12-1207

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

UMAR FAROUK ABDULMUTALLAB,

Defendant-Appellant.

On Appeal of Defendant Umar Farouk Abdulmutallab's Conviction from the United States District Court for the Eastern District of Michigan Southern Division

District Court Case No. 10-cr-20005

PRINCIPAL BRIEF OF DEFENDANT-APPELLANT

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34, Appellant Umar Farouk Abdulmutallab requests oral argument due to the complexity of the issues in this case.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this matter pursuant to the United States Constitution, Article 3, § 2, and 18 U.S.C. § 3231 because Appellant Umar Farouk Abdulmutallab was charged with violating the laws of the United States by, inter alia, allegedly conspiring to commit an act of terrorism transcending national boundaries in violation of 18 U.S.C. §§ 2332b(a)(1) and 2332b(a)(2), possessing a destructive device in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii), and 924(c)(1)(C)(ii), and attempting to commit murder within the special aircraft jurisdiction of the United States in violation of 18 U.S.C. § 1113 and 49 U.S.C. § 46506. After Abdulmutallab was convicted and sentenced, he filed a timely notice of appeal in the district court. (R. 137) Therefore, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

I. The district court erred by ordering Abdulmutallab to stand trial and accepting his guilty plea as knowingly, intelligently, and voluntarily made after it refused to order a competency examination even though there was a bona fide doubt as to Abdulmutallab's competency.

II. The district court erred by allowing Abdulmutallab to represent himself even though there was a bona fide doubt as to his competency and a competency examination was never held.

III. The district court erred by refusing to suppress incriminating statements Abdulmutallab involuntarily made while authorities questioned him without a Miranda warning at the University of Michigan Hospital while he was receiving treatment and falling asleep.

IV. Abdulmutallab's life sentence constitutes cruel and unusual punishment.

V. The applicable portions of 18 U.S.C. § 924(c)—prohibiting the "use and carrying" and "possession" of a "destructive device" in connection with a "crime of violence"—are unconstitutional because Congress lacked the power to enact them under the Commerce Clause.

VI. Abdulmutallab's sentence is substantively unreasonable.

STATEMENT OF THE CASE

Appellant Umar Farouk Abdulmutallab traveled on Northwest Airlines Flight 253 from Amsterdam to Detroit, Michigan, on December 25, 2009. The superseding indictment alleged that Abdulmutallab attempted to detonate an explosive device concealed in his underwear shortly before landing on behalf of al Qaeda. However, instead of exploding, the device started a small fire in which no one, other than Abdulmutallab, suffered a serious physical injury. The aircraft landed safely in Detroit and authorities immediately took him into custody.

Authorities took Abdumutallab to the University of Michigan Hospital for treatment of his burn wounds. While there, he was administered fentanyl, a drug 100 times more powerful than morphine. He also fell asleep. Nevertheless, authorities interrogated him, without a Miranda warning and while he was receiving emergency treatment, because they feared other attacks were imminent.

Shortly after being charged, Abdulmutallab told the district court that he wanted to represent himself. The district court allowed him to proceed pro se and appointed standby counsel. Standby counsel later filed a motion for a competency examination under seal. Standby counsel was concerned about Abdulmutallab's "irrational behavior" and "mental lapses."

Abdulmutallab sometimes seemed concerned with presenting a defense but sometimes he seemed unconcerned about his defense. Standby counsel asked for funds to retain experts and a competency examination. The district court denied the motion for a competency examination. It concluded that a hearing was unnecessary because Abdulmutallab did not want a hearing and he professed that he was competent. A competency examination was never held and the district court never took proof on the issue of competency.

Abdulmutallab moved to suppress his statements at the University of Michigan Hospital, alleging that they were coerced and involuntary. After a hearing, the district court denied the motion, finding that the statements were voluntary and that a Miranda warning was not required because the possibility of simultaneous attacks constituted an emergency situation.

Abdulmutallab proceeded to trial. On the first day of trial, he informed the district court that he did not wish to contest the charges. The district court ordered a recess so he could discuss his decision with standby counsel. After the recess, trial continued. On the second day of trial, Abdulmutallab again informed the district court that he wished to plead guilty to all of the charges, triggering a mandatory life sentence as he did not have a Rule 11 plea bargain. The district court engaged him in a plea colloquy and accepted his guilty plea as knowingly, intelligently, and

voluntarily made.

Abdulmutallab filed a motion to declare his mandatory life sentence unconstitutional as a violation of the Eighth Amendment's prohibition of cruel and unusual punishments and as a violation of the Commerce Clause. He also requested a downward variance and a sentence other than imprisonment for life. The district court denied the motion and imposed the maximum sentence for each count, resulting in multiple life sentences.

Abdulmutallab filed a timely notice of appeal.

STATEMENT OF THE FACTS

A. The Alleged Offense Conduct

The superseding indictment charged Appellant Umar Farouk Abdulmutallab with numerous offenses after he allegedly traveled by aircraft from Amsterdam, the Netherlands, to Detroit, Michigan, with an explosive device concealed in his underwear on December 25, 2009. (R. 28) Abdulmutallab, a Nigerian national, allegedly attempted to detonate the explosive device on the aircraft in furtherance of a suicide mission on behalf of al Qaeda. The superseding indictment further alleged that Abdulmutallab traveled to Yemen in August 2009 for the purpose of becoming involved in violent jihad on behalf of al Qaeda, a designated terrorist organization

pursuant to 18 U.S.C. § 2339B(a)(1) and 8 U.S.C. § 1189(a). In Yemen, Abdulmutallab allegedly received the explosive device containing Pentaerythritol Tetranitrate (known as "PETN") and Triacetone Triperoxide (known as "TATP"), two highly explosive chemicals.

