IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SEALED

UNITED STATES OF AMERICA

v.

SAMI AMIN AL-ARIAN,

Defendant.
_____/

Case No.: 8:03-CR-77-T-30TBM
FILED UNDER SEAL

UNITED STATES OF AMERICA

v.

JOHN DOE A01-246 (T-112)
_____/

GRAND JURY 06-1 (E.D.VA)
FILED UNDER SEAL

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DEFENDANT SAMI AMIN AL-ARIAN'S
MOTION TO ENFORCE PLEA AGREEMENT

Defendant Sami Amin Al-Arian ("Dr. Al-Arian"), by and through undersigned counsel, hereby moves this Honorable Court to enforce the parties' plea agreement and order specific performance of the non-cooperation aspect of that agreement, thereby requiring the writ *ad testificandum* issued to Dr. Al-Arian be quashed. The grounds supporting this motion are set forth in the incorporated memorandum of law.

MEMORANDUM OF LAW

I. INTRODUCTION

On October 19, 2006, Dr. Al-Arian was summoned by the U.S. Attorney's Office for the Eastern District of Virginia to testify before a grand jury empanelled in Alexandria, Virginia, charged with investigating an organization called "IIIT." Upon the commencement of questioning by AUSA Gordon Kromberg ("AUSA Kromberg"), Dr. Al-Arian declined to answer any questions on the grounds that his forced cooperation violated the plea agreement he entered into with the government on February 28, 2006, in Case No. 8:03-CR-77-T-30TBM (M.D. Fla.). *See Exhibit A*, Plea Agreement (Dkt. 1563), dated

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February 28, 2006. Later that day, AUSA Kromberg called Dr. Al-Arian before the Honorable Gerald Bruce Lee of the District Court for the Eastern District of Virginia to seek a contempt order against Dr. Al-Arian for his refusal to testify before the grand jury. The District Court determined that the basis for Dr. Al-Arian's refusal to testify centered on Dr. Al-Arian's belief that the parties' plea agreement foreclosed the possibility of his cooperation with the government. Because that plea agreement was negotiated, drafted, and accepted by this Court, the District Court in Virginia reasoned that this Court was in the best position to determine if the government's attempt to force Dr. Al-Arian to testify before the grand jury constituted a breach of the plea agreement.

Accordingly, the District Court continued the hearing on the government's motion to hold Dr. Al-Arian in contempt to allow this Court the opportunity to decide whether non-cooperation was contemplated by the parties to the above-reference plea agreement. This motion follows the District Court's order. *See Exhibit B*, Order of District Court for the Eastern District of Virginia, dated October 19, 2006.

II. BACKGROUND

On September 21, 2004, Dr. Al-Arian was charged, along with various co-defendants, in a 53-count Superseding Indictment. On December 6, 2005, after a six month trial in the Middle District of Florida, Dr. Al-Arian was acquitted on eight (8) counts and the jury was unable to reach a unanimous verdict on the remaining nine (9) counts. Notwithstanding the jury's favorable verdict, Dr. Al-Arian remained in detention, without bond, awaiting a new trial on the nine remaining counts. During this period, the parties began negotiating in good faith to resolve this case.

The overarching purpose of the parties' plea agreement was to conclude, once and for all, all business between the government and Dr. Al-Arian. *See Exhibit C*, Declaration of Sami Amin Al-Arian, at ¶ 5; *Exhibit D*, Declaration of Linda Moreno, Esq., at ¶ 5. Ultimately, the parties agreed on a resolution that provided for Dr. Al-Arian to receive a sentence of virtually time-served and immediate deportation from the United States. *See*

Exhibit A (Dkt. 1563), at §§ A.7, 8, and 11; *see also Exhibit D*, at ¶ 11.

From the start of plea negotiations, defense attorneys Linda Moreno ("Ms. Moreno") and William Moffitt[1] ("Mr. Moffitt") made clear to the government that Dr. Al-Arian would *never* enter into a plea agreement requiring his cooperation. *See Exhibit D*, at ¶ 4. Mr. Moffitt and Ms. Moreno were adamant on this point and the government did not take a contrary position. *Id.* Because the parties understood at the outset of plea negotiations that Dr. Al-Arian would not cooperate with the government, the issue of cooperation was immediately taken off the table and never raised again. *Id.* Notably, during the course of plea discussions, any language that could, in any way, be construed as evidence of cooperation or a commitment to cooperate was excised from the plea agreement and presentence investigation report. *See Exhibit C*, at ¶ 6.

