**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

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| **UNITED STATES** | ) | |
| | ) | **Case No. 1:08cr131** |
| **v.** | ) | |
| | ) | |
| **SAMI AMIN AL-ARIAN** | ) | |

**DEFENDANT DR. SAMI AMIN AL-ARIAN'S MEMORANDUM**
**IN SUPPORT OF HIS MOTION TO DISMISS THE INDICTMENT**

In the last few weeks, the Court has been given new evidence related to the plea agreement reached between Dr. Sami Amin Al-Arian and the Justice Department after his acquittals of various charges in a trial in Tampa, Florida. As the Court has stated, this evidence raises very troubling questions about a possible "bait and switch" where Dr. Al-Arian and his counsel were assured that, if he agreed to plead guilty, he would not be subject to any further involvement with the Justice Department beyond his deportation following the completion of his sentence. The Court has continued the trial in this case to allow the filing of a motion to dismiss based on this new evidence and the failure of the government to rebut the factual record showing that the defendant believed that he would not have to cooperate in any way with the Justice Department.

Dr. Al-Arian respectfully submits that this record now justifies dismissal on a variety of grounds, including the violation of the plea agreement, the failure to establish elements of the crime of contempt, and general principles of judicial integrity. After six hearings discussing the plea agreement, five declarations on the negotiations, and extensive briefing, the doubts over the basis for these charges have only grown for the Court. If a federal court with access to the full range of available evidence struggles with factual and legal basis for this indictment, it should

not be a matter simply thrown before a jury to let laypersons try to sort it out. The government created this muddled record with its negotiations and subsequent conflicting positions on Dr. Al-Arian's testimony. It cannot now force a trial on that confused record in the hopes that a jury will not "sweat the specifics" in sending an individual to prison for a long incarceration. The defense submits that it is time for this case to be dismissed and for the government to honor its commitment to deport Dr. Al-Arian – albeit after extending his incarceration by almost three years beyond the sentence under the plea agreement.

**BACKGROUND**

In December 2005, Dr. Al-Arian, after being charged in the Middle District of Florida with numerous criminal counts, was acquitted on eight counts and all but a couple of jurors voted to acquit him on all charges. In the aftermath of the verdict, Dr. Al-Arian and his attorneys began negotiating with the government in an effort to "*terminate[] all business between Dr. Al-Arian and the Department of Justice*." Decl. of L. Moreno, attached as Ex. A, ¶ 5.

During these negotiations, one of the lead government negotiators, Cherie Krigsman, expressly assured to Dr. Al-Arian's attorneys that she was unaware of any other jurisdictions' interest in Dr. Al-Arian. *Id*. ¶ 7. Lead counsel William B. Moffitt negotiated directly with Alice Fisher, at the time Assistant Attorney General for the Criminal Division,[1] and other prosecutors, including a critical meeting held at Main Justice in Washington, D.C.[2] He expressly raised Assistant United States Attorney ("AUSA") Gordon Kromberg and the IIIT investigation in the

[1] Ms. Fisher was Deputy Assistant Attorney General of the Criminal Division from July 2001 to 2003 and Assistant Attorney General for the Criminal Division from 2003 until May 23, 2008. *See* http://www.usdoj.gov/opa/pr/2008/April/08-opa-359.html (last accessed Mar. 23, 2009).

[2] Both Mr. Moffitt and Ms. Moreno have informed the defense that Ms. Fisher was leading the negotiations at this meeting, referenced in both of their declarations. Various other prosecutors were present with Ms. Fisher at the meeting held in Washington, D.C. The government has notably not denied that the negotiations included discussions of the IIIT investigation and Mr. Kromberg.

Eastern District of Virginia ("EDVA") as a primary motivation for a non-cooperation agreement. Decl. of W. Moffitt, attached as Ex. B ¶¶ 6-7. Nevertheless, in mid-March 2006, AUSA Kromberg "applied to the DOJ Office of Enforcement Operations ("OEO") for authorization to seek an ordering compelling Dr. Al-Arian's grand jury testimony in EDVA." (Dkt. No. 103 at 21.) Dr. Al-Arian and his attorneys were not notified of these actions until the most recent government filing in this case. (*Id.*)

After significant discussions, Dr. Al-Arian and the government came to terms on the plea agreement on February 28, 2006. This agreement provided that the government would recommend the low end of the guidelines range, that Dr. Al-Arian would be deported upon completion of his sentence, and that the government would expedite the deportation.[3] Ex. A ¶¶ 10-12. At the request of Dr. Al-Arian's attorneys, the government removed the standard cooperation provision found in the vast majority of plea agreements used in the Middle District of Florida.[4] The removal of cooperation provisions had been the "most significant issue" for Dr. Al-Arian during the negotiations. Ex. B. ¶ 3. Dr. Al-Arian, through his attorneys "made clear that he would never agree to a plea agreement that contained any cooperation agreement." Ex. A ¶ 4.

Before the plea was entered and finalized in court, "prosecutors who negotiated the plea

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[3] In Dr. Al-Arian's April 14, 2006 change of plea hearing, Magistrate Judge McCoun informed Dr. Al-Arian that he would not be deported immediately upon completion of his criminal sentence. *See U.S. v. Al-Arian*, Case No. 8:03-cr-77-T-20TBM, M.D. Fla., Tr. of Apr. 14, 2006 hearing, at 32-33 ("And you understand the status of the deportation issue? I think in the law "expedited" is a relative term, and it may not be tomorrow. As you've seen in the case of Mr. Hammoudeh, it may be a matter of months.").

[4] The government has conceded this point. (Dkt. No. 92, Tr. of Feb. 5, 2009 Hearing, at 30) ("**We don't disagree that there was a plea agreement that had a cooperation clause in there** -- I never saw it -- and that as a result of negotiations, that clause was taken out, and I don't disagree that it was taken out because Mr., Mr. Turley's client wanted it taken out, and then we have the plea agreement that we have.") (emphasis added).

agreement with [Dr.] Al-Arian in MD FL learned of [Kromberg's] application to OEO for authority to seek an immunity order for Al-Arian. MD FL expressly opposed the request at that time and OEO deferred consideration of EDVA's application." (Dkt. No. 103 at 21.) [5] Again, neither Dr. Al-Arian nor his defense team were notified of these facts until the most recent government filing.

Dr. Al-Arian entered his plea on April 14, 2006 in a closed hearing. The plea bound the Department of Justice, the Middle District of Florida, and the Eastern District of Virginia. Although the parties to the plea agreement expected Dr. Al-Arian to receive a minimum sentence, they also understood that the Middle District of Florida could impose a longer sentence and that Dr. Al-Arian would not be released immediately even if he received the recommended sentence. (*See id*. at 21 (noting that Dr. Al-Arian would have been released in "June or July" if the Middle District of Florida had accepted the government's sentencing recommendations)).

On May 1, 2006, U.S. District Court Judge James Moody sentenced Dr. Al-Arian to the maximum amount of time allowable under the guidelines – 57 months – thereby delaying Dr. Al-Arian's ultimate deportation by more than a year. AUSA Kromberg made known that he believed the deal had been a "bonanza" for Dr. Al-Arian and later said that he believed Dr. Al-Arian "fooled" everyone. Ex. C, Dec. of J. Fernandez, ¶ 5. Within days of the sentencing, AUSA Kromberg obtained an order immunizing Dr. Al-Arian and compelling him to testify before a grand jury in the EDVA on May 10, 2006. (*See* Dkt. No. 103 at 22.)

Because he felt that such an order violated the plea agreement, Dr. Al-Arian filed a motion in the EDVA to quash the grand jury subpoena, asserting that his plea agreement protected him from cooperating and being required to testify before a grand jury in the EDVA.

[5] It is unclear why this request was denied. It is logical to conclude, however, that negotiators thought such information might derail the plea agreement.

Instead of rendering a decision on Dr. Al-Arian's motion, the District Court ordered Dr. Al-Arian to re-file his motion in the Middle District of Florida. Dr. Al-Arian filed a motion in the Middle District of Florida to enforce the 2006 plea agreement. Dr. Al-Arian included with this filing a declaration, made under penalty of perjury, from Linda Moreno, who served as co-counsel for him in the Florida proceedings and participated in the plea negotiations after the December 6, 2005 acquittals. *See* Ex. A. This declaration made clear that, "from the outset" Dr. Al-Arian's position on non-cooperation was made plain to the government. *Id*. ¶ 4. Moreover, the government "never asserted that Dr. Al-Arian could be forced to cooperate under the plea agreement or would be expected to do so voluntarily." *Id*. ¶¶ 2, 4.

The defense also included a declaration from Dr. Al-Arian which stated that Dr. Al-Arian:

> made clear to [his] attorneys, and they in turn made clear to the government, that under no circumstances would [he] provide cooperation, in any form, to the government" and that "it was [his] clear understanding that [he] would not be called upon by the government to provide cooperation in any fashion and this was a key motivation in [his] execution of the plea agreement.