The superseding indictment alleged that Abdulmutallab traveled through various countries in the Middle East and Africa with the explosive device before reaching Amsterdam, the Netherlands. There, he boarded Northwest Airlines Flight 253 flying non-stop to Detroit, Michigan. Flight 253 carried 281 passengers and 11 crew members, including nationals of the United States, the Netherlands, and other countries.

The superseding indictment further alleged that shortly before landing, Abdulmutallab went to the restroom and, upon returning to his seat, stated that his stomach was upset. He then pulled a blanket over himself. Once covered by the blanket, he allegedly attempted to detonate the explosive device. The detonation allegedly occurred in the airspace of the United States over the Eastern District of Michigan near Woodhaven, Michigan. Instead of an explosion, the explosive device only started a small fire. Passengers believed that someone had lit firecrackers and the fire injured no one but Abdulmutallab. Passengers and flight crew subdued and

restrained him after he started the small fire. The airplane landed safely minutes later and Abdulmutallab was arrested and transported to the University of Michigan Hospital for treatment of his burn wounds.

This series of events was widely covered by the news media throughout the world. The news media in the United States commonly referred to Abdulmutallab as "the underwear bomber."

The superseding indictment charged Abdulmutallab with eight counts as follows:

- Count One—Conspiracy to Commit an Act of Terrorism Transcending National Boundaries in violation of 18 U.S.C. §§ 2332b(a)(1) and 2332b(a)(2).

- Count Two—Possession of a Firearm/Destructive Device in Furtherance of a Crime of Violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii), and 924(c)(1)(C)(ii).

- Count Three—Attempted Murder within the Special Aircraft Jurisdiction of the United States in violation of 18 U.S.C. § 1113 and 49 U.S.C. § 46506.

- Count Four—Use and Carrying of a Firearm/Destructive Device During and in Relation to a Crime of Violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii), and 924(c)(1)(C)(ii).

- Count Five—Willfully Placing a Destructive Device in, upon, and in Proximity to a Civil Aircraft Which was Used and Operated in Interstate, Overseas and Foreign Air Commerce, which was Likely to Have Endangered the Safety of Such Aircraft in violation of 18 U.S.C. § 32(a)(2).

- Count Six—Possession of a Firearm/Destructive Device in Furtherance of a Crime of Violence in violation of 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii), and 924(c)(1)(C)(ii).

- Count Seven—Attempted Use of a Weapon of Mass Destruction in violation of 18 U.S.C. § 2332a(a)(2).

- Count Eight—Willful Attempt to Destroy and Wreck a Civil Aircraft in violation of 18 U.S.C. §§ 32(a)(8) and 32(a)(1).

Counts 1 and 7 carried a maximum penalty of imprisonment for life. Counts 4 and 6 carried a mandatory sentence of imprisonment for life if convicted of (1) both Counts 4 and 6 or (2) either of Counts 4 or 6 in addition to Count 2. 18 U.S.C. § 924(c)(1)(C)(ii).

B. Procedural History

Abdulmutallab's Initial Appearance occurred on December 26, 2009, the day after the incident onboard the airplane, at the University of Michigan Hospital Burn Center. (R. 142, p.3) The following exchange occurred between the district court and Abdulmutallab:

> THE COURT: Okay. First let me ask you, sir, you're entitled under the Constitution to counsel to represent you. Do you wish to retain counsel or do you wish to have appointed counsel to represent you as the case proceeds?
>
> THE DEFENDANT: I don't understand that.

(R. 142, p. 5) The district court went on to explain that it would appoint

counsel for him if he did not have the funds to hire counsel. He stated that he did not have the funds to hire counsel and agreed to appointment of the Federal Public Defender's Office.

The Grand Jury returned the initial indictment with six counts against Abdulmutallab on January 6, 2010. (R. 7) He pleaded not guilty and consented to detention. (R. 70, p. 5-6) At a status conference on April 13, 2010, his attorney's reported that security restrictions at Federal Correctional Institute Milan ("Milan") had severely limited their ability to meet with him to review discovery and other matters. (R. 145, p. 5) He was held in solitary confinement under constant 24-hour manned observation. The district court granted defense counsel's request to take a laptop to Milan to review discovery, which had been provided in electronic format, with Abdulmutallab. (R. 145, p. 6)

At a status conference on September 13, 2010, Abdulmutallab's attorneys informed the district court that Abdulmutallab wanted to represent himself. (R. 23, p. 3). He confirmed that he wanted to represent himself because he believed that any representation he had would not be in his best interests. (R. 23, p. 5-6) He did not elaborate. The district court conducted the inquiry suggested by *United States v. McDowell*, 814 F.2d 245, 251 (6th Cir. 1987). The district court asked him if he had ever studied law or

represented anyone in a criminal action and he responded no to both questions. (R. 23, p. 7) It also discussed the charges and the penalties he faced. (R. 23, p. 8-9) The district court asked him if he was familiar with the Federal Rules of Evidence and he responded that he was not. The district court also asked him if he was familiar with the Federal Rules of Criminal Procedure, to which he responded "some." (R. 23, p. 9)

Then the following exchange occurred:

> The Court: Mr. Abdulmutallab, I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You're not familiar with the law, you are not familiar with court procedure, you're not familiar with the rules of evidence, and I would strongly urge you not to represent yourself.
>
> Now, in light of the penalty that you may suffer if you are found guilty, and in light of all the difficulties of representing yourself, is it still your desire to go forward and represent yourself without giving another try to having an attorney represent you, just even over the next month or two, to see if perhaps we can appoint an attorney who would have what you believe to be your best interests in mind?
>
> The Defendant: Yeah, I don't want that, no.
>
> The Court: You don't want another attorney?
>
> The Defendant: No.

