UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT AL-ARIAN'S MOTION TO ENFORCE PLEA AGREEMENT

The United States of America by Paul I. Perez, United States Attorney, Middle District of Florida, submits the following response in opposition to defendant Al-Arian's Motion to Enforce Plea Agreement:

A. Identification and Statement of the Issues Presented

According to defendant Al-Arian's motion, he has been subpoenaed to give testimony in a grand jury proceeding in the Eastern District of Virginia. Based on a contention that the plea agreement executed in this case[1] exempts him from providing any testimony to anyone anywhere, defendant Al-Arian filed a motion in the Eastern District of Virginia to quash the subpoena.[2] The Eastern District of Virginia United

[1]Of course, the plea agreement led to his plea of guilty to conspiring to provide funds, goods and services to the Palestinian Islamic Jihad, a Specially Designated Terrorist Organization, and a sentence of 57 months which he is currently serving.

[2]This is not the first time that defendant Al-Arian has re-interpreted or ignored the plea agreement to suit his purposes. Paragraph B-5 contained the standard Middle District of Florida "Appeal of Sentence-Waiver." Defendant's Motion Exhibit A, ¶ B-5. Notwithstanding the fact that he had waived his right to appeal his sentence, defendant Al-Arian filed a notice of appeal. May 10, 2006, D-cr-1577. On May 26, 2006, totally ignoring the waiver provision, defendant Al-Arian filed a brief in the Eleventh Circuit challenging the 57 month sentence he received from this Court. This office filed a

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States District Court Judge deferred making a ruling, and ordered defendant Al-Arian to file his motion in the Middle District of Florida.

Although it is fairly obvious from a reading of defendant Al-Arian's motion, it must be pointed out that this current dispute does not involve the conduct of the United States Attorney's Office for the Middle District of Florida. The defendant has been subpoenaed to testify in the Eastern District of Virginia. This Office has made no request or demand of defendant Al-Arian for any information or testimony. There is no on-going proceeding in the Middle District of Florida to which defendant Al-Arian has been subpoenaed to testify. There is absolutely no allegation in defendant Al-Arian's motion that the Eastern District of Virginia is acting as an agent for the Middle District of Florida, secretly or otherwise. Therefore, there is no controversy in the Middle District of Florida over which this Court has jurisdiction. Instead, the Court in the Eastern District of Virginia has in effect referred an issue involving the proper interpretation of the Middle District of Florida plea agreement to this Court for a ruling impacting a proceeding in the Eastern District of Virginia.

Defendant Al-Arian raises a host of tangential issues in his motion concerning his treatment in the Eastern District of Virginia. For example, at pages 5-6, he complains about comments allegedly made by the Eastern District of Virginia Assistant United States Attorney. At page 6, defendant Al-Arian suggests that the

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motion to dismiss the appeal based solely on the existence of the waiver provision. On October 5, 2006, the Eleventh Circuit granted the government's motion. D-cr-1647. (On October 24, 2006, defendant Al-Arian filed a motion in the Eleventh Circuit to vacate that Court's order.) In considering the merits of this motion, this Court should take note of the effrontery which defendant Al-Arian displayed toward the "Appeal of Sentence-Waiver" provision.

Eastern District of Virginia Assistant United States Attorney is acting with an improper motive and an improper purpose. At page 14, defendant Al-Arian contends that the Eastern District of Virginia Assistant United States Attorney is harassing him and abusing the grand jury process. At page 16, defendant Al-Arian complains that he has no relevant information to provide to the grand jury of which the Eastern District of Virginia prosecutorial authorities are not already aware. Presumably, these comments have been made because defendant Al-Arian may contend that they are relevant to some defense defendant Al-Arian may believe he has to a contempt citation. However, none of these allegations are relevant or necessary to a resolution of the instant motion.

