

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

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v.

CASE NO. 8:03-cr-77-T-30-TBM

SAMI AMIN AL-ARIAN, et al.

**UNITED STATES' RESPONSE TO
DEFENDANT SAMI AMIN AL-ARIAN'S MOTION
TO REPRESENT HIMSELF AND TO
TERMINATE COURT APPOINTED COUNSEL**

The United States of America, by Paul I. Perez, United States Attorney for the Middle District of Florida, submits the following response to defendant Sami Al-Arian's "Motion to Represent Himself and to Terminate Court Appointed Counsel."

Defendant Sami Al-Arian has moved to terminate court appointed counsel and to represent himself pursuant to the Sixth Amendment of the United States and under the authority of Faretta v. California, 422 U.S. 806 (1975) until such time as defendant can retain his own counsel. Thus, defendant Al-Arian's motion essentially has three parts: (1) a motion to terminate court-appointed counsel; (2) a motion to represent himself; and (3) an assert of his intention to employ counsel to assist him. For reasons stated below, this tripartite motion should be denied.

The right to self-representation in federal court is codified at 28 U.S.C. § 1654. In Faretta, the Supreme Court held that the Sixth and Fourteenth Amendments of the United States Constitution prohibited a state from denying a defendant the right of self-representation.

In Faretta, the Supreme Court held that a defendant has a constitutional right to voluntarily and knowingly waive his right to the assistance of counsel and to represent himself at trial. Id. Subsequent case law further established a defendant has a right to represent himself or to be represented by counsel, but has no right to a hybrid defense partly by himself and partly by counsel. U.S. v. Olano, 62 F.3d 1180 (9th Cir. 1995). In order to invoke the right of self-representation, the defendant must take a clear and unequivocal position on self-representation and the intention to dispense with counsel and defend himself. Brown v. Wainwright, 665 F.2d 607, 610-11 (5th Cir. 1982), see Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989).

In this case, the defendant has failed to take a clear and unequivocal position on self-representation and the intention to dispense with counsel and defend himself. Paragraph Four of the defendant's Affidavit in Support of Motion to Represent Himself and to Terminate Appointed Counsel is not a clear and unequivocal assertion of the right to self-representation. Rather, it is a statement of displeasure with current court appointed counsel (as laid out in the grievances listed in paragraphs one through three) and a desire to secure new counsel for trial. The defendant has not "clearly and unequivocally" established an intention to forego counsel but has in other words stated "I prefer other counsel, but would rather have none if forced to continue on in litigation with the current court appointed attorneys." The defendant's motion leaves significant room for doubt on the issue of self-representation and expresses a desire by the defendant to be allowed at his convenience to discharge current counsel and replace them with other counsel or participate in his defense as he might from time to time elect. The court should deny the motion on the grounds the defendant has failed to

take a clear and unequivocal position on self-representation and the intention to dispense with counsel. Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989); U.S. v. Davis, 260 F.Supp. 1009 (D.C. Tenn. 1966).

By wavering between self-representation and representation by counsel, the defendant has declined to make a definitive choice before trial to either represent himself or to engage in counsel. U.S. v. Bennett, 539 F.2d 45, 50-51 (10th Cir. 1976). The defendant in Bennett, although making clear his desire to hire counsel of his choice at the onset of the case, failed to obtain the specific representation he wanted in a timely fashion and instead accepted the appointment by the court of qualified counsel. As in Bennett, the defendant is clearly wavering between the decision to represent himself or to accept representation by counsel. Defendant Al-Arian, dissatisfied with the representation (as laid out in paragraphs one through three of the affidavit), but at the same time unable to secure the counsel of his choice, fails to seek an established legal remedy to the situation and instead crafts his own "hybrid" solution to the problem. A defendant is entitled to self-representation or representation by counsel, but not both. The defendant, in paragraph four of the affidavit, lays out a remedy that provides for a mixture of the two rights. The defendant has indicated no intention of waiving the right to counsel, an act deemed necessary by the courts in order to initiate self-representation in a given case. The defendant's lack of commitment to either self-representation or representation by counsel is grounds for denying the motion. Id at 50-51.

The right of self-representation is coupled with a waiver of the right to counsel and therefore prevents a defendant from enjoying both rights at trial. Because of the

importance and well-recognized benefits associated with legal representation, the right to counsel must be affirmatively waived and a failure to do so merits the denial of a motion for self-representation. Brown v. Wainwright, 685 F.2d 607, 610-11 (11th Cir. 1982). The defendant has failed to affirmatively waive his right to representation, and in fact, asserts his right and desire for counsel in the same motion. Under these circumstances, his motion should be denied.

Moreover, the motion is not even couched in terms in support of a request for self-representation and contains extraneous allegations. If a defendant wants to represent himself, he does not have to provide reasons to terminate his appointed counsel. He needs no reasons. Yet here defendant Al-Arian goes out of his way in paragraphs one through three to make broad allegations of irreconcilable differences, failure to follow instructions and unauthorized conduct against his current counsel. This portion of Al-Arian's motion would only be necessary and proper if Al-Arian were seeking different appointed counsel, which he claims he is not. Then, in paragraph four, Al-Arian does not unequivocally and unconditionally request to represent himself. Instead, he declares his intent to obtain retained counsel. The issue of self-representation arises only with respect to the time between termination of appointed counsel and the hiring of retained counsel. Al-Arian is seeking the Court's endorsement of stopgap representation, namely, himself.

This might be all well and good except that Al-Arian has been attempting to hire retained counsel since at least February 20, 2003, the day of his arrest, without success, apparently due to lack of sufficient funds. He may be successful tomorrow or he may never be successful. If it does happen, and it happens soon, then this whole

issue is moot. If it does not happen soon, then the Court is faced with the risky prospect of allowing a defendant, who has affirmatively invoked his right to counsel, to proceed through pretrial litigation without the benefit of counsel.

Either defendant represents himself or he has counsel represent him. Given his motion, defendant Al-Arian has not made the election. The motion should be denied.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By: 
Terry A. Zitek
Executive Assistant United States Attorney
Florida Bar Number No. 0336531
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6336
Facsimile: (813) 274-6246

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by United States Mail this 17th day of July, 2003, to the following:

Jeffrey Brown, Esq.
Florin, Roebig & Walker, PA
777 Alderman Road
Palm Harbor, Florida 34683

Daniel M. Hernandez, Esq.
902 N. Armenia Avenue
Tampa, Florida 33609

Counsel for Sameeh Hammoudeh

Franklyn Louderback, Esq.
Louderback & Helinger
150 2nd Avenue N.
Southtrust Bank Bldg., Suite 840
St. Petersburg, Florida 33710

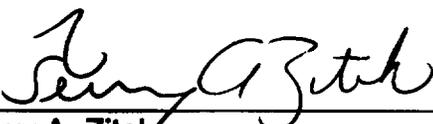
Bruce G. Howie, Esq.
Piper, Ludin, Howie & Werner
5720 Central Avenue
St. Petersburg, Florida 33707

Counsel for Sami Al-Arian

Counsel for Ghassan Ballut

Donald E. Horrox
Assistant Federal Public Defender
400 N. Tampa St., Suite 2700
Tampa, Florida 33602

Counsel for Hatim N. Fariz



Terry A. Zitek
Assistant United States Attorney