(R. 23, p. 10-11) The district court then found that Abdulmutallab knowingly and voluntarily waived his right to counsel and permitted him to

represent himself. (R. 23, p. 11) The district court also appointed standby counsel.

At the next status conference, on October 14, 2010, Abdulmutallab appeared with standby counsel and expressed satisfaction with the arrangement. (R. 33, p. 4). He stated that he did not want standby counsel to be appointed as regular counsel. (R. 33, p. 5) Standby counsel informed the district court that he had not received discovery. (R. 33, p. 5-6) The United States responded that it would only provide discovery to standby counsel if Abdulmutallab would consent. (R. 33, p. 6) He stated that he did not "think it was necessary" to provide standby counsel with discovery. (R. 33, p. 7) The district court ordered the United States to provide the discovery to standby counsel notwithstanding his objection.

Abdulmutallab attempted to waive his presence at the next status conference but the district court denied the motion and required him to attend the conference on January 25, 2011. (R. 30; R. 35) At the conference, the district court told him that he could not waive his presence because he represented himself. (R. 73, p. 4) The district court asked him if he wanted to continue to represent himself and he responded that he did. (R. 73, p. 4-5) Standby counsel informed the district court that he had difficulty

in communicating with and meeting with Abdulmutallab at Milan. (R. 73, p. 8)

The next pretrial conference took place on April 7, 2011. After discussing various scheduling matters, Abdulmutallab informed the district court that restrictions at Milan, such as his inability to make a phone call to standby counsel and the opening of his mail from standby counsel, were severely limiting his defense. (R. 74, p. 8) Despite being a pretrial inmate, he was housed in Milan's Special Housing Unit. The district court stated that it would contact Milan to make sure that Abdulmutallab could communicate with and receive visits from standby counsel. (R. 74, p. 10)

On July 7, 2011, the district court held a hearing on various motions, including the motion to define the role of standby counsel. After a lengthy discussion regarding the role of standby counsel, the district court addressed Abdulmutallab. He expressed satisfaction with his standby counsel but he complained that Milan would not allow him to receive certain documents he needed to prepare for trial, including an example of a trial transcript. (R. 115, p. 17) The district court agreed with Abdulmutallab that he should receive the materials and ordered Milan to permit him access.

Later, the district court asked Abdulmutallab how he would divide the labor at trial with his standby counsel. (R. 115, p. 31) When asked whether

he would voire dire the jurors, Abdulmutallab responded:

> I haven't thought about that yet. That would be something I would want to find out more about the procedure and then—

(R. 115, p. 31) The district court asked Abdulmutallab if he would make the opening argument. He responded:

> Again, I'm still not fully familiar with the jury trial process, and I'm still trying to learn that, but I would imagine I would want to make that opening statement myself.

(R. 115, p. 31-32) Abdulmutallab stated that he wanted his standby counsel to question witnesses but he wanted to do the closing argument. (R. 115, p. 32-33)

On August 5, 2011, standby counsel filed a motion to suppress statements he gave after his arrest, a motion for disclosure of Grand Jury transcripts, a motion to change venue, a motion for individual voire dire examination, and a motion to suppress statements made to the government at Milan. (R. 55, 56, 57, 58 & 59) The United States filed a motion to determine whether Abdulmutallab concurred in these motions. (R. 64)

C. The Motion for Competency Hearing

Standby counsel also filed a Motion for a Competency Hearing (the "Motion") under seal on August 5, 2011. (Sealed Electronic Appendix) In the sealed motion, standby counsel noted that he had "recently noticed several troubling tendencies in regards to Defendant ABDULMUTALLAB

that has caused standby counsel to question the Defendant's competency." Standby counsel stated that Abdulmutallab "demonstrated irrational behavior," suffered "a series of reoccurring mental lapses," and exhibited "spontaneously erratic behavior." Specifically, Abdulmutallab would be engaged and cooperative in meetings but then, minutes later, he would become disengaged, irrational, and uncooperative. Sometimes he would be concerned about mounting a defense and sometimes he would indicate that he had no desire to prepare a defense. All of these troubling tendencies led standby counsel to question Abdulmutallab's competency and his psychological well-being. Abdulmutallab's irrational behavior had existed to some degree from the beginning of the case but "recently it has risen to unprecedented levels." Therefore, standby counsel requested a competency examination pursuant to *Drope v. Missouri*, 420 U.S. 162 (1975), and *Pate v. Robinson*, 383 U.S. 375 (1966), because there were bona fide doubts as to Abdulmutallab's competency. Standby counsel requested funds for experts and a hearing.

The United States filed an opposition to the Motion under seal. (Sealed Electronic Appendix) The United States argued that the Motion set forth insufficient facts to call Abdulmutallab's competency into question and that Abdulmutallab "displayed an obvious understanding of the proceedings

and his ability to conduct his defense." The facts presented in the Motion merely demonstrated that Abdulmutallab and standby counsel disagreed about certain aspects of the case, such as trial strategy. The Motion did not allege that Abdulmutallab suffered from a mental illness or inability to understand the proceedings against him.