While defendant Al-Arian's motion runs for 17 pages and contains numerous attachments consisting of exhibits and declarations, defendant Al-Arian's motion can be reduced to two simple issues: (1) whether the Middle District of Florida plea agreement by its terms provides protection to defendant Al-Arian from having to give testimony in a court proceeding; and (2) whether the Eastern District of Virginia is bound to observe and abide by the terms of the Middle District of Florida plea agreement. These are the only issues this Court can and should address and resolve. These issues can be resolved through an examination of the plea agreement and the guilty plea hearing. No evidentiary hearing is required. No parol evidence need be considered. As far as defendant Al-Arian's complaints about his actual treatment in the Eastern District of Virginia, those are for the Eastern District of Virginia Court to address and resolve.[3]

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[3]If this Court has a different view of the scope of the proceedings in the Middle District of Florida, this Office would then request additional time to address and brief whatever other issues this Court determines must be addressed and resolved before the Court enters its final order.

B. General Law Governing the Interpretation of Plea Agreements

Generally speaking, plea agreements are interpreted in accordance with contract law principles. United States v. Altro, 180 F.3d 372, 375 (2d Cir. 1999); United States v. Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990). In determining whether a party has breached a provision in a plea agreement, the Court must first determine the scope of that party's promises. United States v. Copeland, 381 F.3d 1101, 1105 (11th Cir. 2004).[4] The Court must use objective standards to interpret disputed terms in a plea agreement. In Re Arnett, 804 F.2d 1200, 1202 (11th Cir. 1986). The Court must decide whether the government's actions are inconsistent with what the defendant reasonably understood to be a binding promise when he entered his guilty plea. Id. at 1203. A written plea agreement should be viewed against the background of the negotiations and should not be interpreted to "directly contradict an oral understanding." Copeland, 281 F.3d at 1105. However, the Second Circuit has held that it will not require the government to anticipate and expressly disavow every potential term that a defendant might believe to be implicit in a plea agreement. Altro, 180 F.3d at 376. With respect to an allegation by a defendant that the government made an oral promise, the Eleventh Circuit has held: "Where, from the transcript, the plea-taking procedures are clear and regular on their face, a petitioner asserting the existence of a bargain outside the record and contrary to his own statements under oath bears a

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[4]The government recognizes that a plea agreement is different from a regular contract because it constitutes a waiver of constitutional rights, and thus constitutional concerns require holding the government to a greater degree of responsibility than the defendant for imprecisions and ambiguities in the plea agreement. Copeland, 381 F.3d at 1106.

heavy burden." United States v. Hauring, 790 F.2d 1570, 1571 (11th Cir. 1986), quoting Barnes v. United States, 579 F.2d 364, 366 (5th Cir. 1978). A hyper-technical reading of the written terms of the plea agreement and a rigidly literal approach in the construction of the language should not be accepted. Jefferies, 908 F.2d at 1523. However, "the final memorialization of the plea negotiations best informs the court of the agreements the parties have reached." Raulerson v. United States, 901 F.2d 109, 1012 (11th Cir. 1990).

> If a written plea agreement is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the agreement should be interpreted and enforced accordingly. "Neither side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind."

Altro, 180 F.3d at 377, quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986). It is "[o]nly when the language in the plea agreement is ambiguous, or where government overreaching is alleged, does the court consider parol evidence . . ." Copeland, 381 F.3d at 1105, citing Raulerson, 901 F.2d at 1012. A term in a plea agreement that is determined to be ambiguous should be read against the government. Jefferies, 908 F.2d at 1523. The party asserting a breach of a plea agreement has the burden of proving its breach. United States v. Martin, 25 F.3d 211, 217 (4th Cir. 1994).

C. The Middle District of Florida plea agreement does not make any promise to the defendant that he will not have to testify in a court proceeding

At the outset, it must be emphasized that defendant Al-Arian does not and cannot point to any provision of the Middle District of Florida plea agreement which has

allegedly been breached by the United States government or any part of it.[5] At page 8 of his motion, defendant Al-Arian states that he "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." That is the promise he claims the United States Government made to him for which he now seeks specific performance to quash a grand jury subpoena.

