a high likelihood that the information to be elicited from Ali would be different at trial than it would be at a deposition taken now, particularly since the defense is still deeply involved in its factual investigation.

If our preference for live testimony of Ali meant that he would be in custody for that reason alone from now until the trial next summer, we would share the Court's concern for that consequence. But our understanding from a reading of Ali's motion, and from discussions with Ali's counsel, Jeffrey Zimmerman, is that if this Court were to maintain in full force and effect its ruling of August 14 which directed no more than that the United States not deport Ali pending further order of the Court, the consequence of that Order would not be detention of Ali between now and trial. Indeed, our assumption is that nothing in the Court's August 14 Order directs that Ali be detained and that, indeed, if this is correct, he is currently entitled, according to Mr. Zimmerman,<sup>1</sup> to be released from custody.

If we are correct in our assumption, it would seem to make sense to preserve Ali's testimony by videotaped deposition, serve him with a trial subpoena with the hope he will be able to appear live at trial, release him, and maintain the August 14 Order in place. Counsel for Ali has advised that there is no hardship to Ali in remaining in the United States for trial – indeed he would prefer to give live testimony in Mr. Moussaoui's defense if he is able to do so. The hardship for Ali would be if he were to be held in custody during the interim between now and trial and we see nothing in this Court's Order which so directs.

#### CONCLUSION

We rely on Ali's counsel for the fact that, with the dissolution of the material witness warrant, Ali can be released. Accordingly, instead of choosing between live testimony and a videotaped deposition, we say:

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<sup>1</sup> We note that the Government's response represents that there is an INS detainer on Mr. Ali. We have no basis for challenging that assertion or, for that matter, Mr. Zimmerman's .

- (a) Keep the August 14 Order in place since live testimony is preferred;
- (b) Grant Ali's motion for release;
- (c) Require that Ali submit to a videotaped deposition to be promptly taken as a condition of his release pursuant to 18 U.S.C. § 3144; and
- (d) Permit Ali to give live testimony at trial if he is then available as a witness.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Response to Mukkaram Ali's Motion for Release from Material Witness Warrant was served upon AUSA Robert A. Spencer, AUSA, David Novak, and AUSA Kenneth Karas, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, via facsimile and by placing a copy BY HAND in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia, and by facsimile and first class mail to Jeffrey Zimmerman, 1317 King Street, Alexandria, VA 22314, and UPON APPROVAL OF THE SECURITY OFFICER via first class mail to Zacarias Moussaoui, c/o Alexandria Detention Center, 2001 Mill Road, Alexandria, VA 22314 this 17<sup>th</sup> day of October 2002.

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~~Frank W. Dunham, Jr.~~