A hearing on the motions occurred on August 17, 2011. Standby counsel admitted that Abdulmutallab did not authorize the filing of the Motion but that standby counsel believed it was his duty to the court to raise the competency concerns. (R. 116, p. 3) However, Abdulmutallab consented to the other motions. (R. 116, p. 9-10)

The district court placed Abdulmutallab under oath and asked him questions concerning his understanding of the proceedings. (R. 116, p. 11-13) He indicated that he knew he was facing imprisonment for life, that he was generally satisfied with the current arrangement with standby counsel, and that he understood the nature of the proceedings. (R. 116, p. 13-15). Then the following exchange occurred:

> [the district court]: Let me ask you one additional question, Mr. Abdulmutallab. You understand that [standby counsel] has asked that you be examined for competency to go forward in this case.
>
> [Abdulmutallab]: Yes, I understand that.

> [the district court]: And what's your position on that?
>
> [Abdulmutallab]: I guess, simply, I believe I'm competent to proceed by myself and I do not wish to have the examination.
>
> [the district court]: And if I were to order the examination, would you cooperate with it?
>
> [Abdulmutallab]: Well, one thing was, as I—as he, [standby counsel] said when—because when we discussed about the motion is initially [sic] my idea was perhaps I would even—that would be a good thing to prove my competency to proceed standby, but then when he put it to me that, you know, the kind of—the reasons why, or the arguments that have to be put forward before even someone has that type of examination, and I said that's counter productive to what I even want, so I don't want the examination.
>
> [the district court]: All right. I'm satisfied that Mr. Abdulmutallab is in fact competent to proceed in this matter, and I have no reason to believe that he is not, and I think that there needs to be more of a showing than was set forth in the motion that was filed in this case to order a competency exam. I'm going to deny the motion without prejudice.
>
> If something arises that makes you feel it is important to renew that motion, then by all means, please do so.

(R. 116, p. 15-16) The district court entered an order denying the Motion. (R. 66) Standby counsel never raised the issue of competency again.

After denying the Motion, the district court discussed the restrictions Milan continued to impose on Abdulmutallab. Abdulmutallab wanted various magazines and reports covering the incident on the airplane so he could understand the press coverage, which would help him in jury

selection. (R. 116, p 19) Milan would not allow him to have these materials. The district court stated that it would order Milan to allow him access to media articles and the trial transcript to use as an example but otherwise he would be subject to Milan's general policy, which prohibited him from having a radio or magazines.

D. Other Motions

The district court granted Abdulmutallab's motion for individual voire dire examination and set the other motions for a hearing on September 14, 2011. (R. 76) At the hearing, Abdulmutallab chose to appear in a t-shirt instead of putting on a suit that had been provided to him because he was not allowed "to wear it the way [he] want[ed]." (R. 117, p. 6) He had filed a motion for a detention hearing, arguing that he was entitled to be released from detention because he is a Muslim, he is subject only to the law of the Koran, and the United States could not detain him and subject him to laws in which he did not believe. (R. 79). The district court denied the motion. (R. 117, p. 9) Abdulmutallab had also filed a motion for no use of excessive force complaining about the conditions at Milan. (R. 78) The district court denied the motion as moot because it "had numerous conversations with the officials and the warden at [Milan] who are fully aware of all their responsibilities under the U.S. Constitution." (R. 117, p. 10)

The district court heard testimony regarding the motion to suppress incriminating statements Abdulmutallab made at the University of Michigan Hospital, including that he was sent by al Qaeda to destroy an aircraft. (R. 117, p. 75) Nurse Julia Longenecker, the nurse who treated Abdulmutallab for his burn wounds, testified that she administered 300 micrograms of Fentanyl to him. (R. 117, p. 25) Fentanyl in an anti-pain medication that is "a very strong drug" designed to "fool[] the body into thinking that it's not in pain." (R. 117, p. 43-42) Longenecker also testified that FBI agents interrogated Abdulmutallab while he was in the hospital. (R. 117, p. 40) She never heard them Mirandize him. (R. 117, 41-42)

Next to testify was Special Agent Tim Waters from the FBI. (R. 117, p. 65) Agent Waters interrogated Abdulmutallab at the University of Michigan Hospital but did not Mirandize him. (R. 117, p. 77) He admitted that Abdulmutallab was in custody at the time of the interrogation. (R. 117, p. 82) However, he claimed he needed to interrogate Abdulmutallab immediately because of the possibility of other attacks and his concern that Abdulmutallab, a foreign national, would not understand the Miranda warning. (R. 117, p. 77-78) Waters said there was "an immediate threat" and "we needed to deal with it right now." (R. 117, p. 81) He admitted that he had no other information that a flight was in danger. (R. 117, p. 112)

Next to testify was Eugene Schoener, Ph.D., a professor of psychiatry and pharmacology at Wayne State University School of Medicine. (R. 117, p. 146) He testified that fentanyl moves quickly in the body and it can cause respiratory depression, confusion, nausea, vomiting, or hallucination. (R. 117, p. 156) However, based on his training and experience, a review of the records, and his conversation with Longenecker, it was his opinion that the dose administered to Abdulmutallab did not leave Abdulmutallab impaired. (R. 117, p. 157) While fentanyl is 100 times more powerful than morphine, (R. 118, p. 4), Abdulmutallab received extremely small doses in micrograms (a microgram is one millionth of a gram). (R. 117, p. 161) Adbulmutallab's doses of 50 micrograms each would have worn off within five to ten minutes. (R. 117, p. 162) Nevertheless, he could not have operated heavy machinery and the fentanyl actually put him to sleep. (R. 118, p. 23-24)

The district court denied the motion to suppress, finding (1) that Abdulmutallab's statements were voluntary and (2) that the circumstances present at the time of his questioning fell within the public safety exception to *Miranda* recognized in *New York v. Quarles*, 467 U.S. 649 (1984).