Also at page 8 of his motion, defendant Al-Arian states, "[a]lthough this understanding was not memorialized in the written plea agreement, it nonetheless was central to the parties' resolution of Dr. Al-Arian's case." Thus, while claiming it was "central" to the resolution of the case, the defendant acknowledges that the Court will not find any written provision in the plea agreement containing such a concession from the United States Government. Defendant Al-Arian does not even suggest that there is some provision which contains ambiguous language about such a concession.

The best that defendant Al-Arian can do is to point to other provisions which are merely consistent with such a concession. For example, at page 9, defendant Al-Arian points out that the Middle District of Florida prosecutors agreed to recommend a sentence at the low end of the Guidelines. See Al-Arian Exhibit A at ¶ A-11. The Middle District of Florida prosecutors also promised to recommend to Immigration authorities that they expedite their efforts to deport defendant Al-Arian following the service of his criminal sentence. Id. at ¶ A-8. Reading these two

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[5]At this point in this memorandum, the United States draws no distinction between the United States Attorney's Office for the Middle District of Florida, the Counterterrorism Section of the Department of Justice and the United States Attorney's Office for the Eastern District of Virginia. That distinction is drawn in Section D infra.

It is also true that the lack of a "defendant agrees to cooperate" provision does not (1) imply that the United States Government would not require or compel defendant Al-Arian's testimony in a court proceeding or (2) operate to prevent such action. "Cooperation" and "compelled testimony" are different legal animals. The Middle District of Florida "cooperation" provision in universal use by the United States Attorney's Office in its plea agreements reads in pertinent part:

> Defendant agrees to cooperate fully with the United States in the investigation and prosecution of other persons, and to testify, subject to a prosecution for perjury or making a false statement, fully and truthfully before any federal court proceeding or federal grand jury in connection with the charges in this case and other matters, such cooperation to further include a full and complete disclosure of all relevant information, including production of any and all books, papers, documents, and other objects in defendant's possession or control, and to be reasonably available for interviews which the United States may require. . . .

This Court has read countless Middle District of Florida plea agreements which included this provision. This is what "cooperation" means to the United States Attorney's Office for the Middle District of Florida. This provision requires a defendant to submit to interviews and debriefings at the discretion of the United States. It requires the defendant to produce all relevant information against "other persons" anywhere without any limitations. It also requires a defendant to testify. A defendant who signs a plea agreement with this provision voluntarily agrees to do all of these things without compulsion.[6] This provision does not appear in Al-Arian's plea agreement.

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[6]Some defendants even provide cooperation proactively by functioning as informants.

More importantly, not only does the plea agreement not contain a "no cooperation" or a "no testimony" concession, the plea agreement does contain what is commonly known as an "integration clause:"

> This plea agreement constitutes the entire agreement between the government and the defendant with respect to the aforementioned guilty plea and no other promises, agreements, or representations exist or have been made to the defendant or defendant's attorney with regard to such guilty plea.

Defendant Al-Arian's Exhibit A, ¶ B-10. This provision explicitly disavows any other "promises, agreements or representations." At the guilty plea hearing on April 14, 2006, Magistrate Judge McCoun specifically asked defendant Al-Arian and his counsel whether the government had made any other promises, to which Al-Arian (while under oath) and counsel responded in the negative. D-cr-1567, pages 30-32. For good measure, near the end of the guilty plea colloquy, Magistrate Judge McCoun again discussed the "integration" clause with the defendant personally. Id. at page 42. As part of the Rule 11 process, Magistrate Judge McCoun made the factual finding that the written plea agreement (and one oral promise discussed below) constituted all the promises made by the government to defendant Al-Arian. What defendant Al-Arian is now doing through his motion and the attached declarations is to impeach and contradict his previous statements under oath. On April 14, 2006, defendant Al-Arian stated under oath that there were no other promises; on October 26, 2006, defendant declared, subject to penalties for perjury, that there were. Defendant Al-Arian cannot have it both ways. Hauring, 790 F.2d at 171. His unilateral effort to rewrite the plea agreement should be rejected.