Ultimately, the parties agreed on the following material terms:

(1) Dr. Al-Arian would plead guilty to count 4 of the Superseding Indictment, which carried a Guidelines range of 46 to 57 months incarceration, *See Exhibit A* (Dkt. 1563), § A.7 at 3;

(2) The Government would recommend that Dr. Al-Arian be sentenced to the low end of the Guidelines range (i.e., 46 months incarceration), *Id.* § A.11 at 5; and

(3) Dr. Al-Arian would be expeditiously deported from the United States. *Id.* § A.8 at 4.

On April 14, 2006, Dr. Al-Arian appeared before Magistrate Judge Thomas B. McCoun, III, for entry of his guilty plea. Although the plea agreement provided that the United States Attorney's Office for the Middle District of Florida and the Counterterrorism Section of the Department of Justice were bound by its terms, during the plea colloquy the government orally amended paragraph A.6 "to further bind the Eastern District of Virginia[.]" *See Exhibit E*, Transcript of Plea Hearing (Dkt. 1567), at 18-19.

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[1] Attorney William Moffitt is currently in trial in Chicago. Consequently, Dr. Al-Arian expects to file Mr. Moffitt's affidavit next week with a notice of supplemental filing.

For a variety of reasons, at the time the plea was negotiated and entered into by Dr. Al-Arian, all parties involved, both government and defense counsel alike, believed Dr. Al-Arian would be sentenced to the low-end of the Guidelines. *See Exhibit F,* Affidavit of Jack Fernandez, at ¶ 4; *see also Exhibit D*, at ¶ 11. Accordingly, based on the amount of time Dr. Al-Arian had spent in pre-trial and post-trial detention (i.e., approximately 38 months), and the amount of gain time *both parties* anticipated Dr. Al-Arian would be credited with by the Bureau of Prisons, at the time of the plea, *both parties* expected that Dr. Al-Arian would complete his prison sentence by June 1, 2006. *See Exhibit D,* at ¶ 11; *Exhibit F*, at ¶ 4. The parties further anticipated that Dr. Al-Arian would be immediately transferred to the custody of the Department of Homeland Security and expeditiously deported.[2] *See Exhibit D*, at ¶¶ 10, 12. However, on May 1, 2006, Dr. Al-Arian was sentenced to the high end of the Guidelines—57 months incarceration. *See* Dkt. 1574.

In May 2006, AUSA Cherie Krigsman ("AUSA Krigsman") first informed Ms. Moreno that the U.S. Attorney's Office for the Eastern District of Virginia was interested in calling Dr. Al-Arian to testify before a grand jury. *See Exhibit D*, at ¶ 14. During this conversation Ms. Moreno expressed her dismay at the government's decision to contravene the parties' express understanding that Dr. Al-Arian would not be expected to cooperate with the government. *Id.* at ¶ 5. Moreover, Ms. Moreno conveyed to AUSA Krigsman that she feared, under the circumstances, that Dr. Al-Arian was being called before the grand jury as a contempt trap. *Id.* at ¶ 16. AUSA Krigsman denied this was the purpose of the grand jury proceeding. *Id.*

On September 12, 2006, AUSA Kromberg contacted defense counsel Jack Fernandez ("Mr. Fernandez") to inform him that the Eastern District of Virginia was interested in either speaking to Dr. Al-Arian informally or immunizing Dr. Al-Arian and

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[2] On April 12, 2006, just two (2) days before Dr. Al-Arian entered his guilty plea, the parties met in the office of the United States Attorney in Tampa, Florida to discuss the logistics of Dr. Al-Arian's deportation from the United States. *See Exhibit F*, at ¶ 4. During this meeting, the government reiterated its belief that Dr. Al-Arian would be sentenced to the low end of the Guidelines and deported soon after June 1, 2006. *Id.*

calling him before a grand jury to testify about his involvement with and knowledge of an organization called "IIIT." *See Exhibit F*, at ¶ 5. Mr. Fernandez echoed Ms. Moreno's fear that the government's interest in Dr. Al-Arian's testimony appeared to be, at minimum, a contempt or perjury trap. *Id.* AUSA Kromberg advised Mr. Fernandez that he was not part of any conspiracy to hurt Dr. Al-Arian. *Id.* However, during the conversation, AUSA Kromberg told Mr. Fernandez that he believed Dr. Al-Arian's sentence and plea deal was "a bonanza." *Id.* Over the course of a week, Mr. Fernandez spoke to AUSA Kromberg on several more occasions.