E. Trial and Guilty Plea

After three days of jury selection, Abdulmutallab's trial began on October 11, 2011. After discussing various motions, the following exchange took place at a side bar conference outside the presence of the jury:

> [the district court]: Good morning.
>
> [Abdulmutallab]: Morning. Yeah, I don't want to contest the charges.
>
> [the district court]: You don't want to contest any of the charges?
>
> [Abdulmutallab]: No.
>
> [the district court]: Have you discussed this with him?
>
> [standby counsel]: No, I have not. Can we have a few moments?
>
> [the district court]: Absolutely.
>
> [standby counsel]: This is my first discussion on this.

(R. 119, p. 9) After returning from a recess, standby counsel stated that Abdulmutallab was prepared to proceed to trial. (R. 119, p. 10)

After preliminary jury instructions, the United States made its opening argument. (R. 119, p. 18) The United States then called its first witness, a passenger on Flight 253. (R. 119, p. 86) The witness saw Abdulmutallab put a blanket over his head and then heard a loud pop four or five minutes later. (R. 119, p. 98-99) He then saw smoke rising from Abdulmutallab's lap. (R. 119, p. 101)

The next day, October 12, 2011, standby counsel indicated to the district court that Abdulmutallab intended to plead guilty. The guilty plea was a blind plea as Abdulmutallab had never been offered a plea bargain. (R. 114, p. 4) The district court began a lengthy and detailed plea colloquy. At one point, the following exchange occurred:

> [the district court]: It does appear to me that Mr. Abdulmutallab is competent to proceed in this matter. [Standby counsel], do you concur?
>
> [standby counsel]: Yes, Your Honor.
>
> [the district court]: Mr. Tukel [the Assistant U.S. Attorney]?
>
> [Mr. Tukel]: Yes, Your Honor.

(R. 114, p. 9) After a lengthy plea colloquy, the district court found that Abdulmutallab "is fully competent and capable of entering an informed plea." (R. 114, p. 36) The district court accepted the plea and adjudged him guilty without ever holding a competency examination, taking proof on the issue of competency, or providing standby counsel funds to retain experts to evaluate Abdulmutallab's competency.

F. Sentencing

Abdulmutallab's total adjusted offense level was 43. He had no criminal history, which would have placed him in Criminal History Category I, but he was in Criminal History Category VI pursuant to USSG § 3A1.4 as

his conviction involved a felony intended to promote terrorism. His resulting Guidelines range was life, plus a mandatory consecutive sentence of 30 years on Count 2, followed by a mandatory consecutive sentence of life on Count 4, and another mandatory consecutive sentence of life on Count 6. He faced a mandatory life sentence pursuant to 18 U.S.C. § 924(c)(1)(C)(ii) for his convictions on Counts 4 and 6.

Abdulmutallab filed a motion for new standby counsel, which the district court denied. (R. 126) The United States filed a sentencing memorandum recommending the maximum sentence for each count, including the mandatory life sentence he faced after pleading guilty to Counts 4 and 6. (R. 130, p. 1) Abdulmutallab then filed a motion to hold the mandatory life statute unconstitutional, arguing that (1) a mandatory life sentence where no one was killed was cruel and unusual punishment, (2) carrying a destructive device and possession of a destructive device in connection with a crime of violence does not have a substantial effect on interstate commerce, and (3) he should receive a downward variance because the Guidelines range was too harsh. (R. 131)

At sentencing on February 16, 2012, the district court heard argument and denied the motions. (R. 139) It then took testimony from some of the passengers of Flight 253.

The district court sentenced Abdulmutallab to 240 months of imprisonment on Counts 3, 5, and 8, to be served concurrently, imprisonment for life on Count 7, to run concurrent with the other three counts, imprisonment for life on Count 1 to run consecutive to all other counts, 30 years of imprisonment on Count 2 to run consecutive to all other counts, imprisonment for life on Count 4 to run consecutive to all other counts, and imprisonment for life on Count 6, to run consecutive to all other counts. (R. 136) This sentence was the maximum penalty permitted on each of the eight counts.

Abdulmutallab filed a timely notice of appeal the day after sentencing. (R. 137)

SUMMARY OF ARGUMENT

The district court erred when it allowed Abdulmutallab to proceed to trial and to plead guilty without conducting a competency examination. Any reasonable judge would have had a bona fide doubt regarding Abdulmutallab's rational and factual understanding of the proceedings against him. His standby counsel filed a motion requesting a competency hearing, noting that Abdulmutallab suffered "mental lapses," engaged in "bizarre behaviors," and sometimes seemed interested in presenting a defense while at other times he seemed indifferent to his defense. Abdulmutallab also demonstrated indifference toward his defense in front of the district court. The district court denied the motion for a competency examination based largely on Abdulmutallab's own equivocal and rambling profession of competency. The failure to hold the competency examination cannot be cured after the fact and requires a new trial so that a "concurrent determination" of competency can be made. Abdulmutallab's guilty plea did not waive the competency issue because a person whose competence is in doubt cannot knowingly, voluntarily, and intelligently waive a right or plead guilty.

There is a higher standard of competency to self-represent than there is to proceed to trial. The district court never expressly considered whether

Abdulmutallab was competent to represent himself under this higher standard. In light of the bona fide doubts about his competency to proceed to trial, the district court should have ordered a competency examination before allowing him to self-represent and ultimately plead guilty to charges carrying a mandatory life sentence. It did not.