promises together, defendant Al-Arian argues that the parties anticipated that Al-Arian would be deported from the United States in early June 2006 and "would not be around long enough to cooperate with the government." Al-Arian motion at 9. However, these provisions do not establish that the United States government ever agreed that defendant Al-Arian would not have to "cooperate with the government in any matter," construed in this case to include "compelled testimony." It is a fallacious argument to claim that the existence of promise A in a plea agreement necessarily establishes the implicit existence of promise B merely because promise A is consistent with promise B.

There are also provisions in the plea agreement which are inconsistent with a promise by the United States Government that defendant Al-Arian "would never be required to cooperate with the government in any matter." While the parties may have anticipated that it was probable that defendant Al-Arian would receive a 46 month sentence and would be deported from the United States in June 2006, the plea agreement's terms did not require that outcome. Magistrate Judge McCoun emphasized this to defendant Al-Arian. D-cr-1567, pages 20-22. Paragraph A-7 only required that the Court impose a sentence of imprisonment between 46 and 57 months. While ¶ A-11 provided that the United States would recommend a sentence at the low end of that range, that same paragraph also explicitly provided that the parties acknowledged that the Court retained the discretion to impose a sentence up to 57 months. Thus, some terms of the plea agreement created the possibility that the defendant would remain within the jurisdiction of the legal system for up to eleven months longer than the parties contemplated and hence be available to provide testimony in a court proceeding. That possibility came to pass.

Independent of any plea agreement, the Eastern District of Virginia prosecutorial authorities invoked the compulsory process powers of the grand jury and brought defendant Al-Arian to that jurisdiction to give testimony. All that is required of defendant Al-Arian in the Eastern District of Virginia is that he testify in a grand jury proceeding. His obligation to testify is governed by the simple proposition that in the American legal system, "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." Branzburg v. Hayes, 408 U.S. 665, 688 (1972), citing United States v. Bryan, 339 U.S. 323, 331 (1950). While this principle allows a witness to assert his constitutional privilege against self-incrimination, it is our understanding that the Eastern District of Virginia court has issued an immunity order pursuant to 18 U.S.C. § 6002 compelling defendant Al-Arian to testify before the grand jury. Therefore, defendant Al-Arian was summoned to the Eastern District of Virginia to provide to the grand jury his "evidence." The Middle District of Florida plea agreement simply did not exempt defendant Al-Arian from this basic legal obligation in American society.[7]

D. The Middle District of Florida plea agreement does not prohibit the Eastern District of Virginia authorities from summonsing defendant Al-Arian to testify before an Eastern District of Virginia grand jury.

Separate from the issue as to whether the Middle District of Florida plea agreement protects defendant Al-Arian from cooperating with the government in any matter, the more fundamental issue to be resolved is whether the Middle District of

[7]This Court will recall that at defendant Al-Arian's sentencing, in exercising his right of allocution, defendant Al-Arian extolled the virtues of the American legal system. This is the same legal system whose obligations at which he now flouts.

Florida plea agreement binds the Eastern District of Virginia authorities to the extent that defendant Al-Arian is exempt from testifying before an Eastern District of Virginia grand jury. The short answer is no. The long answer follows.

Defendant Al-Arian in his motion contends that the "overarching purpose of the parties' plea agreement was to conclude, once and for all, all business between the government and Dr. Al-Arian." Defendant's Motion at 2. The principal "business" between the parties consisted of criminal investigations and cases against defendant Al-Arian. To conclude that "business," defendant Al-Arian requested and the United States agreed to the following unambiguous written provision in the Middle District of Florida plea agreement:

> If the Court accepts this plea agreement, the United States Attorney's Office for the Middle District of Florida and the Counterterrorism Section of the United States Department of Justice agree not to charge defendant with committing any other federal criminal offenses known to the United States Attorney's Office or the Counterterrorism Section at the time of the execution of this agreement, related to the conduct giving rise to this plea agreement.