*See* Ex. D ¶¶ 7-8. Despite these facts, and without holding an evidentiary hearing, Judge Moody denied Dr. Al-Arian's motion. Dr. Al-Arian appealed to the Eleventh Circuit, which affirmed the District Court's ruling on January 25, 2008. *United States v. Al-Arian*, 514 F.3d 1184 (11th Cir. 2008).

In the meantime, AUSA Kromberg was successful in convincing the Court to hold Dr. Al-Arian in civil contempt for over a year for refusing to testify before the grand jury. Ultimately, Dr. Al-Arian voluntarily answered written questions by submitting two sworn declarations that outlined all he knew about the IIIT topics raised by the government in communications with Dr. Al-Arian's counsel. Dr. Al-Arian even offered to take a polygraph test

to show that he was not withholding information on these questions. Moreover, the day before the indictment, the government assured counsel that Dr. Al-Arian's answers had laid a foundation for the final resolution of the case and that the government was prepared to reach a final compromise. On June 26, 2008, the very next day, without warning to the defense, AUSA Kromberg secured an indictment of Dr. Al-Arian.

Since the indictment, this Court has recognized that this case presents a "unique factual situation." (*See* Dkt. No. 83, Tr. from Jan. 16, 2008 Hearing, at 13.) The parties submitted numerous pre-trial motions and extensively briefed the problems and troubling nature of the immunity orders used by AUSA Kromberg in this case. (*See* Dkt. Nos. 16-105.) Recognizing that once the proceedings against Dr. Al-Arian became criminal in nature the case became a "different ball game," this Court sought greater detail about the negotiations regarding the plea agreement. (Dkt. No. 92 at 9.) The Court stated that such information was "extremely important." (*Id*. at 8.) The Court explicitly asked the government to produce evidence on this point, stating that it was "interested in hearing from the government's own people exactly what was going on and what -- when these discussion about cooperation or testimony or whatever came up, how they came up, what was being discussed." (*Id*. at 11.)

In response, the defense produced two new affidavits from Dr. Al-Arian's trial counsel – one from Mr. Moffitt and a supplemental declaration from Ms. Moreno – that explicitly discussed the issues raised by the Court. (Dkt. No. 95; *see also* Exs. B and E ) Mr. Moffitt stated that the

> [t]he purpose of the plea agreement was to terminate all business between the United States and Dr. Al-Arian [and] that "the Justice Department, including the Counter-Terrorism section, knew that Dr. Al-Arian signed this agreement on its express understanding that he would not be expected to testify in any existing or future cases and he only signed the agreement on the basis of that understanding.

Ex. B ¶¶ 19, 22.

The government produced no evidence or affidavits. In response, the defense sought to compel discovery on this issue, having first requested it on July 30, 2008. (*See* Dkt. No. 88.) The Court granted this Motion (Dkt. No. 91), ordered the government to produce all *Brady* and Rule 16 material, and described the lack of evidence provided by the government on the plea negotiations as a disturbing "hole in the case." (Dkt. No. 92 at 8-9.)

Instead of complying with the Court's order or responding to the defense's requests, the government sought reconsideration of the Court's ruling. (*See* Dkt. No. 93.) The Court denied the government's motion to reconsider and stated "I have evidence under the penalty of perjury from defense counsel, and I have no evidence, I have only representations from the United States." (*See* Dkt. No. 98, Tr. from Feb. 20, 2009 Hearing, at 13-14.) Moreover, the Court observed that "there's a very significant cloud over this criminal prosecution" because

> the Counterterrorism Unit involved in the actual negotiations of the plea agreement and, as I said last time, that same unit, that same section having to have been in the pipeline of approving the request to get immunity orders, and given the fact that I have representations from defense counsel that it was their understanding that the deal they worked out did not involve Dr. Al-Arian being subject to being a witness in any matter relating to the IIIT investigation.

(*Id*. at 14.)

At the February 20, 2009 hearing, the Court again raised its discomfort over the plea agreement controversy and how it undermined the criminal case: "The *Santobello* issue in this case is, in my view, absolutely critical. Defense counsel have to be able to negotiate in good faith with the Department of Justice." (*Id*.) The Court gave the government another opportunity to offer substantive evidence to rebut the evidence put forward by the defense: "I think the integrity of the Justice Department and the integrity of the criminal justice plea bargaining process is too significant to just let it die on the vine given the nature of the record before this

Court." (*Id.* at 15.)

At the request of the government, the Court granted the government until March 4, 2009 to respond to its order compelling discovery. (Dkt. No. 101.) The government proceeded to file a document that was yet another motion for reconsideration of the denial of the prior reconsideration motion. The government did, however, add a few pages that presented the "collective knowledge" of the prosecutors while continuing to deny any direct statements or declarations from DOJ officials like Alice Fisher or Counter-terrorism branch prosecutor Cherie Krigsman. (Dkt. No. 103 at 17-24.) As discussed more fully below, the government's general disclosures, however, included new evidence that was never given to the trial court in Tampa or either the Eleventh or Fourth Circuits. This includes, but not limited to, ten new factual disclosures including that, before the plea was finalized, the trial prosecutors were informed of (and indeed objected to) EDVA compelling the testimony of Dr. Al-Arian.

At the March 9, 2009 hearing, the Court closely questioned the government about these new disclosures. Moreover, AUSA Kromberg admitted that he had been given information from the sealed plea agreement in the spring of 2006, before the EDVA was added to the plea agreement, despite the fact that he was not counsel of record in the case – a disclosure that the Court stated was very troubling and appeared to violate court rules governing such sealed material. (Dkt. No. 108, Tr. of Mar. 9, 2009 Hearing, at 6-7.)[6]

To date, the government has not produced a single page of evidence to the defense or to the Court related to the negotiations that gave rise to the plea agreement.

[6] Mr. Kromberg also conceded that the "the plea agreement . . . bound the Eastern District of Virginia" and that they were substantially involved in the process because of their interest in compelling Dr. Al-Arian's testimony. (Dkt. No. 108 at 6.) Previously, Mr. Kromberg had denied that the EDVA was bound by the agreement as opposed to the Florida prosecutors and the Counterterrorism Section. (*See, e.g.,* Dkt. No. 74, Tr. of Aug. 8, 2008 Hearing, at 1-2) ("we think we were not officially bound by that agreement.")

## ARGUMENT

### I. The Indictment Should Be Dismissed Because the Compulsion Orders Violate the 2006 Florida Plea Agreement.

The Supreme Court has recognized that the government is obligated to comply with promises extended to induce a defendant to plead guilty to a criminal offense. *Santobello v. New York*, 404 U.S. 257, 262 (1971). The *Santobello* court held 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." *Id*. at 262. The government violates the due process rights of a defendant by failing to comply with the "express or implied terms of a plea agreement." *United States v. Martin*, 25 F.3d 211, 217 (4th Cir. 1994); *see also United States v. Harvey*, 869 F.2d 1439, 1443 (11th Cir. 1989).

#### A. Parol Evidence In This Case Is Essential to Evaluating The Alleged *Santobello* Violation.

When evaluating whether the government has committed a *Santobello* violation by breaching a plea agreement, courts undertake a process similar to private commercial contract interpretation. Courts, however, have recognized that the analogy between commercial contracts and plea agreements "should not be taken too far" for two reasons. *See United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990).

First, plea agreements raise constitutional issues not present in private contract disputes. *See United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) ("the defendant's underlying 'contract' right [in a plea agreement] is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law"). Specifically, courts must ensure that a defendant's guilty plea represents the defendant's "voluntarily, knowing, intelligent act" and that it was offered to the defendant "with sufficient awareness of the likely consequences" for such agreement "[t]o constitute a valid waiver of substantial

constitutional rights." *In re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986) (refusing to apply a "hyper-technical reading" of, or take "'a rigidly literal approach in the construction of language'" in a written plea agreement because of such constitutional concerns (citations omitted)); *see also Harvey*, 791 F.2d at 301 ("Unlike the private contract situation, the validity of a bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant -- and not his counsel -- enters the bargained plea."). In the March 9, 2009 hearing, this Court recognized that the constitutional mandate that a defendant's decision to plead guilty be a knowing, voluntary, and intelligent act requires courts to determine the true intent and understanding of the parties with respect to the plea agreement and not strictly apply commercial contract law principles in this context. This Court noted that:

> a plea bargain is, in essence, a contract, and to some degree, contract rules such as parol evidence rules, are not inappropriate at times, but we have to always remember that a plea bargain is more than just a contract, because the issues at stake from a defendant's standpoint are his or her individual liberty.

(Dkt. No. 108 at 29.)

Second, courts do not strictly apply the rules of commercial contract interpretation when evaluating plea agreements because the government must adhere to promises made to defendants during plea negotiations to maintain the integrity of the justice system. The Fourth Circuit, in *Harvey*, stated that the application of commercial contract rules to a plea agreement should be tempered not only as result of the defendant's individual constitutional rights at stake, but also because:

> the courts' concerns run even wider than protection of the defendant's individual constitutional rights-to concerns for the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government."