Abdulmutallab's incriminating, involuntary statements made at the University of Michigan Hospital should have been suppressed. Abdulmutallab was interrogated while he was under the influence of fentanyl, a drug 100 times more powerful than morphine. At one point he fell asleep. Authorities purposefully withheld a Miranda warning even though they knew they were dealing with an injured foreign national who was unfamiliar with the United States' legal system. Abdulmutallab was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious when questioned. His statements are not admissible.

Abdulmutallab's life sentence violates the Eighth Amendment's prohibition of cruel and unusual punishments. While Abdulmutallab concedes that the weight of authority is against this argument, the evolving standards of decency prohibit a life sentence where no one (other than himself) was physically injured, most of the passengers believed that the

detonation was the result of firecrackers, and he had no prior criminal history. A life sentence is significantly disproportionate to his crime.

The portion of 18 U.S.C. § 924 under which Abdulmutallab was convicted is unconstitutional because Congress lacked the power to enact it under the Commerce Clause. The activity regulated by the applicable subsections of the statute, 18 U.S.C. § 924—"use and carrying" and "possession" of a "destructive device" in connection with a "crime of violence"—is not commercial activity and has no substantial effect on interstate commerce.

Abdulmutallab's life sentence is substantively unreasonable in light of the history and characteristics of the defendant. Abdulmutallab is a young man who was in his early 20s when he allegedly committed the offense conduct. Imprisoning him for the rest of his life is an extraordinarily harsh punishment that inappropriately rules out any possibility of rehabilitation far too early for a young man with absolutely no criminal history whatsoever other than the charged conduct. In light of the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment, a lengthy term of imprisonment other than a life sentence would be sufficient.

ARGUMENT

I. ABDULMUTALLAB'S GUILTY PLEA WAS NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY MADE WHERE HIS COMPETENCY WAS IN DOUBT AND THE DISTRICT COURT FAILED TO ORDER A COMPETENCY EXAMINATION

A guilty plea is valid if it is entered knowingly, intelligently, and voluntarily. *United States v. Dixon*, 479 F.3d 431, 434 (6th Cir. 2007). This Court reviews the legal question of whether a plea was validly entered de novo. *Id*. A criminal defendant may not be tried or plead guilty unless he is competent. *Godinez v. Moran*, 509 U.S. 389, 396 (1993); *Osborne v. Thompson*, 610 F.2d 461, 462-63 (6th Cir. 1979) (affirming grant of writ of habeas corpus where there was "real doubt" regarding a defendant's competence when he pleaded guilty). The right to be tried only when competent is a basic due process right and the prohibition on trying an incompetent defendant is "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). The legal standard for competence to stand trial is whether the defendant has (1) sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and (2) a rational and factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam).

The due process right to a fair trial imposes a legal duty on a trial court to hold a competency examination where there is substantial evidence of a defendant's incompetency. *Drope*, 420 U.S. at 171-72; *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966); *Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of those factors standing alone may, in some circumstances, be sufficient." *Drope*, 420 U.S. at 180. On appeal, the standard of review is whether "a reasonable judge, situated as was the trial judge, should have doubted the defendant's competency." *Franklin*, 695 F.3d at 447 (citing *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983)).

Two Supreme Court cases, *Pate* and *Drope*, provide the foundation for the law governing when the trial court's duty to conduct a competency examination is triggered. In *Pate*, the accused's counsel admitted that the accused shot and killed his wife but claimed that the accused was insane at the time of the shooting. 383 U.S. at 376. The trial court never conducted a competency examination, the insanity defense was rejected, and the accused was found guilty. *Id*. at 383-84. On appeal, the state insisted that he waived his defense of incompetence by failing to demand a hearing. *Id*. at 384. The

Supreme Court rejected this position because "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id*. Instead, the evidence introduced raised a "bona fide doubt" as to the accused's competence and entitled him to a competency examination. *Id*. at 385. "The court's failure to make such inquiry thus deprived [the accused] of his constitutional right to a fair trial." *Id*. The Court also held that the failure to hold a competency examination and make a "concurrent determination" could not be cured by a later competency examination. *Id*. at 387.

In *Drope*, the Supreme Court followed *Pate* and held that the evidence of the accused's bizarre behaviors toward his wife and his suicide attempt in the middle of trial "created a sufficient doubt of his competence to stand trial to require further inquiry on the question." *Id*. at 180. While there are no "fixed or immutable signs" that trigger the duty to inquire, evidence of irrational behavior and medical opinions may be sufficient to require a competency examination. *Id*. Even where a defendant is competent at the commencement of the trial, "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id*. at 181. The Supreme

Court concluded that the trial court reversibly erred by failing to order a competency examination in light of the accused's increasingly bizarre behavior and his suicide attempt. *Id*. at 183.

The holdings of *Pate* and *Drope* have been codified in 18 U.S.C. § 4241(a), which requires a competency hearing upon a showing of "reasonable cause." *See United States v. White*, 887 F.2d 705, 709 (6th Cir. 1989) (holding that the failure to conduct a hearing upon a determination of reasonable cause was reversible error).

Here, the record is awash with substantial evidence of Abdulmutallab's incompetency to stand trial or plead guilty. Despite the doubts as to his competency, the district court found his pro se guilty plea to be knowingly, intelligently, and voluntarily made without following the *Drope* procedure. The district court followed the wrong procedure by failing to order an examination and reached the wrong result by concluding that he was competent as a matter of law without an examination. *Pate v. Smith*, 637 F.2d 1068, 1072 (6th Cir. 1981) ("once a reasonable doubt arises to the competence of a person to stand trial, the issue must be decided on the basis of a hearing.").

