

6TH CIRCUIT: YOU CAN STILL REPRESENT YOURSELF IF SOLITARY CONFINEMENT HAS MADE YOU INCOMPETENT

As expected, the Sixth Circuit wasted no time in denying Umar Farouk Abdulmutallab's appeal of his conviction and sentence. The Circuit affirmed District Court Judge Nancy Edmunds on all matters.

Curiously though, in his opinion, Judge David McKeague spends relatively little time on the most contentious issue of the case: whether or not Abdulmutallab was competent to represent himself. He doesn't really address an issue raised by Abdulmutallab's Appellate lawyer, Travis Rossman, whether any competence determination be concurrent.

As I noted in my coverage of the hearing, Standby Counsel Anthony Chamber's case for incompetence was not that Abdulmutallab was incompetent in 2009 when he was arrested or in 2010 when he fired his attorneys, but had been made incompetent by 19 months of solitary confinement.

The question wasn't whether Abdulmutallab was competent on August 17, 2011, Tuke suggested, when Edmunds did not call for a competency hearing, nor whether he was competent on October 12, 2011, when he plead guilty. Rather, it was whether he was competent on September 13, 2010, when he fired his defense attorneys. This was part of what seemed a broader government strategy to obscure the timing issues. He also argued all Abdulmutallab's most bizarre behavior post-dated the August 2011

hearing. He argued that because Abdulmutallab attended college in England, he must be competent (!). He also argued that US v. Miller weighs against the standard on concurrent determination.

What Tukul didn't provide much evidence about (beyond that Abdulmutallab always answered Edmunds' questions about counsel as one would expect a defendant defending himself) is whether he was incompetent in August 2011.

Yemeni daggers. Allahu Akbar. Improper attire. Those are the external signs of "craziness" this hearing focused on.

And yet, in spite of the fact that Rossman repeatedly raised Chambers' descriptions of Abdulmutallab's "mental lapses," no one focused on that question.

Which is crucial because, as Rossman argued (albeit weakly), part of the argument was that the conditions of Abdulmutallab's confinement – 19 months of solitary confinement by the time of the August 2011 hearing – made him incompetent to defend himself.

And while McKeague pointed to one point where Abdulmutallab responded rationally to Edmunds' questions, his most sustained case for Abdulmutallab's competence rests on the Nigerian's competence in carrying out his terrorist plot 21 months before he pled guilty (note, some of these claims are actually quite contestable, but I won't deal with that here).

In order for Abdulmutallab to accomplish his goal of blowing up an aircraft over United States soil, Abdulmutallab had to make numerous calculated decisions. A brief overview of the steps that Abdulmutallab took in preparation for his mission is instructive:

- *Abdulmutallab studied the teachings of the radical Imam Anwar Awlaki, which prompted his decision to travel to Yemen for the purpose of meeting Awlaki.*
- *While in Yemen, Abdulmutallab agreed to carry out the martyrdom mission.*
- *In order to conceal his time in Yemen, Abdulmutallab decided to travel to Ghana before departing to Amsterdam.*
- *Abdulmutallab had to come up with clever reasons for traveling to the United States when an airport screener in Amsterdam questioned his reasons for travel.*

These actions show the deliberate, conscious, and complicated path Abdulmutallab chose to pursue in the name of martyrdom. Unlike the defendants in Pate and Drope, Abdulmutallab not only acted rationally, but was (nearly) able to execute a complex martyrdom mission. The complexity behind Abdulmutallab's mission indicates the exact opposite of incompetence.

In other words, McKeague's opinion most strongly

argues that if you're competent enough to (almost) carry out a terrorist plot then you are competent enough to defend yourself, whether or not 19 months of solitary confinement make you incompetent in the meantime.

Ramzi bin al-Shibh, take note.

Perhaps as significant a part of this ruling as the competency one is how the Circuit dealt with Abdulmutallab's challenge to his statements at University of Michigan hospital, given the assault on Miranda in other terrorism cases. Not only had he not been Mirandized, but he had also been administered drugs, when he made those comments.

Basically, McKeague punted.

Abdulmutallab argues that the district court erred in failing to suppress the statements he made during his time at the University of Michigan Hospital. Abdulmutallab states that his testimony at the hospital was compelled and therefore the Fifth Amendment prohibited the use of that testimony in trial.

We will not address the merits of Abdulmutallab's argument, as he waived any right to challenge the suppression of his statements when he entered the guilty plea. When a criminal defendant pleads guilty, "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards [for effective assistance of counsel]." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This court has held that a defendant who pleaded guilty may not appeal an adverse ruling on a pre-plea motion to suppress evidence "unless he has preserved the

right to do so by entering a conditional plea of guilty in compliance with Rule 11(a)(2)."

I don't question this decision, particularly given the decision on competence. But it's important because commentators had pointed to Abdulmutallab's case as precedent for the treatment of (among others) Dzhokhar Tsarnaev. But the Circuit declined to fully endorse his treatment, one way or another.