Defendant's Motion Exhibit A, ¶ A-6. The other critical paragraph is the following:

> It is further understood that this agreement is limited to the Office of the United States Attorney for the Middle District of Florida and the Counterterrorism Section of the Department of Justice and cannot bind other federal, state or local prosecuting authorities . . . .

Defendant's Motion Exhibit A, ¶ B-6. Thus, in terms of concluding all business between the United States and the defendant, these are the two pertinent written provisions.

Defendant Al-Arian was aware of the Eastern District of Virginia's criminal investigation, and he sought personal protection against that investigation as well. The

Middle District of Florida prosecutors obtained a concession from the Eastern District of Virginia which Special Assistant United States Attorney Krigsman orally announced to the Court and the parties during the guilty plea hearing. Her exact words were:

> I have been authorized by the Deputy Assistant Attorney General of the Criminal Division to further bind the Eastern District of Virginia such that if the Court accepts the plea agreement, the United States Attorney's Office for the Eastern District of Virginia likewise will not charge the defendant with committing any other federal crimes known to that United States Attorney's Office at the time of the agreement related to the conduct giving rise to the agreement.

D-cr-1567, page 18-19.

Given the fact that the additional oral promise tracks the language of ¶ A-6, it is abundantly clear that the only concession made by the Eastern District of Virginia United States Attorney's Office was a promise not to prosecute defendant Al-Arian for crimes they then had under investigation in the Eastern District of Virginia. That promise has been kept. Instead, the Eastern District of Virginia authorities have sought to obtain defendant Al-Arian's testimony in connection with that very same investigation. Even if the Middle District of Florida prosecutorial authorities had agreed to exempt defendant Al-Arian from providing cooperation or giving testimony, the Eastern District of Virginia prosecutorial authorities did not separately agree to that, or more precisely, the Eastern District of Virginia prosecutorial authorities did not agree to exempt defendant Al-Arian from testifying before a grand jury in the Eastern District of Virginia.

Thus, while defendant Al-Arian claims in his motion at page 9, footnote 4, that he specifically sought to bind the Eastern District of Virginia prosecutorial authorities to a promise not to prosecute him AND not to hold him as a material witness or to subpoena

him to a grand jury there, it is clear that the Middle District of Florida plea agreement does not contain the latter two concessions. There is no ambiguous language with which to struggle to interpret. Moreover, there is no allegation in defendant Al-Arian's motion that he had any separate negotiations with anyone representing the Eastern District of Virginia prosecutorial authorities, or else we can be confident this Court would have been informed of the results of those negotiations. So, not only does defendant Al-Arian contend that the Middle District of Florida implicitly agreed to not require his cooperation or testimony, he boldly suggests that the Eastern District of Virginia did the same. The terms of the plea agreement unambiguously refute that contention.

E. The controlling case law supports the United States' interpretation of the plea agreement.

The disposition of this motion is controlled by Eleventh Circuit precedent. In the case styled In Re Grand Jury Proceedings (Perdue), 819 F.2d 984 (11th Cir. 1987), defendant Perdue was cited for contempt for refusing to testify before a grand jury. The defendant had been charged with a crime by the Northern District of Georgia. The prosecutor initially offered a plea agreement with a recommendation for a short sentence if the defendant agreed to cooperate. The defendant rejected the offer, so the prosecutor made a second offer with a recommendation of a long sentence but without a requirement that the defendant cooperate. The defendant accepted the second offer.

Later, a prosecutor in the Southern District of Florida obtained an immunity order and subpoenaed the defendant to testify before the grand jury there. Defendant Perdue refused to testify, contending that he thought that the plea

agreement with the high sentence recommendation he accepted meant that he was not required to give testimony anywhere. The District Court disagreed and the Eleventh Circuit affirmed. The Eleventh Circuit held that even assuming Perdue plausibly thought that was the case, "we cannot read into the words of the plea agreement any specific terms about testimony. The agreement . . . simply does not contain any mention of future testimony, whether voluntary or compelled." Perdue, 819 F.2d at 987. Likewise, the Middle District of Florida plea agreement "simply does not contain any mention of future testimony, whether voluntary or compelled."