791 F.2d at 300, quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972). The *Harvey* court also stated that "both constitutional and supervisory concerns require holding the

Government to a greater degree of responsibility than the defendant (or possibility than would be either of the parties to commercial contracts) for imprecision or ambiguities in plea agreements." *Id*. This Court likewise observed in the March 9, 2009 hearing that the need to maintain the integrity of the justice system precludes strict application of the rules of commercial contract interpretation when considering plea agreements. The Court noted that "I think there are significant questions about what actually happened, and as I've said, the Justice Department, you know, it's not a fishmonger. It's the Department of Justice. The Department of Justice ought to always negotiate in complete good faith." (Dkt. No. 108 at 14.). Subsequently in the hearing, the Court noted that "I think there's something more important here, and that is the integrity of the Department of Justice when it gets involved in plea bargaining." (*Id*. at 28.)

Based on these dual concerns, courts do not apply the parol evidence rule when interpreting plea agreements where there is ambiguity within the plea agreement or evidence of government overreaching. *See Harvey,* 791 F.2d at 300; *see also United States v. Copeland*, 381 F.3d 1101, 1105 (11th Cir. 2004). This Court has correctly observed that the uncontradicted evidence presented by Dr. Al-Arian about the circumstances surrounding his 2006 plea negotiations requires the examination of extrinsic evidence on the issue of whether the government's actions in seeking Dr. Al-Arian's compelled grand jury testimony in this District violated the government's promises that induced Dr. Al-Arian's plea. (*See* Dkt. No. 108 at 10, 14, 28-30).

Dr. Al-Arian's Florida trial counsel, Mr. Moffitt and Ms. Moreno, have both provided sworn declarations demonstrating that the government induced Dr. Al-Arian to plead guilty in Florida in exchange for a promise that the agreement would end all business between Dr. Al-Arian and the U.S. Department of Justice, including barring any compelled testimony by Dr. Al-

Arian. *See* Ex. B, ¶¶ 16, 19-20; Ex. A ¶¶ 9-10; Ex. E ¶ 10. Dr. Al-Arian, under penalty of perjury, has also declared that "[t]he overarching purpose of the plea agreement was to bring to an end all business with the government regarding their investigation of me and my family, and since I could no longer live in the United States, to expedite my deportation. These were the key inducements in my decision to enter the plea agreement with the government." *See* Ex. D ¶ 5.

Ms. Moreno stated, in her initial declaration, that Dr. Al-Arian's position, from the outset of the plea negotiations with the officials from the United States Attorney's office for the Middle District of Florida and the Counterterrorism branch of the Department of Justice, was that he would not cooperate with the government and that "the government never rejected the defense's stance on this issue and it never asserted that Dr. Al-Arian could be forced to cooperate under the plea agreement or would be expected to do so voluntarily." Ex. A ¶¶ 2, 4. In his declaration, Mr. Moffitt stated that "the IIIT investigation and the use of the grand jury subpoenas by Gordon Kromberg were discussed" during the negotiations with officials from the United States Attorney's office for the Middle District of Florida and the Counterterrorism branch of the Department of Justice and that Mr. Kromberg's interest in Dr. Al-Arian's compelled testimony was Mr. Moffitt's "main reason for insisting that the agreement not include a cooperation provision." Ex. B ¶ 6. Dr. Al-Arian noted in his declaration that the government's promise that he would not have to cooperate "in any fashion" with the government "was a key motivation in my execution of the plea agreement." Ex. D ¶ 7.

Mr. Moffitt clarified that Dr. Al-Arian's position on non-cooperation included his "refusal to provide any information, whether sought by compulsion or not, on other individuals being investigated by the United States government or by foreign governments including testimony to a grand jury pursuant to a compulsion order." Ex. B ¶ 11. Dr. Al-Arian's

understanding of the plea agreement was that it required the government to expedite his deportation once his criminal sentence was completed and barred any component of the Department of Justice from seeking to compel his testimony. *See* Ex. D ¶ 5, Ex. E ¶ 4. As explained by Mr. Moffitt, "the plea bargain was designed to be the end of Dr. Al-Arian's involvement with the U.S. government. There were to be no grand jury subpoenas, no proffer agreements, no further briefings or discussions. The only thing left was for Dr. Al-Arian to be deported." Ex. B ¶ 20. Ms. Moreno has also given a detailed account of her negotiations with prosecutors, often separate from Mr. Moffitt. Like Mr. Moffitt, she has declared under penalty of perjury that the negotiations turned on the critical issue of future non-cooperation with the Justice Department. This earlier declaration is now supported by contemporaneous notes located by Ms. Moreno recently. These notes from February 7, 2006 marked "Plea Discussions" describe the discussions with the prosecutors about other jurisdictions pursuing Dr. Al-Arian's testimony, noting "CK [Cherie Krigsman] does not know of anyone else, in any other jurisdiction, who is interested in sami."[7]

The government has produced no evidence contradicting these declarations demonstrating that the government promised to end all of its business with Dr. Al-Arian, including agreeing not to compel his grand jury testimony in the future, in exchange for his plea. While the government has failed to submit any declarations from the prosecutors involved in the plea negotiations, it has inadvertently added new evidence that would have been highly material to both the Tampa court, the Eleventh Circuit proceedings, and the civil contempt proceedings in this jurisdiction. The government revealed in its March 4, 2009 filing that the EDVA USAO, in

[7] If the Court wishes to review this contemporaneous note, the defense is prepared to submit it with proper protections for confidentiality and work produce privileges.

mid-March 2006, applied to the DOJ OEO for authorization to seek an order compelling Dr. Al-Arian's grand jury testimony in EDVA. (Dkt. No. 103 at 21.) The government then noted that:

> At some point after the plea agreement was signed but before it was entered in court [on April 14, 2006], prosecutors who negotiated the plea agreement with [Dr.] Al-Arian in MD FL learned of this district's application to OEO for authority to seek an immunity order for Al-Arian. MD FL expressly opposed the request at that time and OEO deferred consideration of EDVA's application. The government attorneys who negotiated the plea agreement in Florida expected when the plea was entered that EDVA would not subsequently be able to obtain Al-Arian's compelled testimony.

(*Id*. at 21.) These revelations raise questions about why the M.D. District of Florida prosecutors objected to the USAO EDVA's March 2006 request and why Main Justice denied it, and why the attorneys who negotiated the plea agreement, which included attorneys from the Middle District of Florida and Main Justice, believed that EDVA could not compel Dr. Al-Arian's testimony.

These revelations also suggest that after Judge Moody's sentence of Dr. Al-Arian to 57 months incarceration rather than 46 months as recommended by the government, the government decided to take advantage of the lack of explicit language in the plea agreement regarding cooperation to compel Dr. Al-Arian's testimony contrary to its oral promise to Dr. Al-Arian during the plea negotiations.[8] Where there is such evidence of government overreaching, "the written agreement should be viewed 'against the background of the negotiations' and should not

[8] The disclosure also raises concern about the government's conduct in the plea negotiations even prior to Dr. Al-Arian's change of plea on April 14, 2006. In her initial declaration, Ms. Moreno stated that she spoke on February 7, 2006 with AUSA Cherie Krigsman about a number of issues, including the "global aspect of the plea agreement." Ex. A ¶ 7. Ms. Moreno noted that Ms. Krigsman "indicated she did not know of anyone else, in any other jurisdiction, 'who is interested in Sami.'" *Id*. The government's March 4, 2009 filing indicates that the attorneys involved with the plea negotiations learned of EDVA's application for approval of a compulsion order within two months of Ms. Moreno's conversation with Ms. Krigsman and prior to Dr. Al-Arian's change of plea. (Dkt. No. 103 at 21.) No one from the government informed Dr. Al-Arian or his attorneys of this development despite the clear evidence that Dr. Al-Arian's desire to end all of his business with the U.S. Department of Justice was a central requirement for him to accept the plea arrangement.

be interpreted to 'directly contradict[t] [an] oral understanding.'"[9] *Jefferies*, 908 F.2d at 1523, quoting *In re Arnett*, 804 F.2d at 1203. Thus, this Court should hold that the government committed a *Santobello* violation by seeking to compel Dr. Al-Arian's testimony if it finds that the government in good faith failed to live "up if not to the express, to the implied understanding of the parties when they negotiated this plea agreement." (Dkt. No. 108 at 10.)

### B. The Government Committed a *Santobello* Violation by Seeking to Compel Dr. Al-Arian's Testimony Despite An Oral Agreement that Dr. Al-Arian's Plea Ended All His Dealings with the U.S. Department of Justice.