On September 18, 2006, AUSA Kromberg informed Mr. Fernandez that he was issuing a writ *ad testificandum* to have Dr. Al-Arian transferred to Virginia and that it would probably take the U.S. Marshals Service approximately ten (10) business days to effectuate the transfer. *Id.* at ¶ 6. AUSA Kromberg further stated that Dr. Al-Arian was being scheduled to testify in mid-October. *Id.* Upon informing Dr. Al-Arian of his imminent transfer to Virginia, Dr. Al-Arian brought to Mr. Fernandez' attention the fact that Ramadan was approaching and he asked if it was possible to delay the transfer for 30 days to avoid disrupting his observance of the religious holiday. *Id.* at ¶ 7. Mr. Fernandez called AUSA Kromberg to relay Dr. Al-Arian's request to the government. *Id.* In response to Dr. Al-Arian's request for a delay in his transfer for religious reasons, AUSA Kromberg remarked:

> If they can kill each other during Ramadan, they can appear before the grand jury; all they can't do is eat before sunset. I believe Mr. Al-Arian's request is part of the attempted Islamization of the American Justice System. I am not going to put off Dr. Al-Arian's grand jury appearance just to assist in what is becoming the Islamization of America.

Id.

Later that day, Mr. Fernandez followed up his conversation with AUSA Kromberg to discuss his concerns about AUSA Kromberg's comments regarding Ramadan and Muslims in America. *Id.* at ¶ 8. During this conversation, Mr. Fernandez expressed his belief that comments such as the kind made earlier in the day called into question AUSA

Kromberg's objectivity in calling Dr. Al-Arian up to Virginia for questioning. *Id.* On September 20, 2006, in a follow-up telephone conversation between AUSA Kromberg, Mr. Fernandez, Ms. Moreno, and Mr. Fugate, Mr. Fernandez again addressed his concern that AUSA Kromberg's comments about Muslims displayed a lack of objectivity. *Id.* at ¶ 9. Mr. Fernandez went so far as to recommend to AUSA Kromberg that he recuse himself from that part of the investigation concerning Dr. Al-Arian. *Id.* Mr. Fernandez' comments were met with the following fiery response from AUSA Kromberg: "You file whatever you want, it's up to you. We can do this the hard way or the easy way." *Id.*

III. THE PARTIES' PLEA AGREEMENT AND THE NON-COOPERATION ASPECT OF THAT AGREEMENT SHOULD BE ENFORCED.

Here, the writ *ad testificandum* issued to Dr. Al-Arian, compelling his testimony before the grand jury empanelled in Alexandria, Virginia, violates the parties' plea agreement. Furthermore, based on the comments made by AUSA Kromberg to Mr. Fernandez, it also appears this writ was issued to nullify Dr. Al-Arian's sentencing "bonanza," as explained *infra* at 14-16.

A. The Government's Attempt to Compel Dr. Al-Arian to Testify Before the Grand Jury Impaneled in the Eastern District of Virginia Constitutes a Breach of Dr. Al-Arian's Plea Agreement.

1. Plea Agreements Should Not Be Construed to Contravene the Intent of the Parties.

During the course of plea negotiations, an understanding was reached by the parties that Dr. Al-Arian would not be required to cooperate with the government in any manner. *See Exhibit D*, at ¶ 4; *see also Exhibit C*, at ¶ 6. In fact, the plea agreement was intended to conclude all business between the parties. *See Exhibit D*, at ¶ 5; *Exhibit C*, at ¶ 5. Thus, the government's attempt to force Dr. Al-Arian to testify before a grand jury deprives Dr. Al-Arian of the benefit of his bargain and, therefore, violates his plea agreement.

Plea agreements are generally interpreted like contracts. *United States v. Jefferies,* 908 F.2d 1520, 1523 (11th Cir. 1990). However, because constitutional rights are

implicated by a defendant's agreement to plead guilty to a criminal offense, plea agreements receive greater scrutiny than contracts in a commercial setting. *United States v. McQueen,* 108 F.3d 64, 66 (4th Cir. 1997). Furthermore, in analyzing a plea agreement, principles of contract law are tempered by concerns of "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." *United States v. Harvey,* 791 F.2d 294, 300 (4th Cir. 1986) (citation omitted). Consequently, "[i]n interpreting a plea agreement, [courts] do not accept a hypertechnical reading of the written agreement or a rigidly literal approach in the construction of the language." *United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004) (citation and internal quotation marks omitted). Also, insofar as there exists any ambiguity or imprecision with respect to the terms of the parties' agreement, that language must be construed against the government. *Id.* at 1108; *United States v. Dixon,* 998 F.2d 228, 230 (4th Cir. 1993) (citation omitted).