The Eleventh Circuit in Perdue specifically distinguished United States v. Harvey, 791 F.2d 294 (4th Cir. 1986). In Harvey, the plea agreement contained an ambiguous term involving its effect on another jurisdiction, which the Fourth Circuit resolved against the government. In Perdue, the Eleventh Circuit stated that while there was a clear conflict between the parties in terms of the understanding of the plea agreement, the words of the plea agreement were unambiguous. "[W]e cannot rewrite the agreement to include a bar on attempts by the government to compel testimony by Perdue." Perdue, 819 F.2d at 987. The Eleventh Circuit in Perdue never reached the issue as to whether the Southern District of Florida was bound by a promise in the Northern District of Georgia plea agreement because it found the promise itself was lacking.

This case is also distinguishable from United States v. Garcia, 956 F.2d 41 (4th Cir. 1992). In Garcia, the prosecutor offered the defendant two plea agreements, one which included cooperation and one that did not. The defendant chose the latter. The prosecutor then sent a formal plea agreement to the defendant

attached to a cover letter which specifically indicated that cooperation was not required. Later, the prosecutor subpoenaed the defendant to the grand jury. The defendant refused to testify and was held in contempt. The Fourth Circuit reversed, holding that the cover letter constituted another promise to which the government was bound. In this case, there was no cover letter with an additional promise made by the Middle District of Florida, the Counterterrorism Section of the Department of Justice or Eastern District of Virginia.

Factually, this case is very similar to the situation in United States v. Altro, 180 F.3d 372 (2d Cir. 1999). In Altro, the prosecutor had offered a "cooperation" plea agreement to the defendant, and he declined in part out of fear for his safety. Defendant Altro later pleaded guilty pursuant to a plea agreement which did not contain a "cooperation" clause, but did contain an "integration" clause disavowing any other promises. Later, the defendant was subpoenaed to testify before a grand jury in the same jurisdiction. Altro tried to invoke the plea agreement as a defense. While acknowledging that the plea agreement did not contain a "no cooperation" provision, Altro argued that his understanding that he was not required to cooperate or testify was "implicit in the whole course of dealing between himself and the Government." Id. at 375. The Second Circuit rejected this argument, holding that there was nothing in the written plea agreement which could reasonably be construed as a "no cooperation" promise. Id. at 376. The Second Circuit further held that the existence of an "integration" clause precluded the court from considering evidence of a purported "implicit understanding" the defendant tried to rely on. Finally, the Second Circuit in Altro also distinguished Garcia because there the government had made a "no

cooperation" promise in the cover letter to the plea agreement whereas in the case before it the government had not. Id. at 376.[8]

F. Conclusion

Wherefore, for the foregoing reasons, this Court should deny defendant Al-Arian's motion on two grounds. First, the Middle District of Florida plea agreement cannot reasonably be construed to contain a "no testimony required" provision. Second, the Eastern District of Virginia is not bound by such a term even if the Court were to determine the plea agreement contained such a term. Finally, the Court should refer all other issues back to the Eastern District of Virginia for resolution there.

Respectfully submitted,

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[8]United States v. Singleton, 47 F.3d 1177 (9th Cir. 1995) (unpublished) is also distinguishable. The issue there was not whether the plea agreement contained a "no cooperation" clause, because clearly it did not. The issue was whether the particular plea negotiations involved in that case provided a reasonable basis for the defendant's belief that he did not have to provide cooperation in that district. The Ninth Circuit held that those plea negotiations did just that. But, the Ninth Circuit did not have to deal with a subpoena issued by a prosecutor who was not a party to, or bound by, the plea agreement or the plea negotiations.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2006, a true and correct copy of the foregoing document was sent by United States Mail to the following:

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