Based on the uncontraverted evidence before this Court, it is clear that the government made a material promise to end all of the Department of Justice's dealings with Dr. Al-Arian to induce his plea, including barring the Department of Justice from seeking compelled testimony from Dr Al-Arian in the future. The government committed a *Santobello* violation by seeking

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[9] Although Section 10 of Dr. Al-Arian's plea agreement contained an integration clause, this Court should still consider extrinsic evidence when interpreting the agreement because there is evidence of government overreaching. *United States v. White*, 366 F.3d at 293, 299-300 (4th Cir. 2004); *see also United States v. Singleton*, 1995 WL 66792, 47 F.3d 1177, at **2-4 (9th Cir. Feb. 16, 1995) (unpublished table decision). In *White*, the written plea agreement, which included an integration clause, did not state that the defendant's plea was conditional. 366 F.3d at 293. Noting that "[p]roof of the Government's refusal to abide by such an oral promise [that defendant could conditionally plead] would clearly constitute evidence of 'government overreaching' or 'fraud in the inducement,' admissible without running afoul of the parol evidence rule," the *White* court remanded the case for an evidentiary hearing on the issue of whether the government made an oral promise that the plea was conditional, based on the defendant's uncontradicted sworn allegation that the government made such a promise. *Id*. at 295, 299-300. The unfilled promise of the government not to require future cooperation from Dr. Al-Arian identified in the declarations of Mr. Moffitt and Ms. Moreno constitutes similar evidence of government overreaching.

In addition, this Court has recognized that there is ambiguity with respect to the integration clause because an additional inducement for Dr. Al-Arian's plea not explicitly stated in the plea agreement – that the USAO for the Eastern District would be barred from prosecuting Dr. Al-Arian for crimes known at the time of the agreement – was discussed during the April 14, 2006 change of plea hearing before Magistrate Judge McCoun. (*See* Dkt. No. 92 at 11) ("[W]e know from the plea colloquy, despite the integration clause in the written plea agreement, there was, in fact, an additional plea agreement. It was orally put on the record. There's nothing wrong with that, but it shows again that a pure literal reading of just the four corners of the plea agreement would not be accurate.").

Dr. Al-Arian's compelled testimony in this jurisdiction in violation of this promise and as a result Judge Lee's compulsion orders of January 10, 2007 and February 29, 2008 are invalid. This Court should dismiss the indictment because Judge Lee's orders were invalid.

The Fourth Circuit, in *United States v. Garcia*, held that the government committed a *Santobello* violation based on facts analogous to those in this case. 956 F.2d 41 (1992). The *Garcia* court found that the government committed a *Santobello* violation by seeking to compel grand jury testimony in violation of a non-cooperation agreement that was not included within the defendant's written plea agreement. *Id*. at 44-45. The government offered Garcia a plea arrangement that did not require Garcia to cooperate with law enforcement after Garcia rejected a plea arrangement that would have required him to cooperate to law enforcement but called for a shorter recommended sentence. *Id*. at 42. While the government confirmed in a letter that non-cooperation was a term of the plea agreement, the written plea agreement did not include a non-cooperation clause. *Id.*

The Court notably did not make a finding that the written plea agreement was ambiguous. Indeed, the *Garcia* court refused to apply the parol evidence rule because it found that non-cooperation was a term of Garcia's agreement with the government even if it was not in the actual agreement. *Id.* at 44. The Court viewed the matter as raising the same type of integrity issues that the Court raised in the last hearing. The *Garcia* court held that the government should not be permitted to benefit from the parol evidence rule "to profit from an omission in a contract it prepared" potentially as a result of governmental overreaching and that the Court "cannot countenance such unfair dealing." *Id.* ("[T]he omission of the 'no cooperation' promise in the formal agreement could only be due to governmental overreaching, inadvertent omission, the

dereliction of defense counsel, or some combination of those factors. None of these would justify the government of its promise.").

Dr. Al-Arian has presented uncontroverted evidence of similar unfair dealing in this case. As evidenced by the declarations of Mr. Moffitt and Ms. Moreno, the government agreed that the Florida plea agreement would end all of Dr. Al-Arian's business with the U.S. Department of Justice and the government would not require any cooperation from him. *See* Ex. B ¶¶ 16, 19-20, Ex. A ¶¶ 9-10, Ex. E ¶ 10. Mr. Moffitt stated that "the amount of time that Dr. Al-Arian would likely have to serve was lengthened due to his refusal to agree to the standard cooperation provision." Ex. B ¶ 10. Like in *Garcia*, the government breached its promise by seeking to compel Dr. Al-Arian's testimony despite the non-cooperation agreement.

Notably, the court in *Garcia* also rejected any distinction between voluntary and involuntary cooperation, expressly finding that the non-cooperation agreement relieved the defendant both from providing voluntary cooperation and barred the government from seeking compelled testimony from the defendant.[10] 956 F.2d at 45 ("In short, there is no general rule that, as a matter of law, 'cooperate' in a plea agreement means only 'voluntary' cooperation. . . . We think it perfectly plausible that Garcia would trade five years of freedom for the privilege of remaining silent, but absurd that he would sacrifice that time merely to force the government to send him a subpoena."); *see also Singleton*, 1995 WL 66792 at *3 ("Singleton has testified that he understood cooperation to include revealing and testifying against co-participants in his

[10] This Court likewise observed in the February 5, 2009 hearing that "I suspect if we were to ask ten experienced defense attorneys and prosecutors as to what their understanding of what cooperation really means as it – in a practical world, it means you're not going to have to provide information to the government, whether it's compelled or voluntary isn't the issue." (Dkt. No. 92 at 10.)

offenses. Singleton's understanding of 'cooperation' to include compelled testimony is plausible as the *Garcia* court found").

The evidence in the instant case also demonstrates that the parties understood that the government's no-cooperation promise included a bar from seeking compelled testimony. In his declaration, Mr. Moffitt explained that Dr. Al-Arian's "position on non-cooperation included his refusal to provide any information, whether sought by compulsion or not, on other individuals being investigated by the United States government or by foreign governments including testimony to a grand jury pursuant to a compulsion order." Ex. B ¶ 11. He also noted that "[w]hen the government seeks an agreement on cooperation, it obviously means potential testimony in future cases. It was understood by all attorneys in these meetings that we were talking about any and all cooperation, including testimony." *Id.* ¶ 12.

Moreover, this Court should find that the non-cooperation agreement barred the government from compelling Dr. Al-Arian's testimony regardless of the government's understanding of the scope of this promise. The Fourth Circuit has held that ambiguities with respect to the government's promises inducing a plea must be read against the government. *See Garcia*, 956 F.2d at 45 (holding that non-cooperation agreement must be read to bar compelled testimony "[i]nasmuch as *Harvey* requires the government to bear the burden of this ambiguity" as to the meaning of the term "cooperate"); *see also Harvey*, 791 F.2d at 303 (holding that where there was an "honest conflict of understandings and intentions" with respect to an ambiguous clause of a plea agreement, the clause must be read against the government). The Eleventh Circuit applied this same standard when reversing a district court's ruling that the government did not violate a plea agreement that stated that the "defendant will not be charged in federal court in the Southern District of Alabama with any other criminal acts resulting from information

provided by him to the government pursuant to this agreement as long as all information he provides is truthful and complete" by charging the defendant with a gun charge before the government granted him a debriefing opportunity. 381 F.3d at 1103, 1106. The *Copeland* court found that the plea "agreement suffers not from ambiguity in the usual sense but from the omission of language to specifically address" whether the government was obligated to debrief the defendant prior to bringing the gun charge. *Id*. at 1107. To resolve this question, the *Copeland* court remanded the case to the district court for a determination of whether the defendant "reasonably understood the government to be promising an opportunity to be debriefed and to thereby immunize himself against the imminent gun charge." *Id*. at 1109. This Court should find that the non-cooperation promise barred the government from seeking Dr. Al-Arian's compelled testimony because the evidence is clear that Dr. Al-Arian reasonably understood the promise to have that meaning and the government is bound by this understanding. Specifically, Ms. Moreno stated that Dr. Al-Arian "knew and understood the concept of 'cooperation' to include, among other things, testimony before any future grand jury because both Mr. Moffitt and I fully explained it to him in this manner."[11] Ex. E ¶ 4.

With the new disclosures produced in the criminal proceedings, it is clear that Dr. Al-Arian cannot be compelled to testify. Accordingly, the compulsion orders of January 10, 2007

[11] Based on this same reasoning, the government's non-cooperation promise bound the entire Department of Justice, including the USAO for the EDVA. The *Harvey* court held that "[it] is the Government at large-not just specific United States Attorneys or United States *Districts*'- that is bound by plea agreements negotiated by agents of Government." 791 F.2d at 303. Both Mr. Moffitt and Ms. Moreno, in their declarations, stated that the parties intended for the plea agreement to bar the United States Department of Justice as a whole and not just some subset of the Department. Ex. B ¶¶ 19-20, Ex. A ¶¶ 5-8, Ex. E ¶ 10. Moreover, Dr. Al-Arian has provided a sworn statement that he understood the reference to the USAO EDVA during the April 14, 2006 plea hearing to confirm that USAO EDVA was bound by the agreement prohibiting the government from "calling [him] to testify before the grand jury investigating IIIT." Ex. D ¶ 8. Thus, the evidence establishes that Dr. Al-Arian reasonably believed that the non-cooperation promise bound the USAO EDVA.

and February 29, 2008 are invalid and cannot be used as a basis for prosecution. In *Singleton*, the Ninth Circuit affirmed the district court's finding based on parol evidence that non-cooperation was a term of the defendant's plea agreement despite the fact that the plea agreement itself was not ambiguous and was silent with respect to cooperation. 1995 WL 66792 at 2-4. The *Singleton* court held that "the terms of Singleton's plea agreement, as supplemented by parol evidence, restrict the Government from compelling Singleton's testimony" and affirmed the district court's order refusal to issue a civil contempt order against the defendant. *Id.* at *4.