Plea agreements are interpreted to give effect to the parties' intent. *United States v. Eldick*, 443 F.3d 783, 789 (11th Cir. 2006) (citation omitted); *McQueen,* 108 F.3d at 66 ("[P]arties to [a plea] agreement should receive the benefit of their bargain."). Whether the government has violated a plea agreement "is judged according to the *defendant's reasonable understanding* at the time he entered his plea." *See United States v. Boatner*, 966 F.2d 1575, 1578 (11th Cir. 1992) (citation omitted and emphasis added).[3] Even if the parties do not memorialize an oral understanding, if a government attorney verbally makes a promise to the defendant, that promise must be kept. *See United States v. White,* 366 F.3d 291, 295 (4th Cir. 2004). Ultimately, "a written plea agreement should be viewed against the background of the [parties'] negotiations[.]" *United States v. Williams,* 444 F.3d 1286, 1305 (11th Cir. 2006).

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[3] If the Court "do[es] not enforce [the defendant's] reasonable understanding of the plea agreement, he cannot be said to have been aware of the consequences of his guilty plea." *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992).

It is uniformly recognized that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971). Accordingly, the government's breach of an express or implied term of a plea agreement violates the defendant's due process rights. *United States v. Martin,* 25 F.3d 211, 217 (4th Cir. 1994) (citations omitted). If a breach occurs, the court may exercise its discretion to fashion an appropriate remedy, but specific performance of the plea agreement is usually favored. *Santobello,* 404 U.S. at 263, 92 S. Ct. at 499; *see, e.g., United States v. Nelson,* 837 F.2d 1519, 1525 (11th Cir. 1988).

Dr. Al-Arian entered into a plea agreement with the government based on the parties' explicit understanding that he would *never* be required to cooperate with the government in any matter. The term "cooperate," in the context of a plea agreement, does not refer exclusively to "voluntary" cooperation, it also refers to "forced" cooperation (e.g., compelled testimony before a grand jury). *United States v. Garcia*, 956 F.2d 41, 45 (4th Cir. 1992). Although this understanding was not memorialized in the written plea agreement, it nonetheless was central to the parties' resolution of Dr. Al-Arian's case. *See United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992) (a plea agreement "should be viewed against the background of negotiations and should not be read to directly contradic[t] [an] oral understanding.") (citation and internal quotation marks omitted); *see, e.g., Martin,* 25 F.3d at 217 (enforcing government's oral modification of plea agreement). Accordingly, the fact that the government did not include a cooperation provision in the plea agreement was a key inducement to Dr. Al-Arian's acceptance of the plea agreement. *See Exhibit C,* at ¶ 7.

2. The Language of the Plea Agreement Demonstrates that Dr. Al-Arian Was Not Expected to Cooperate with the Government.

The written plea agreement reflects the government's understanding that Dr. Al-Arian would not provide it with any cooperation. For instance, in paragraph A.11 the U.S.

Attorney's Office agreed to recommend to this Court that Dr. Al-Arian be sentenced to the low end of the Guidelines. *See Exhibit A*, § A.11 at 5. In addition, the U.S. Attorney's Office agreed to recommend to Homeland Security that it expedite Dr. Al-Arian's deportation from the United States. *Id.* § A.8 at 4. Based on the extent of time Dr. Al-Arian had already spent in pre-trial and post-trial detention, a sentence to the low end of the Guidelines would virtually constitute a sentence of time served. In combination with the government's recommendation that Dr. Al-Arian be deported expeditiously, the parties reasonably anticipated, based on the language of the agreement, that Dr. Al-Arian would be removed from the United States within the first couple weeks of June 2006. The government's aggressive stance on Dr. Al-Arian's deportation demonstrated, and reinforced the reasonable impression in Dr. Al-Arian's mind, that Dr. Al-Arian would not be around long enough to cooperate with the government. Even at the plea colloquy, AUSA Terry Zitek stated that "the process has already started" for arranging Dr. Al-Arian's deportation. *See Exhibit E* (Dkt. 1567), at 31.