The district court should have ordered a competency examination in response to the Motion and prior to accepting his plea because (1) the

allegations of mental lapses and erratic behavior in standby counsel's Motion raised a "bona fide doubt" about Abdulmutallab's competency to stand trial, (2) Abdulmutallab displayed an increasingly dismissive attitude toward his defense even though he represented himself, and (3) the district court's primary basis for denying a competency examination was Abdulmutallab's own equivocal, rambling, ipse dixit statement that he was competent and no examination was necessary. *Torres v. Prunty*, 223 F.3d 1103, 1109-10 (9th Cir. 2000) (finding error under *Pate* where trial court refused to order a competency hearing even though defense counsel questioned the defendant's competence and the defendant engaged in bizarre behavior such as insisting on wearing jailhouse clothing). In light of these concerns, any reasonable judge should have doubted Abdulmutallab's present ability to consult with a lawyer with a reasonable degree of rational understanding and his rational and factual understanding of the proceedings against him. *See Dusky*, 362 U.S. at 402.

A. The Motion Raised Bona Fide Doubts Regarding Abdulmutallab's Competency

The allegations of the Motion raised "a bona fide doubt" about Abdulmutallab's competence. *Pate*, 383 U.S. at 385. The Motion alleged that Abdulmutallab "demonstrated irrational behavior," suffered "a series of

reoccurring mental lapses," exhibited "spontaneously erratic behavior," and that he would cooperate sometimes but then suddenly turn uncooperative for no apparent reason. The Motion stated:

> That there have been instances where the Defendant is concerned about mounting a defense, then there are moments within that same meeting that the Defendant indicates that he has no desire to prepare a defense.

(Motion ¶ 7) The mental lapses, irrational behavior, and cooperation problems were reported to the district court by standby counsel. More than anyone else, standby counsel was in a prime position to observe these behaviors because he met with Abdulmutallab frequently and he aided Abdulmutallab in the preparation of the defense. *See Torres*, 223 F.3d at 1109 ("Torres's defense counsel was in the best position to evaluate Torres's competence and ability to render assistance."). The allegations of the Motion unequivocally call into question Abdulmutallab's sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and his rational and factual understanding of the proceedings against him. *See Dusky*, 362 U.S. at 402.

Standby counsel's allegations would have been enough to raise a doubt as to Abdulmutallab's competency to a reasonable judge. The Motion stated facts similar to those found in *Drope*. In *Drope*, the defense attorney

filed a motion for a continuance to allow the defendant to receive psychiatric treatment and attached a psychiatrist's report as grounds. 420 U.S. at 164. The report stated that the defendant had a difficult time relating, he was irrelevant in his speech, and engaged in strange behavior. *Id*. at 165 n.2. These allegations are similar to the statements in the Motion that Abdulmutallab engaged in "irrational behavior," suffered "mental lapses," and often showed little concern with mounting a defense. Like the defendant in *Drope*, Abdulmutallab should get a new trial so his competency can be determined.

The United States' Response to the Motion essentially argued that the allegations of the Motion were too vague and simply indicated a disagreement among standby counsel and the defendant as to trial strategy. The United States also stated argued that "the bar for competency is high" and that a defendant who suffers a mental condition is not necessarily incompetent.

However, the United States' Response missed the point. The question was not whether Abdulmutallab was, in fact, competent—something that could only be determined after a hearing and the taking of proof. Instead, the question was whether the doubts were sufficient to require an examination and hearing. The allegations of the Motion were specific

enough and credible in light of the totality of the circumstances. *See Torres*, 223 F.3d at 1108-09 (rejecting as "clearly inadequate" the trial court's conclusion that the defendant was merely seeking removal of his counsel when he engaged in bizarre behaviors that caused counsel to question his competency).

Abdulmutallab is allegedly a dedicated terrorist who rejected a life of wealth and privilege in favor of an attempt to detonate an explosive device on an aircraft to kill everyone onboard, including himself. In the process, he severely injured himself and required substantial medical treatment, including the administration of fentanyl, a drug 100 times more powerful than morphine. (R. 118, p. 4) Pending trial he was held in solitary confinement and placed under constant watch in conditions that would strain the mental health of anyone. His treatment vastly differed from that of most pretrial inmates and his frequent reports of troubles with Milan coincided with his declining interest in mounting a defense. He repeatedly refused appropriate clothing that had been provided for him to wear. At voire dire, Abdulmutallab chose to appear in a t-shirt instead of putting on a suit that had been provided to him because he was not allowed "to wear it the way [he] want[ed]." (R. 117, p. 6) Similar to the facts of *Torres*, where the court

held there was *Pate* error, standby counsel raised competency concerns and Abdulmutallab engaged in bizarre behaviors, such as refusing the clothing provided to him. 223 F.3d at 1109-10.

Furthermore, standby counsel requested funds in the Motion for expert witnesses to evaluate Abdulmutallab's competency. The district court never expressly addressed the request for funds but denied the Motion in its entirety. At a minimum, the district court should have granted funds so standby counsel could have explored the issue of competency further and possibly demonstrated reasonable cause to the satisfaction of the district court. Instead, it summarily dismissed standby counsel's competency concerns and gave standby counsel no reasonable means to explore the issue further.

B. Abdulmutallab's Dismissive Attitude Toward His Defense Raised Bona Fide Doubts Regarding His Competency

Standby counsel's concerns about Abdulmutallab's competency were all the more important because Abdulmutallab defended himself against charges carrying a mandatory life sentence but displayed a dismissive attitude toward his defense. "No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court." *Massey v. Moore*, 348

U.S. 105, 108 (1954). The district court should have held a competency examination to make sure it was not confronted with such a situation but it did not.