*Garcia* and *Singleton* demonstrate that compulsion orders are unlawful if the government is barred by a plea agreement from compelling the individual's testimony. *See also United States v. Pearce*, 792 F.2d 397, 400 (3d Cir. 1986) ("If the terms of the plea bargain protected Pearce from having to testify, then the order compelling him to testify was invalid."). The Fourth Circuit has held that "an essential element of contempt of court under § 401(3) is that the court enter a '**lawful** order.'" *United States v. Tigney*, 367 F.3d 200, 202, n.3 (4th Cir. 2004) (emphasis added); *see also United States v. Bostic*, No. 94-5462, 1995 U.S. App. LEXIS 15515, at *10 (4th Cir. June 21, 1995). Accordingly, the government cannot prove an essential element of the offense of criminal contempt because the compulsion orders were unlawful. This Court therefore should dismiss the indictment.

### C. Prior Proceedings Connected With Dr. Al-Arian's Civil Contempt Do Not Bar Dismissal of the Indictment.

The government has repeatedly sought to get the Court to reconsider its prior orders and to bar any consideration of the new evidence in this case as barred by prior civil proceedings. To date, Dr. Al-Arian has been deprived of the opportunity to have any court consider the uncontroverted evidence that the government induced his 2006 plea agreement by promising that the plea would end all his dealings with the Department of Justice and barred the government

from compelling his future testimony. That "hole" is particularly precarious when an individual faces a criminal judgment as opposed to a civil one.

When the government, on October 19, 2006, requested an order to hold Dr. Al-Arian in civil contempt, Judge Lee recessed the hearing to permit Dr. Al-Arian to file a motion to enforce the plea agreement in the Middle District of Florida. On November 6, 2006, the Middle District denied Dr. Al-Arian's motion to enforce the plea agreement, without consideration of any extrinsic evidence relating to the plea negotiation, based on the face of the plea agreement. In the March 9, 2008 hearing, this Court recognized this refusal of the Middle District to consider extrinsic evidence relating to the plea agreements when stating:

> Of course, you know, the unfortunate thing, and I would be much more comfortable with the status of this case if the government had not opposed an evidentiary hearing in Florida at the first instance, because these issues, it seems to me, should have been fully adjudicated in a full evidentiary hearing.

(Dkt. No. 108 at 14.) What is most troubling is that, with the new disclosures from the government, it appears that the government withheld evidence that was highly material to the understanding of the parties about whether the government indicated that Dr. Al-Arian would not have any further interaction with the Justice Department when he completed his sentence under the plea agreement.

Based on the trial court's denial of the motion to enforce the plea agreement, Judge Lee issued civil contempt orders against Dr. Al-Arian on November 16, 2006 and then again on January 22, 2007. Dr. Al-Arian appealed Judge Lee's civil contempt order to the Fourth Circuit, which affirmed the lower court ruling. *In re Grand Jury Subpoena v. John Doe A01-246*, 221 Fed.Appx. 250, 251 (4th Cir. 2007).[12] Subsequently, the Eleventh Circuit affirmed the denial of

[12] The Fourth Circuit mistakenly found that the Middle District of Florida denied the motion to enforce the plea agreement "[a]fter an evidentiary hearing." *Id*.

the Motion to Enforce the Plea Agreement without considering extrinsic evidence.[13] *Al-Arian*, 514 F.3d at 1191-94. The Eleventh Circuit declined to review this ruling *en banc* and the Supreme Court denied Dr. Al-Arian's petition for writ of certiorari. *United States v. Al-Arian*, Case No. 06-16008-EE, (11th Cir. Apr. 1, 2008); *Al-Arian v. United States*, 129 S.Ct. 288 (2008). Despite the fact that no Court has undertaken a review of the extrinsic evidence surrounding his plea negotiations (and critical evidence did not exist before the criminal proceedings), the government now contends that Dr. Al-Arian is barred in this new criminal matter from asserting, based on the new evidence now before this Court, that it committed a *Santobello* violation. (Dkt. No. 103 at 10-17.)

This Court was correct in refusing to bar discovery under a collateral estoppel theory. Collateral estoppel, or issue preclusion, is an equitable doctrine and this Court has broad discretion to decide whether to apply it. *See Maryland Cas. Co. v. ARMCO, Inc.*, 822 F.2d 1348, 1355 (4th Cir. 1987); *Rye v. United States Steel Mining, Co.*, 856 F.Supp. 274, 279 (E.D. VA 1994); *see also Evans v. Katalinic*, 445 F.3d 953, 956 (7th Cir. 2006). Application of the collateral estoppel doctrine in these circumstances could result in the Court permitting a *Santobello* violation to stand that Dr. Al-Arian has not been permitted to challenge based on the available extrinsic evidence. It would be inequitable and a miscarriage of justice for this Court to allow this criminal prosecution to proceed without permitting Dr. Al-Arian a full opportunity to address the government's alleged *Santobello* violation.

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[13] The Eleventh Circuit relied specifically on *Perdue* and *In re Altro*, 180 F.3d 372, 376 (2d Cir. 1999) in support of its ruling affirming the Middle District of Florida's decision. The *Altro* court found that the parol evidence rule was correctly applied because the plea agreement was unambiguous and "because the affirmation of Altro's attorney does not indicate that the Government here made any statement – oral or written – that could be construed as a 'no cooperation' promise." *Id.* Mr. Moffitt and Ms. Moreno, however, have submitted declarations that present evidence of such an oral non-cooperation promise that was not subsequently incorporated into the written agreement.

Dr. Al-Arian also should not be collaterally estopped from asserting that the government committed a *Santobello* violation by seeking to compel his testimony because there is new evidence before this Court on this issue that has been not previously considered. Courts have held that application of the collateral estoppel doctrine is inappropriate in circumstances where there is new evidence that was not previously considered. *See, e.g, Evans*, 445 F.3d at 956, *Rye*, 856 F.Supp. at 279. Here, the government presented new evidence in its March 4, 2009 filing that this Court has recognized may provide support for Dr. Al-Arian's assertion that the government committed a *Santobello* violation. Specifically, this Court observed that "I think the factual representations by the government in its papers, if anything, did make the case even more problematic."[14] (Dkt. No. 108 at 28.)

Moreover, this Court is not restrained by the law of the case doctrine from considering whether Judge Lee's orders are invalid based on Dr. Al-Arian's plea agreement because of the

[14] In fact, the government, during the March 9, 2009 hearing, asserted a novel argument in support of its position that no *Santobello* violation occurred, to attempt to respond to the new evidence. The newly disclosed fact that the "MD FL expressly opposed" EDVA's application for authority to seek a compulsion order against Dr. Al-Arian prior to entry of Dr. Al-Arian's plea supports the evidence in Mr. Moffitt and Ms. Moreno's declarations that the parties to Dr. Al-Arian's plea negotiations understood that the government had promised to end all of Dr. Al-Arian's business with the Department of Justice as a condition of the plea. (Dkt. No. 103 at 21.)

The government attempted to negate this logical inference from the new evidence by arguing that Middle District of Florida's position was merely based on the expectation that there would be no time for EDVA to seek Dr. Al-Arian's testimony assuming that the Florida trial court accepted the government's sentencing recommendation and that there was nothing in the plea agreement that barred the government from seeking Dr. Al-Arian's testimony once "an intervening event"– the 57 month sentence rather than the 46 months recommended by the government - occurred. (Dkt. No. 108 at 11-12.) The government's new argument does not provide a plausible explanation why the MD FL would have objected to EDVA's application had there not been a promise to end all business between Dr. Al-Arian and the Department of Justice because 1) at the time of MD FL's objection, that office was well aware that the Florida court could have sentenced Dr. Al-Arian for longer than the 46 months, and 2) EDVA would have had time to seek Dr. Al-Arian's testimony prior to deportation even if he had only been sentenced to 46 months because his sentence would not have been completed "until June or July" 2006, more than a month after his May 1, 2006 sentencing. (Dkt. No. 103 at 21.)

new evidence surrounding the plea negotiations. Courts have held that they are not bound by the law of the case when there is new evidence material to the issue in question. *See Smith v. North Carolina*, 528 F.2d 807, 810 (4th Cir. 1975) (stating that the district court was not bound by law of the case when material new evidence was provided); *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985) ("while a district judge should carefully consider the propriety of re-examining a prior ruling of another district judge in the same case, when good reasons for doing so appear (such as new evidence or controlling law, or clear error), the 'law of the case' doctrine must yield to rational decision-making"). In the course of reviewing the pre-trial motions, this Court has now reviewed five declarations and new disclosures from both the government and defense raising serious questions about the understanding of the parties behind the plea agreement. The new evidence is material to the criminal charges and the government repeated claims of estoppel are little more than an invitation for willful blindness of the troubling questions raised before this Court.