Now, AUSA Kromberg is attempting to exploit Dr. Al-Arian's 57-month term of incarceration to try and force his cooperation with an investigation being conducted in the Eastern District of Virginia.[4] It was only after Dr. Al-Arian was sentenced to 57 months—not 46 months as the parties anticipated—and the government realized that Dr. Al-Arian would be in the United States for a longer period of time than originally contemplated, that

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[4] As described in Ms. Moreno's declaration, during the plea negotiations the defense sought to bind *all* prosecuting authorities in the United States to the plea agreement. *See Exhibit D*, at ¶ 6. Although the government initially agreed in principle with the defense's request to add language to this effect, it ultimately refused to abandon its standard plea agreement language. *Id.* at ¶¶ 7-8. Instead, the government agreed to specifically add the U.S. Attorney's Office for the Eastern District of Virginia to the list of parties bound by the plea agreement. *Id.* at ¶¶ 8-9. This is no coincidence. The parties knew about AUSA Kromberg and his interest in Dr. Al-Arian, so the defense sought to bind the Eastern District of Virginia to the plea agreement to avoid any question that Dr. Al-Arian would not be subject to prosecution in that jurisdiction, or held as a material witness, or called to testify before a grand jury (specifically with respect to IIIT). *Id.* at ¶ 13; *see also Exhibit C*, at ¶ 8. These facts beg a simple question: If adding the Eastern District of Virginia to the plea agreement does not preclude it from seeking Dr. Al-Arian's testimony before a grand jury empanelled there, then what was the point in binding that prosecuting authority to the parties' plea agreement?

it arranged to compel his testimony before the grand jury in Virginia.

3. The Government's Attempt to Force Dr. Al-Arian to Testify Before a Grand Jury Violates the Plea Agreement and Dr. Al-Arian's Due Process Rights.

United States v. Garcia, 956 F.2d 41 (4th Cir. 1992) is dispositive. In *Garcia*, the government offered to recommend to the sentencing judge a 10-year sentence for the defendant if he pled guilty to one count of the indictment and agreed to cooperate with the government. *Id.* at 42. Fearing retribution against his family if he cooperated, the defendant refused the government's offer. *Id.* In response, the government withdrew the cooperation element of its plea offer and agreed to recommend a 15-year sentence for the defendant in exchange for pleading guilty to one count of the indictment. *Id.* The defendant accepted the government's second offer. *Id.* Subsequently, the government sent defense counsel a letter describing the terms of the parties' oral agreement, including the understanding that the defendant would not be required to cooperate with the government. *Id.* However, the parties signed a written plea agreement that did not contain a provision explaining that the defendant was not required to cooperate with the government. *Id.* One month after being sentenced, the defendant was subpoenaed to testify before a grand jury. *Id.* The defendant refused to testify and was held in contempt. *Id.* at 43. The district court denied the defendant's habeas petition based on its conclusion that the plea agreement was unambiguous, thereby barring the introduction of parol evidence (i.e., the government's letter confirming its oral commitment to not seek the defendant's cooperation). *Id.* In reaching its decision, the district court also noted that the written plea agreement did not contain a "no-cooperation required" clause, thus settling the issue. *Id.*

In reversing the district court's decision in *Garcia*, the Fourth Circuit Court of Appeals determined that strict application of the parol evidence rule was not appropriate even though the written plea agreement was clear and unambiguous. *Id.* at 44. It determined that the government's letter to defense counsel evidenced an oral promise to not compel the defendant to cooperate with the government and its omission from the written

plea agreement was due to "government overreaching, inadvertent omission, the dereliction of defense counsel, or some combination of those factors." *Id.* Notwithstanding the failure to memorialize the no-cooperation element of the parties' agreement, the court of appeals concluded it did not absolve the government of its obligation to *honor* its commitment to the defendant. *Id.* Therefore, the court of appeals concluded that the government breached the plea agreement, thereby warranting remand and granting of defendant's habeas petition.

Similarly, in *United States v. Singleton,* 47 F.3d 1177, 1995 WL 66792 (9th Cir. 1995) (unpublished),[5] the court refused to hold the defendant in contempt for his unwillingness to testify before a grand jury because the defendant entered his plea with the understanding that he would not have to cooperate with the government. In *Singleton*, the defendant refused to consider any plea offer by the government that contained a cooperation provision. *Id.* at *1. During jury selection the parties reinitiated plea discussions, and in the presence of the district court judge, they negotiated the substance of their plea deal. *Id.* Ultimately, a written plea agreement was drafted and executed by the parties. *Id.* This written agreement did not contain any provision regarding cooperation, and like most plea agreements, it contained an integration clause providing that the written agreement constituted the sum total of the parties' accord. *Id.* A year later, the government issued the defendant a grand jury subpoena. *Id.* at *2. Although the district court denied the defendant's motion to quash the subpoena, it also denied the government's request to hold the defendant in contempt for refusing to testify before the grand jury. *Id.* The district court acknowledged that the plea agreement was unambiguous, but concluded that the defendant believed he would not be called to testify before the grand jury. *Id.*

In affirming the lower court's decision in *Singleton*, the Ninth Circuit Court of Appeals observed that parol evidence confirmed that the defendant accepted the government's plea offer because he believed he could refuse to cooperate with the government. *Id.* The court of appeals considered parol evidence—in the form of the

[5] A copy of this case is attached as *Exhibit G.*

district court's own observations during the plea negotiations—notwithstanding the fact that the plea agreement was clear on its face and did not contain any provision indicating that the Government waived its grand jury subpoena power. *Id.* Because the plea negotiations affected the defendant's understanding of the written agreement, the court explicitly rejected the government's contention that plea discussions should not be considered where a written agreement memorializes the terms of the parties' agreement. *Id.* at *3. The court ultimately concluded that forcing the defendant to testify before the grand jury would deny him a benefit bargained for in his plea deal. *Id.* at *4.

