

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA :
 :
 v. : Magistrate. No. 19- (MAW)
 :
 MUJEEB RAHMAN SAIFY, : Hon. Michael A. Hammer
 Defendant :
 :
 :

**GOVERNMENT’S MEMORANDUM IN RESPONSE TO DEFENDANT’S
MOTION FOR AN ORDER REGARDING DESIGNATION AND DETENTION OF
MATERIAL WITNESS**

The United States of America, by Craig Carpenito, United States Attorney for the District of New Jersey, and Brian A Benczkowski, Assistant Attorney General of the Criminal Division of the United States Department of Justice, by and through the undersigned attorneys, respectfully submits this memorandum in response to the defendant’s motion for an order regarding designation and detention of a material witness (Doc. No. 13-1).

The government does not object to the defendant Mujeeb Saify’s motion to designate Wasiq Ullah Hedayat (hereinafter “Hedayat”) as a material witness in this case. However, due to national security concerns surrounding Hedayat’s continued presence in the United States, and a significant risk that the Department of Homeland Security will be increasingly unable to effect the removal of Hedayat the longer he remains in the United States, the government requests the material witness order impose a thirty-30 day limitation on the time period Hedayat is detained as a material witness. Additionally, the government requests that the order excuse the government from the bi-weekly reporting requirements for material witnesses held more than 10 days pursuant to Fed. R. Crim. P. 46(h). The government also requests that the order allow

Hedayat to remain incarcerated at his current detention facility. In support, the government states the following points and authorities:

1. Wasiq Ullah Hedayat applied for admission to the United States at Brownsville, Texas, on January 19, 2017, without a valid entry or travel document. Subsequently, an immigration judge found Hedayat inadmissible and ineligible for relief. Hedayat has been subject to a final order of removal as of April 10, 2018. He has exhausted all appeals. Hedayat has been in immigration detention since arriving in the United States and is scheduled for removal to Afghanistan on April 2, 2019. Hedayat is currently in immigration detention in Arizona.
2. The defendant is charged in Counts 3 and 4 of the Complaint with aiding and assisting Hedayat, who was inadmissible on security grounds, to enter the United States. The government intends to introduce at trial evidence that Hedayat was inadmissible to the United States under 8 U.S.C. §1182(a)(3) (inadmissibility based on security and related grounds), but is not intending to call Hedayat as a witness.
3. The Department of Homeland Security, Immigration and Customs Enforcement, Enforcement and Removal Operations (ERO), is the executive department responsible for enforcing the pending order of removal and deporting Hedayat back to Afghanistan. Hedayat's removal has been delayed in the past due to ERO's inability to obtain travel documents from Afghanistan for Hedayat. Those travel documents have been only recently issued and expire within approximately 30 days. If Hedayat remains in the United States beyond the travel documents' expiration date, ERO will not be able to remove him immediately and will be

forced to obtain new travel documents from Afghanistan. The longer the defendant remains in the United States with a pending order of removal but without valid travel documents for Afghanistan, the greater the risk that the government will be unable to detained him.

4. Pursuant to Federal Rule of Criminal Procedure 46(h), an attorney for the government is required to report biweekly to the Court a list of material witnesses held in custody for more than 10 days. Because Hedayat is currently located in immigration detention in Arizona, and because the defense should be afforded a reasonable time to review all discoverable materials pertaining to this witness and prepare for an interview and deposition, the government believes Hedayat's detention as a material witness will likely exceed 10 days. Further, to the extent the Court imposes a time period limitation on Hedayat's designation as a material witness—the government is requesting no more than 30 days—complying with Rule 46(h)'s reporting requirement will be impractical and redundant.
5. The defendant's proposed order requests the Court to order the United States Marshal for the District of New Jersey to take custody of Hedayat and transfer him from Arizona to New Jersey. Any transfer of the witness will undoubtedly take an extended period of time, delaying defense counsel's opportunity to interview and/or depose him. Moreover, after his designation as a material witness ends, the witness must be transferred back to ERO custody. The resulting delays will certainly exceed Hedayat's Afghanistan travel documents expiration and thereby prevent ERO from executing Hedayat's removal order. Any such delay would not serve the ends of justice or the defendant's

constitutional rights. Instead, it would unnecessarily lengthen Hedayat's time in the United States and incur the national security risks that entails.

For the foregoing reasons, the government requests that any order designating Wasiq Ullah Hedyat as a material witness be limited to 30 days, excuse the government's biweekly reporting requirement, and allow Hedayat to remain incarcerated at his current detention facility.

Respectfully submitted,

BRIAN A BENCZKOWSKI
Assistant Attorney General

s/Jay Bauer

JAY BAUER

Trial Attorney

Human Rights and Special Prosecutions

Criminal Division

1301 New York Ave. N.W.

Washington, D.C. 20530

(202) 305-1216

CRAIG CARPENITO

United States Attorney

s/Margaret Ann Mahoney

MARGARET ANN MAHONEY

Assistant United States Attorney

District of New Jersey

United States Attorney's Office

970 Broad Street, 7th Floor

Newark, New Jersey 07102

(973) 645-2761

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Government's Response to the Defendant's Motion for an Order Regarding Designation and Detention of Material Witness by filing it with the Court's Electronic Case Filing System:

s/Jay Bauer

Jay Bauer

Trial Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
	:	
v.	:	Magistrate. No. 19- (MAW)
	:	
MUJEEB RAHMAN SAIFY,	:	Hon. Michael A. Hammer
Defendant	:	
	:	
	:	

ORDER

THIS MATTER having come before the Court upon the application by defendant Mujeeb Rahman Saify (Candace Hom, Assistant Federal Public Defender, appearing), for an Order regarding designation and detention of a material witness pursuant to 18 U.S.C. § 3144; and the government (Jay Bauer, Trial Attorney, Criminal Division, U.S. Department of Justice; and Margaret Ann Mahoney, Assistant United States Attorney, appearing), having no opposition; and for good cause shown:

IT IS on this _____ day of March, 2019,

ORDERED that WASIQ ULLAH HEDAYAT is hereby declared to be a material witness in the above-captioned case;

IT IS FURTHER ORDERED that the United States Marshal, District of New Jersey, is hereby directed to ensure the material witness, Wasiq Ullah Hedayat, in the above-captioned case pending before this Court, is detained pursuant to 18 U.S.C. § 3144; and

IT IS FURTHER ORDERED that the witness be incarcerated at a detention facility specially designated for illegal aliens, including, if practicable, at the detention facility where the witness is currently located; and

IT IS FURTHER ORDERED that if such specially designated facility is not available, the witness shall be incarcerated in another facility approved by the Attorney General of the United States; and

IT IS FURTHER ORDERED that the Department of Homeland Security, Immigrations and Custom Enforcement, shall assist the Marshal to the extent possible.

HONORABLE MICHAEL A HAMMER
UNITED STATES MAGISTRATE JUDGE