In addition, this Court, in accordance with the law of the case doctrine, may reach a different ruling on the validity of immunity orders to prevent the "manifest injustice" of affirming the government's *Santobello* violation. *See Arizona v. California*, 460 U.S. 605, 618 n. 8 (1983) (holding that, under the law of the case doctrine, "it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice").

The collateral bar rule raised by the government also does not preclude this Court from considering whether the compulsion orders are invalid because the government violated his plea agreement by compelling Dr Al-Arian's testimony. The collateral bar rule does not prohibit a criminal contempt defendant from challenging the invalidity of an order when compliance with

the order would have required the defendant to surrender a constitutional right or other right that cannot be restored if waived or where the order is transparently invalid. *See In re Novak*, 932 F.2d 1397, 1401-02 & n.7 (stating that the collateral bar rule does not apply where order requires "an irretrievable surrender of constitutional guarantees," surrender of other rights that would cause "'irreparable injury,'" or when the order is "transparently invalid") (quoting *In re Grand Jury Proceedings*, 601 F.2d 162, 169 (5th Cir. 1979); *United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972) (noting that the collateral bar rule does not apply when the order requires "an irretrievable surrender of constitutional guarantees"). The government violates due process by failing to comply with a plea agreement. *See Martin*, 25 F.3d at 217; *Harvey*, 869 F.2d at 1443. Dr. Al-Arian cannot be prevented by the collateral bar doctrine from asserting in this criminal contempt case that his plea agreement restricted the government from compelling his testimony because he would have irretrievably surrendered his constitutionally based right to enforce the government's non-cooperation promise had he testified in compliance with Judge Lee's compulsion orders.[15]

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[15] Contrary to the government's assertion, *Pearce* also does not suggest that Dr. Al-Arian is barred from challenging the validity of Judge Lee's orders based on his plea agreement. The *Pearce* court vacated a criminal contempt conviction against the defendant because the trial court had refused to permit the defendant to present evidence challenging the validity of the court's order based on his plea agreement. 792 F.2d at 403.

While not referring specifically to the collateral bar rule, the *Pearce* court found that defendant was not bared from challenging the validity of the underlying order because compliance with the order would have caused the defendant irreparable harm. *Id.* at 301 n.5. Pearce would have suffered irreparable harm by complying with the immunity order because he would have provided testimony barred by his plea agreement. The *Pearce* court observed that the defendant could challenge the underlying order collaterally in the criminal contempt case because "Pearce's unwillingness to testify in violation of his plea agreement is analogous to an individual invoking the Fifth Amendment privilege." *Id.*

## II. The Case Against Dr. Al-Arian Should Be Dismissed on the Basis of Insufficient Evidence.

In addition to the *Santobello* issue, the case against Dr. Al-Arian should be dismissed because, in light of the new evidence and the failure of the government to rebut critical disclosures, there is insufficient evidence that Dr. Al-Arian willfully violated a court order. The government must prove every element of the alleged crime, which in the case of criminal contempt includes proof that the defendant acted willfully. The defense has provided a significant volume of evidence that shows that Dr. Al-Arian believed that his plea agreement relieved him from testifying before the grand jury in the Eastern District of Virginia. The government has not produced a single page of discovery related to this issue, despite being ordered to do so by this Court. Indeed, despite repeated requests from the defense and inquiries of the Court, the government continues to refuse to produce the original draft of the plea agreement that was sent to Mr. Moffitt. Without this evidence, a rational trier of fact could not find Dr. Al-Arian guilty of criminal contempt. As a result, this case should be dismissed on the grounds of insufficient evidence.

### A. This Court has the Power to Dismiss the Case for Insufficient Evidence Prior to Trial.

In every criminal case, the government has the burden of proving each and every element of the crime. *United States v. Berry*, 583 F. Supp. 2d 749, 752 (E.D. Va. 2008) ("[a]s a matter of law, the government bears the burden of proving the essential elements of the offense charged beyond a reasonable doubt.") If, prior to trial, the government has failed to provide enough evidence that, even when "viewed in a light most favorable to the government," a rational trier of fact could not find the "essential elements of the crime beyond a reasonable doubt," the Court can and should dismiss the case. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Roach v. Angelone*, 176 F.3d 210, 218 (4th Cir. 1999).

Courts have dismissed cases on the grounds of insufficient evidence when the defendant was charged with criminal contempt. In *United States v. Maynard*, an attorney was charged with criminal contempt for failing to appear on time for a status conference. 933 F. 2d 918 (11th Cir. 1991). The defendant argued that his violation of the Court's order had not been willful. *Id*. at 920. The Eleventh Circuit found that "it [was] difficult to characterize [the attorney's failure] as a deliberate or intentional violation of a court order" and found that a criminal contempt order was "inappropriate" because the evidence was "insufficient." *Id*. at 920-21. As a result, the court reversed and dismissed the proceedings against the defendant. *Id*. at 920.

Courts routinely dismiss cases or certain charges prior to trial on the basis of insufficient evidence. *See United States v. Toliver*, 183 Fed. Appx. 745 (10th Cir. 2006) (court dismissed several counts after arrest on the basis of insufficient evidence); *Rowe v. Norris*, 198 Fed. Appx. 579 (8th Cir. 2006) (dismissing an Eighth Amendment claim prior to trial on the basis of insufficient evidence to create a fact issue to be submitted to the jury); *Royer v. Shea*, Docket No. 05-151-P-H, 2006 U.S. Dist. LEXIS 33270 (D. Me. May 17, 2006) (numerous charges "were dismissed days before trial on the basis of insufficient evidence").

**B. The Government Must Prove Dr. Al-Arian Acted Willfully.**

Dr. Al-Arian has been charged with criminal contempt. As discussed above, the government must prove all elements of the alleged crime. As the Fourth Circuit has stated, to convict for criminal contempt, the government must prove three elements beyond a reasonable doubt: a (1) a willful (2) violation (3) of a decree which was definite, clear, specific, and left no doubt or uncertainty in the minds of those to whom it was addressed. *See United States v. McMahon*, 104 F.3d 638, 646 (4th Cir. N.C. 1997); *see also Richmond Black Police Officers Ass'n v. City of Richmond*, 548 F.2d 123, 129 (4th Cir. 1977).

Specifically, Fourth Circuit courts have found that willfulness is a required element of criminal contempt.[16] *See, e.g. Burd v. Walters*, 868 F.2d 665, 668 (4th Cir. 1989) (a lack of willfulness to disobey the Court order is a complete defense to criminal contempt.); *see also Ashcraft v. Conoco*, Inc., 218 F.3d 288, 300 (4th Cir. 2000); *In re Walters*, 868 F.2d 665, 669 (4th Cir. 1989) ("advice of counsel may be a defense in a criminal contempt proceeding because it negates the element of willfulness"); *United States v. Custer Channel Wing Corp.*, 247 F. Supp. 481, 484 (D. Md. 1965). Likewise, this Court has specifically found that willfulness is an element of criminal contempt that must be proved in this case.[17] Willfulness for purposes of criminal contempt is negated if the defendant engaged in a good-faith attempt to comply with a court order based on a plausible alternative approach, even if the individual was mistaken in his beliefs. *McMahon*, 104 F.3d at 645. ("We recognize that 'willfulness, for the purposes of

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[16] The government might argue that in proving willfulness, it must only show that Dr. Al-Arian was aware that he was disregarding an order from the court, as opposed to showing that he willfully violated a lawful order, knowing that the order was unlawful and that his conduct did not constitute a reasonable alternative approach to complying with the order in light of the circumstances. This argument, of course, is in direct contradiction with the express language of the statute (*see* 18 U.S.C. § 401(3), stating that a court can punish "disobedience or resistance to its **lawful** writ, process, order, rule, decree or command") and is inconsistent with relevant case law. *See e.g.*, *United States v. Tigney*, 367 F.3d 200, 202, n.3 (4th Cir. 2004) (an essential element of contempt of court under § 401(3) is that the court enter a lawful order"); (*see also* Dkt. No. 29 at 1-4.) Moreover, if the government's argument was correct, the Court would have to adopt a bizarre rule that an individual can be sentenced to jail for not complying with an unlawful court order.

[17] In the August 8, 2008 hearing, this Court stated:

> Criminal contempt is different. It is a -- you're alleging a felony violation, and as everybody in this case agrees, one of the essential elements of a criminal contempt case is proof of willful violation of a legitimate court order, and putting aside all the arguments about whether the order was legitimate or not, etc., the issue is, you know, what you're all focusing on in this case is willfulness.