Likewise, in the instant case, the written plea agreement should not be construed to contravene the parties' understanding that Dr. Al-Arian would not be required to cooperate with the government. Like the agreements in *Garcia* and *Singleton*, Dr. Al-Arian's plea agreement does not contain a "no-cooperation required" clause—but that does not matter. At the time the parties negotiated the plea agreement, the possibility of cooperation was raised, discussed, and expressly rejected by the defense. *See Exhibit D*, at ¶ 4. In fact, defense counsels made clear to the government that under no circumstances would Dr. Al-Arian agree to a plea deal that included a cooperation provision. *Id.*; *see also Exhibit C*, at ¶¶ 6-7. Moreover, the overarching purpose of the entire agreement was to resolve any and all matters between the government and Dr. Al-Arian. *See Exhibit C*, at ¶ 5; *Exhibit D*, at ¶ 5. The key objective of the parties (i.e., a final settlement of all matters) could not have been achieved if there existed the possibility of cooperation in the future. Therefore, the government knowingly contravened the parties' plea agreement, thereby violating Dr. Al-Arian's due process rights, by issuing a writ to compel his testimony before a grand jury in Virginia.[6] *See United States v. Martin,* 25 F.3d 211, 217 (4th Cir. 1994) ("If the

[6] Dr. Al-Arian's case is distinguishable from *In re Grand Jury Proceedings,* 819 F.2d 984 (11th Cir. 1987). In *In re Grand Jury Proceedings,* the defendant was prosecuted by and entered into a plea agreement with the U.S. Attorney's Office for the Northern District of Georgia. *Id.* at 984. The following year, he was compelled by a different prosecuting authority not bound by his plea agreement, the U.S. Attorney's Office for the Southern District of Florida, to testify before a grand jury. *Id.* Ultimately, the defendant was held in contempt and the Eleventh Circuit upheld the contempt order. *Id.* at 987. Here, and unlike the situation in *In re Grand Jury Proceedings*, Dr. Al-

government breaches express or implied terms of a plea agreement, a violation of due process occurs.") (citations omitted).

4. Parol Evidence May Be Offered to Clarify an Unambiguous Plea Agreement Where there is Evidence of Government Overreaching.[7]

Where there is evidence of "government overreaching," extrinsic evidence may be introduced to shed light on an otherwise unambiguous plea agreement. *See Harvey*, 791 F.2d at 300. "Proof of the Government's refusal to abide by . . . an oral promise would clearly constitute evidence of 'government overreaching' or 'fraud in the inducement,' admissible without running afoul of the parol evidence rule." *White*, 366 F.3d at 295 (citations omitted). For example, in *White* the defendant sought to introduce parol evidence to prove that the government made an oral representation to defense counsel that the defendant could conditionally plead guilty and still retain the right to appeal the denial of his suppression motion. *Id.* at 292. This oral promise was never incorporated into the plea agreement. *Id.* Notably, no part of the plea agreement addressed the defendant's right to appeal. *Id.* at 293, 298. However, the defendant asserted he was induced to enter his plea by the government's assurance that he could appeal his suppression motion. *Id.* at 293. In light of the defendant's assertions of government overreaching, the Court of Appeals for the Fourth Circuit considered the sworn statements offered by the defendant and his former defense counsel to find that a dispute of material fact existed as to whether an oral

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Arian has been compelled by the U.S. Attorney's Office for the Eastern District of Virginia, *a party to the plea agreement*, to testify before a grand jury in Virginia. From the outset of plea negotiations, the parties understood that Dr. Al-Arian would never be expected, much less required, to provide any form of cooperation to the government. Unlike the federal prosecutor who sought cooperation from the defendant in *In re Grand Jury Proceedings*, AUSA Kromberg is bound by the parties' accord.