(Dkt. No. 74 at 8-9); (*see also* Dkt. No. 83, Tr. from Jan. 16, 2009 Hearing, at 13) ("willfulness, as I understand it, is the scienter that's required in this kind of a case, and I'm not aware that the term 'willful' is defined any differently in a criminal contempt case than it is in any other kind of criminal case.")

criminal contempt, does not exist where there is a good faith pursuit of a plausible though mistaken alternative'") (citations omitted); *Richmond Black Police Officers,* 548 F.2d at 1129 (4th Cir. 1977); *see also United States v. Crowe*, No. 94-5690, 1996 WL 67223, at *1 (4th Cir. Dec. 16, 1996) ("If the defendant makes a good faith effort to comply with a court order, he may not be convicted of criminal contempt.").

### C. Dr. Al-Arian Has Provided Significant Evidence Regarding His Lack of Willfulness; the Government Has Produced No Evidence.

Dr. Al-Arian has repeatedly argued, and provided significant evidence, that any alleged violation could not have been willful, as he understood that his plea agreement barred the government from requiring his cooperation. Dr. Al-Arian has submitted his own affidavit, under penalty of perjury, and four affidavits from the lawyers who negotiated the plea agreement that discuss issues related to his lack of willfulness. For example, Mr. Moffitt stated in his affidavit that:

> at that pre-trial meeting (and every time subsequently when the issue of cooperation was raised) that Dr. Al-Arian would not agree to anything that involved his cooperation and that he would only agree to a plea agreement that established that he would have nothing to do with the Justice Department in any investigation or case.

Ex. B. ¶ 4. Mr. Moffitt also stated that he had personally "struck any language from the [plea] agreement that insisted on Dr. Al-Arian's cooperation." *Id*. at ¶ 8. Mr. Moffitt also noted that "Dr. Al-Arian made clear that he would never agree to a plea agreement that contained any cooperation agreement." *Id*. at ¶ 14. According to Mr. Moffitt, the government agreed to these demands:

> The government understood this to be Dr. Al-Arian's stance and explicitly discussed terms related to Dr. Al-Arian's position on non-cooperation. The government agreed to this threshold demand and expressly agreed to waive any cooperation provision.

*Id*. at ¶ 17. Importantly, Mr. Moffitt explicitly stated that he and his co-counsel "conveyed the government's assurance to Dr. Al-Arian that he would not be expected to testify or cooperate in any investigation." *Id*. at ¶ 18.

Similarly, Ms. Moreno submitted two declarations that also show that Dr. Al-Arian did not willfully violate the Court's order. In her February 17, 2009 affidavit, Ms. Moreno recounts that Mr. Moffitt "made it clear to the government that any successful plea agreement could not include any cooperation provision." Ex. E ¶ 7. Ms. Moreno also discussed the government's reactions to news about Dr. Al-Arian being called to testify, stating that "AUSA Krigsman never asserted that her understanding was that the plea agreement (that she negotiated) left open the issue of Dr. Al-Arian's cooperation as a grand jury witness." *Id*. ¶ 11.

Dr. Al-Arian also explicitly stated in his own affidavit that in signing the plea agreement, "[i]t was my clear understanding that I would not be called upon by the government to provide cooperation in any fashion." *See* Ex. D ¶ 7.

This evidence vividly recounts the discussions between defense counsel and the government and explicitly shows that Dr. Al-Arian and his attorneys specifically required the government to agree to a non-cooperation clause before any final plea agreement could be reached. Because Dr. Al-Arian believed that his plea agreement relieved him from testifying before the grand jury in the Eastern District of Virginia, his conduct before the grand jury did not constitute a willful violation of Judge Lee's orders. Conversely, the government has provided absolutely no evidence to rebut the evidence that Dr. Al-Arian did not willfully violate these court orders and was in fact acting in accordance with this agreement with the Justice Department and preserving his rights for appellate review. To date, the government has neither

complied with the Court's order granting the defense's Motion to Compel Discovery nor has it provided the defense with any evidence.

As discussed above, the government's failure to provide such evidence certainly cannot be attributed to a lack of time to provide such evidence or instruction from the Court to produce such material.[18]

[18] The indictment in this case was filed on June 26, 2008. (*See* Dkt. No. 1.) The defense first requested discovery on this topic on July 30, 2008, specifically asking the government to produce "[a]ll documents and materials relating to the negotiations between the government and Dr. Al-Arian and/or his counsel in connection with the 2006 Florida plea agreement." Dr. Al-Arian, through his attorneys, made clear, as he had well before the indictment, that he would challenge the government's case on the basis of a lack of willfulness. (*See* Dkt. No 21.) The defense again requested discovery on this topic on January 26, 2009. The government failed to comply with these requests, forcing the defense to move to compel discovery on this issue. (*See* Dkt. No. 88.) This Court granted that Motion, describing, in a February 5, 2009 hearing, the lack of evidence provided by the government on the plea negotiations as a disturbing "hole in the case." (Dkt. No. 92 at 8-9.) Noting that it had before it two declarations from the defense that raised troubling questions regarding the plea negotiations, the Court stated that it did not "have any evidence of a testimonial sort from anybody from the prosecution team as to what really went on in those negotiations and what the prosecution in the Middle District of Florida and the Counterterrorism Unit's understanding was when this plea agreement was put to writing." (*Id*. at 8.) The Court found that such evidence was "extremely important." (*Id*. at 8-9.)

The day after the February 5, 2009 hearing, the defense again submitted a letter to the government requesting discovery on this topic, specifically identifying categories of information that the defense believed went to Dr. Al-Arian's willfulness or lack thereof.

The government again failed to comply and instead filed a Motion for Reconsideration of the Court's Order compelling discovery. (*See* Dkt. No 93.) At the February 20, 2009 hearing on that Motion, the Court stated that "I have evidence under the penalty of perjury from defense counsel, and I have no evidence, I have only representations from the United States." (*See* Dkt. No. 98 at 13-14.) The Court denied the Motion for Reconsideration and gave the government an additional week to comply with the discovery order. (*Id*. at 15.) After that week was up, the government again asked for even more time in producing the discovery, which the defense consented to and the Court allowed. (*See* Dkt. No. 101.)

Even after this extended period, the government still refused to produce any discovery, instead filing a document that amounted to nothing more than a Motion for Reconsideration of its initial Motion for Reconsideration. (*See* Dkt. No. 103.) The government's filing notably did not quote any specific prosecutor involved in the negotiations over the plea agreement, or attach any other document that might be used as evidence in this case. (*See id*.)

Given the repeated opportunity for the government to rebut this evidence and supply declarations from the prosecutors who negotiated the agreement, the Court is well within its authority to accept the record as un-rebutted and thus insufficient to warrant a trial on this charge. Therefore, the case should be dismissed on the basis of insufficient evidence.

## III. Dismissal is Warranted When, as Here, an Indictment Would Undermine Both the Integrity of the Court and the Legal Process.

A final basis for dismissal turns on the inherent authority of a federal court to protect not just the integrity of the Court but that of the legal system as a whole. A federal court serves as the critical gatekeeper in our system of justice and it remains the province of the trial court to determine if existing facts and charges warrant a trial. The instant case raises a myriad of troubling issues that range from alleged misrepresentations of the basis for a plea agreement to conflicting factual assertions made to this Court to the failure of the government to rebut allegations made by the defense.

There are a variety of circumstances where trial courts dismiss or quash indictments due to constitutional, statutory, or factual flaws. This can include such issues as the unlawful composition of a grand jury, *Rideau v. Whitley*, 237 F.3d 472 (5th Cir. 2000), denial of representation, *Burgett v. Texas*, 389 U.S. 109 (1967), or the denial of effective counsel, *United States v. Scott, 394 F.3d 111* (2d Cir. 2005). A court may find an indictment unsupported in light of the suppression of unlawfully gathered information needed to sustain a charge. A court may also dismiss a criminal case due to misconduct by officers or prosecutors. It may also do so when the government has misled an individual into cooperating or entrapped an individual into committing a crime. *See United States v. Garcia*, 956 F.2d 41 (1992). Indeed, courts will read ambiguities against the government as a protection of not just the rights of the accused but the legal system as a whole. *Harvey*, 791 F.2d at 303; *see also Copeland*, 381 F.3d at 1103, 1106.

Central to these cases is the principle that the court should not facilitate or become an unwitting accomplice to governmental breaches or abuses. The Supreme Court spoke of the importance of a court using its inherent authority to protect judicial integrity in *Elkins v. United States*:

> It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in *Olmstead v. United States*, more than 30 years ago. "For those who agree with me," said Mr. Justice Holmes, "no distinction can be taken between the government as prosecutor and the government as judge." "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against this pernicious doctrine this court should resolutely set its face.

*Elkins v. United States*, 364 U.S. 206, 222-23 (1960) (citations omitted).

This case speaks volumes of how the government can become "the potent, the omnipresent teacher" of a lesson that affronts the basic notions of fairness and due process. This Court has repeatedly warned the government that it is disturbed by the allegations of possible misrepresentations, or actual bad faith negotiations, that led up to the plea agreement. The Court has repeatedly warned that it viewed the matter as going to the fundamental integrity of the Court and the legal system. (Dkt. No. 98 at 15) (stating in the February 20, 2009 hearing that the Court viewed the allegations as raising a fundamental challenge to "the integrity of the Justice Department and the integrity of the criminal justice plea bargaining process."). As this Court has observed, in the March 9, 2009 hearing, that the new disclosures made by the government in these proceedings have only deepened the concern about the fundamental threat to the integrity of the criminal system as a whole:

> whether this case goes forward or not, despite the government's insistence on legal argument, I think there's something more important here, and that is the integrity of the Department of Justice when it gets involved in plea bargaining, and this record is, in my view, just too incomplete. I think the factual representations by the government in its papers, if anything, did make the case even more problematic.
>
> I have great respect for line prosecutors. I was once a line prosecutor, and I know that I lived or died by my reputation on the street with other counsel, especially defense counsel. If I gave them my word as to a plea bargain, I expected that the U.S. Attorney's Office would back me and the Department of Justice would back me, because that's the only way a prosecutor can effectively work in the criminal justice system.

(Dkt. No. 108 at 28-29.) The Court's words expressed the essence of the international controversy over this prosecution.

The new disclosures in this case began soon after it moved into a criminal context. The defense had argued repeatedly as Mr. Kromberg was seeking to re-try the issues in Florida and had expressed his view that Dr. Al-Arian got off too lightly under the plea agreement. The defense decided to submit detailed answers to all of the questions that Mr. Kromberg had raised with regard to IIIT voluntarily. Dr. Al-Arian not only answered all of these questions under penalty of perjury, but offered to take a polygraph examination on those questions to show that he was not withholding information. He specifically addressed the documents that Mr. Kromberg had raised as the primary purpose of his being called to the EDVA grand jury. When Mr. Kromberg raised a series of new IIIT questions, Dr. Al-Arian proceeded to answer those questions in another binding declaration and again offered to take a polygraph examination. It was then that Mr. Kromberg made clear that he was not particularly interested in the prior IIIT questions and documents and instead wanted to delve into the same issues that were litigated in Florida. Mr. Kromberg reaffirmed this interest before the Court during the arraignment—stating

that he wanted to delve into matters addressed by Judge Moody in the Florida trial. (Dkt. No. 15, Tr. of July 10, 2009 hearing, at 20, 22.)

During the prior proceedings in Florida and Virginia, the government had never conceded that it wanted to return to the same questions litigated in Florida. While Dr. Al-Arian was told that the plea agreement would not only close the matter in Florida, but end any further business with the Justice Department, the EDVA now admits that it wants Dr. Al-Arian to testify in order to revisit those same issues. This disclosure was then followed by other new disclosures including, but not limited to, (1) the government's concession that there was a cooperation provision removed during negotiations with the defense (a representation later contradicted in court);[19] (2) Mr. Kromberg and IIIT were expressly discussed during negotiations over the

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[19] By the latest count, the Justice Department has now told courts twice that a cooperation provision was removed and now has retracted that representation twice. In November 6, 2006 hearing on the motion to enforce the plea agreement, Assistant U.S. Attorney Terry Zitek stated that:

> The Defendant Al-Arian says, "I don't want to cooperate." So we say, we won't put a cooperation provision in there. It's not in there and we're not talking about complaining that the Defendant Al-Arian has refused to cooperate.

*U.S. v. Al-Arian*, Case No. 8:03-cr-77-T-20TBM, M.D. Fla., Dkt. No. 1672, Tr. of Nov. 6, 2006 Tearing, at 22, attached as Ex. G).

In a September 17, 2007 letter responding to the Eleventh Circuit's order during the September 11, 2007 oral argument that the United States produce the "standard cooperation provision" used by the USAO for the M.D. Fla. at the time of Dr. Al-Arian's plea negotiations, the government wrote that "none of the provisions attached to this letter was offered to or placed before Al-Arian for perusal during negotiations" and that Mr. Zitek's comments on November 6, 2006 "was a reference in the abstract." *See* Ex. F.

Page one of the attachment to the September 17, 2007 letter contained the M.D. of Florida's standard cooperation clause that required grand jury testimony. The clause provided that "Defendant agrees to cooperate 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 charge in this case and other matters." *Id.* (emphasis added).

Mr. Kromberg then conceded in the February 5, 2009 hearing that the standard cooperation clause was removed from Dr. Al-Arian's plea agreement at his insistence. (Dkt. No. 92 at 30.)

guarantee of non-cooperation; (3) Mr. Kromberg and EDVA was actively involved with the consummation of the plea agreement; (4) the EDVA informed the negotiating prosecutors that it was planning to compel the testimony of Dr. Al-Arian; (5) the trial prosecutors opposed the effort to subpoena Dr. Al-Arian; (6) the trial prosecutors believed that under the agreement Dr. Al-Arian would not be compelled to testify and would be allowed to leave the country after serving his remaining time; (7) defense counsel have contemporaneous notes showing that they were assured that no other jurisdiction was interested in Dr. Al-Arian before the agreement was finalized; (8) Mr. Kromberg was told about the plea agreement despite the fact that it was still under seal; (9) the EDVA now agrees that it was bound by the agreement and barred from re-litigating the same issues as raised in Florida; and (10) Main Justice played the critical role in crafting the language of the agreement to avoid the need for cooperation. Not only was this information not available to the prior courts in Florida and Virginia, but it substantially corroborates the claims made by Dr. Al-Arian for years that he was promised that, if he accepted a plea deal with an added prison sentence, he would not have to cooperate with the Justice Department in any form before his deportation.

As this Court cautioned the prosecution on March 9, 2008, "the Justice Department [is] not a fishmonger. It's the Department of Justice. The Department of Justice ought to always negotiate in complete good faith." (Dkt. No 108 at 14.) Yet, the Court cannot force the Justice Department to bargain in good faith. However, it can prevent the Justice Department from making the Court a vehicle of the abuse of that system. The concerns over the integrity of the

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The government, however, in its March 4, 2009 filing, stated that "[n]o 'cooperation' clause was ever removed from any plea agreement provided to Al-Arian in the course of the negotiations that led to the signed agreement, because none ever contained a 'cooperation' clause in the first place." (Dkt. No. 103 at 20.)

system are magnified by the increasingly confused and conflicting representations made to the Court by the government. Putting aside the controversy over Mr. Kromberg's unilateral alteration of the statutory language used for immunity orders, the case has been buffeted by controversy and contradictions. The government indicted Dr. Al-Arian only a day after telling him that his voluntary declarations and offers of polygraph examinations would suffice as a foundation for a final resolution. At the time of the indictment, Dr. Al-Arian thought that he had succeeded in supplying the full extent of his knowledge on the IIIT matter and that he was viewed as close to satisfying the government. Once indicted, the government first said that it was not bound by the Florida agreement and then conceded that it was. The government then informed the Court that a cooperation provision was in the original agreement and taken out as a result of negotiations. It later denied that a cooperation provision was in the original agreement. The government represented to the Court that Dr. Al-Arian had turned down an evidentiary hearing offered by the Eleventh Circuit. (Dkt. No. 98 at 17-18.) It then admitted that he was only offered a limited evidentiary hearing and not the full evidentiary hearing sought on the plea negotiations. (Dkt. No. 103 at 6 n.2.) The government represented to the Court that the original agreement was shattered by the trial court imposing a longer sentence and that Dr. Al-Arian was not expected by either the prosecutors or defense counsel to serve any additional time after sentencing – leading to his immediate deportation. That representation was also found to be false since, even under the original plea agreement, Dr. Al-Arian would have to continue to serve time and the EDVA served him within days of his sentencing. (*Id*. at 21.)

It should shock the conscience of the Court and counsel to commit a person to a criminal trial on such a conflicted and controversial record. Even after six hearings, five declarations, and reams of legal argument, the Court still struggles with this record and to reconcile the new

evidence in the case. If the Court and counsel struggle to resolve these conflicts, it is hardly a matter to be simply thrown to a jury. The government asks the Court to simply ignore this mangled record as if, to quote a common musical expression, "this is close enough for Jazz." A criminal case should not be some impulsive or improvised matter. It is a matter not simply charged by a grand jury but certified by a court as ready for trial. This case lacks the foundation for such a trial. The instant case should be dismissed and Dr. Al-Arian allowed to be deported in final fulfillment of his plea agreement – after three years confinement beyond the original sentencing agreement. Justice demands that enough is enough. It is time for the United States government to honor its agreement with Dr. Sami Al-Arian.

**CONCLUSION**

In light of the foregoing, Dr. Sami Amin Al-Arian respectfully asks the Court to dismiss the indictment.

Respectfully submitted,

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Dated: March 23, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of March, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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