[7] In *Jefferies*, the Eleventh Circuit Court of Appeals considered the affidavits of defense counsel without even addressing whether any ambiguity existed in the plea agreement. 908 F.2d at 1523-1524. Because plea agreements, unlike commercial contracts, implicate the waiver of constitutional rights, a rigid adherence to principles of contract interpretation is inappropriate. *See Harvey,* 791 F.2d 294, 300 (In analyzing a plea agreement, principles of contract law are tempered by concerns of "honor of the government [and] public confidence in the fair administration of justice[.]"); *see also Rewis*, 969 F.2d at 988.

agreement had been reached by the parties outside the written plea agreement, thus warranting an evidentiary hearing on the issue. *Id.* at 301-02.

Likewise, the evidence presented here reflects that Dr. Al-Arian's guilty plea was induced by an oral understanding of the parties, in that he would not be required to cooperate with the government. *See Exhibit C,* at ¶ 7; *Exhibit D,* at ¶¶ 4, 13. The government's attempt to contravene the parties' oral agreement constitutes "government overreaching," thereby justifying the consideration of parol evidence on the issue. Here, the declarations offered by Ms. Moreno and Dr. Al-Arian demonstrate that one of Dr. Al-Arian's primary concerns in pleading guilty was avoiding any obligation to cooperate with the government or even creating the impression he had done so. *See Exhibit C,* at ¶ 6; *Exhibit D,* at ¶ 4. Without this explicit understanding, Dr. Al-Arian would have rejected the government's plea offer. *See Exhibit C,* at ¶ 6; *Exhibit D,* at ¶ 4. Accordingly, the government's attempt to ignore the parties' non-cooperation accord constitutes "government overreaching" and, therefore, affidavits of counsel and the defendant are admissible to clarify the intent of the parties in entering this plea agreement.

In conclusion, the "honor of the government [and] public confidence in the fair administration of justice," demand that the government keep its word. *Harvey,* 791 F.2d 300. Here, the parties understood that Dr. Al-Arian would not have to cooperate with the government. *See Exhibit C,* at ¶¶ 6-7; *Exhibit D,* ¶¶ 4, 13. This was a prime inducement to Dr. Al-Arian's acceptance of the plea agreement. *See Exhibit C,* at ¶ 7. Because the writ was issued to Dr. Al-Arian in breach of the parties' agreement, it must be quashed.

B. The Writ *Ad Testificandum* Must be Quashed Because it is Designed to Harass Dr. Al-Arian.

Grand juries may not be used to harass witnesses or targets. *See United States v. R. Enter., Inc.,* 498 U.S. 292, 299, 111 S. Ct. 722, 727 (1991). Yet, that is what is happening in this case. Here, the outrageous comments made by AUSA Kromberg regarding Muslims, coupled with the parties' clear understanding that Dr. Al-Arian would never be expected to

cooperate with the government, shows that the grand jury process is being abused.

The government's attempt to force Dr. Al-Arian to cooperate with its investigation has put Dr. Al-Arian in an impossible situation. Dr. Al-Arian has four options, none of which are fair or appealing:

(1) Refuse to testify and be held in contempt, thereby extending his prison term and delaying his expedited deportation;

(2) Testify truthfully and the government argues his testimony is not consistent with prior statements or its understanding of the facts, thereby subjecting Dr. Al-Arian to perjury charges;

(3) Testify truthfully, the government believes Dr. Al-Arian, but then issues a material witness warrant to keep him in detention in the United States, beyond his term of incarceration, thereby delaying his expedited deportation; or

(4) Testify truthfully, the government believes Dr. Al-Arian, but does not find his testimony particularly helpful, in which case Dr. Al-Arian is deported on schedule and is labeled an informant for the United States government, thereby putting his life in danger and beyond the protection of the United States.[8]

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[8] The United States government even acknowledges that informants and suspected informants are at risk of persecution in the Palestinian-controlled territories. *See* U.S. DEPARTMENT OF STATE, Bureau of Democracy, Human Rights, and Labor, "Country Report on Human Rights Practices for Israel and the Occupied Territories 2005," released March 8, 2006 (a copy is attached as *Exhibit H*). In 2006, the U.S. Department of State reported that Palestinians in the "Occupied Territories Subject to the Jurisdiction of the Palestinian Authority" who were suspected of collaborating with Israeli authorities were subject to detention, torture, and murder. For example:

- On September 26, [2005,] assailants, reportedly from the al-Aqsa Martyrs' Brigades, killed a Palestinian man suspected of collaborating with Israeli authorities. The killers kidnapped him days earlier from the Askar refugee camp near Nablus. *Id.* at 25.

- In August 2004 unidentified assailants threw grenades into a room holding suspected Palestinian collaborators in the Gaza Central Prison. The attack killed two and injured six prisoners. Palestinian security officials arrested *two policemen*, who allegedly carried out the attack on behalf of Hamas. At year's end no further legal action had been taken against the officers. *Id.* (emphasis added).

The government knows these are the only options available to Dr. Al-Arian, yet, it still has insisted on his cooperation. Furthermore, any information Dr. Al-Arian can provide to the government regarding IIIT is already in the government's possession in FISA wiretaps and other electronic surveillance, all of which AUSA Kromberg has been provided access. *See Exhibit F,* at ¶ 9. Because at the time the writ was issued AUSA Kromberg knew Dr. Al-Arian did not have any relevant information to supply to the government regarding IIIT, and was aware of his disposition not to testify before the grand jury in light of the non-cooperation aspect of his plea agreement, it is plain AUSA Kromberg's primary motives in issuing the writ to Dr. Al-Arian was to obtain a contempt order against him.

Under the circumstances of this case, and in light of the comments made by AUSA Kromberg, it is apparent that the writ issued to Dr. Al-Arian is designed to nullify the "bonanza" of a plea deal he received in the Middle District of Florida, and punish him in other ways (i.e., extend his sentence with a contempt order). Accordingly, the parties plea agreement should be enforced and specific performance warrants that the writ *ad testificandum* issued to Dr. Al-Arian be quashed.

IV. CONCLUSION

WHEREFORE, Dr. Al-Arian, by and through undersigned counsel, moves this Honorable Court to enforce the plea agreement and order specific performance of the non-

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- At year's end [2005] Palestinian sources estimated the PA [i.e., Palestinian Authority] imprisoned approximately 239 [Palestinians] suspected of collaboration with Israel. Alleged collaborators often were held without evidence and denied access to lawyers, their families, or doctors. *Id.* at 27.

Notably, the U.S. Department of State's Country Reports on Human Rights Practices have been universally accepted by U.S. federal courts as reliable sources of current country conditions. *See Rojas v. INS,* 937 F.2d 186, 190 n.1 (5th Cir. 1991) (noting that the U.S. Department of State "is the most appropriate and perhaps the best resource the Board [of Immigration Appeals] could look to in order to obtain information on political situations in foreign nations."); *see, e.g., Kazlauskas v. INS,* 46 F.3d 902, 906 (9th Cir. 1995) (referencing the State Department Country Report on Human Rights Practices to ascertain current conditions in Lithuania); *Getachew v. INS,* 25 F.3d 841, 847 (9th Cir. 1994) (relying on State Department Country Report for Human Rights Practices to dispute Board of Immigration Appeals' assessment of country conditions in Ethiopia).

cooperation aspect of that agreement, thereby requiring the writ *ad testificandum* issued to Dr. Al-Arian be quashed.

Dated: October 26, 2006

Respectfully submitted,

Jack Fernandez
Fla. Bar No.: 843751
Lee Fugate
Fla. Bar No.: 0170928
ZUCKERMAN SPAEDER LLP
101 E. Kennedy Boulevard, Suite 1200
Tampa, Florida 33602
Tel: (813) 221-1010
Fax: (813) 223-7961
Email: jfernandez@zuckerman.com
lfugate@zuckerman.com

Attorneys for Defendant Sami Amin Al-Arian

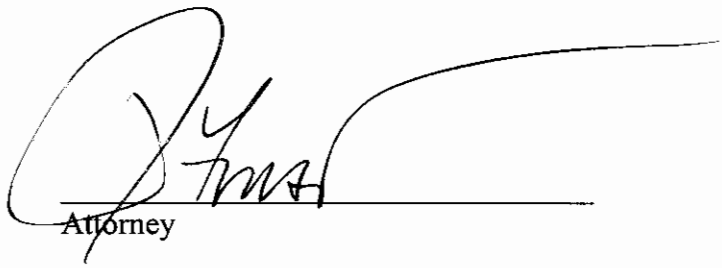
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of October 2006, served via hand delivery or Federal Express the foregoing Defendant Sami Amin Al-Arian's Motion to Enforce Plea Agreement on the following individuals:

Terrence Zitek, Esq.
Walter Furr, Esq.
Cherie Krigsman, Esq.
United States Attorney's Office
400 N. Tampa Street, Suite 3200
Tampa, Florida 33602

The Honorable Gerald Bruce Lee
U.S. District Court Judge
District Court for the Eastern District of Virginia
Albert V. Bryan U.S. Courthouse
401 Courthouse Square
Alexandria, Virginia 22314

Gordon Kromberg, Esq.
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, Virginia 22314



Attorney