From the beginning, Abdulmutallab demonstrated a cavalier attitude toward his defense that would have caused a reasonable judge to question his rational and factual understanding of the proceedings against him. *See Dusky*, 362 U.S. 402. At the September 13, 2010 pretrial conference, he informed the district court that he wanted to represent himself in a case where he was facing a mandatory life sentence even though he had never studied law, was unfamiliar with the Federal Rules of Evidence, and had essentially no legal knowledge. (R. 23, p. 6-9) When questioned why he wanted to represent himself, he gave the vague answer that it was in his best interest to do so and no representation would serve his interests. He never elaborated. When the district court tried to talk him out of representing himself, he gave short and dismissive answers refusing counsel. Later, he requested that his standby counsel not receive discovery because he did not believe "it was necessary," a request the district court denied. (R. 33, p. 7) He also attempted to waive his presence at a status conference but the district court required him to attend since he was representing himself. (R.

30; R. 35) When asked how he would divide the labor at trial with standby counsel, Abdulmutallab stated that he had not "thought about that yet." (R. 115, p. 31-32)

Standby counsel's concern that Abdulmutallab may have been incompetent was supported by Abdulmutallab's repeated presentation of legally uncognizable arguments. He frequently made statements that he was not subject to the laws of the United States. He filed a motion for a detention hearing, arguing that he was entitled to be released from detention because he is a Muslim, he is subject only to the law of the Koran, and the United States could not detain him and subject him to laws in which he did not believe. (R. 79). These legally uncognizable arguments he repeatedly raised should have caused the district court to question his rational and factual understanding of the proceedings against him.

Any interest he may have had in presenting a defense declined to an insignificant level by the time of trial. On the first day of trial, Abdulmutallab stood up and said "I don't want to contest the charges." (R. 119, p. 9) The district court asked standby counsel if he had discussed pleading guilty with Abdulmutallab, to which standby counsel responded that he had not. After a recess to allow them to discuss the matter, Abdulmutallab chose to proceed to trial. However, the next day he

inexplicably pled guilty to all of the charges against him even though he faced a mandatory life sentence and he did not have a Rule 11 plea bargain. The district court accepted his plea as knowingly, intelligently, and voluntarily made despite all of the red flags regarding his competency and the failure to hold a hearing on the issue as required by *Pate* and *Drope*. Doing so was error.

C. Abdulmutallab's Equivocal Expression of Competency Raised Bona Fide Doubts Regarding His Competency and the District Court Should Not Have Relied on the Statement to Find Him Competent

The district court erred because it denied the Motion based largely on Abdulmutallab's own equivocal profession of competency. The following critical exchange occurred at the hearing on the Motion:

> [the district court]: And what's your position on [a competency examination]?
>
> [Abdulmutallab]: I guess, simply, I believe I'm competent to proceed by myself and I do not wish to have the examination.
>
> [the district court]: And if I were to order the examination, would you cooperate with it?
>
> [Abdulmutallab]: Well, one thing was, as I—as he, [standby counsel] said when—because when we discussed about the motion is initially [sic] my idea was perhaps I would even—**that would be a good thing to prove my competency to proceed standby**, but then when he put it to me that, you know, the kind of—the reasons why, or the arguments that have to be put forward before even someone has that type of examination, and I said that's counter productive to what I even want, so I don't want the examination.

> [the district court]: **All right. I'm satisfied that Mr. Abdulmutallab is in fact competent to proceed in this matter** . . .

(R. 116, p. 15-16) (emphasis added)

There are two problems with the district court's reasoning here. First, Abdulmutallab's rambling profession of competency was equivocal. He stated that he believed he was competent but, at one point, he believed it would have been a good idea to "prove" his competency. This subtle expression of doubt as to his own competency was yet another red flag that should have alerted the district court to the need for a competency examination under *Pate* and *Drope*.

Second, the district court followed Catch-22 logic in denying the Motion. An incompetent defendant would naturally opine that he was competent to stand trial because he lacks the capacity to understand his incompetency. The district court should have realized this problem in light of the other red flags raised but it myopically focused on Abdulmutallab's own rambling, equivocal profession of competency. In *United States v. Ross*, 703 F.3d 856 (6th Cir. 2012), this Court rejected a district court's Catch-22 logic in a similar context. In holding that a defendant undergoing a competency examination must be represented by counsel at the hearing, this Court stated that appointment of counsel for the hearing was especially

important where "the pro se defendant believes and argues he is competent, leaving no one to challenge the evidence." *Id*. at 871. By analogy, a competency examination to test the evidence is especially important where standby counsel raises concerns but the pro se defendant facing a mandatory life sentence believes that he is competent to proceed to trial pro se. The reasoning of *Ross* applies here and a district court simply cannot rely on an equivocal, ipse dixit profession of competency to deny a competency examination where there are numerous red flags. *See Pate*, 383 U.S. at 384.

D. The Guilty Plea Was Not Knowingly, Voluntarily, and Intelligently Made and Abdumutallab's Guilty Plea Did Not Waive Appellate Review of this Issue

Finally, it is important to note that as Abdulmutallab's competency to stand trial was in question, he could not knowingly, voluntarily, and intelligently plead guilty and he could not waive appellate review of the issue of the competency evaluation by pleading guilty. *See Pate*, 383 U.S. at 384 & 387 (holding that it is contradictory "to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive'" a right and that competency requires a "concurrent determination"); *Harper v. Parker*, 177 F.3d 567, 571 (6th Cir. 1999), *cert. denied*, 526 U.S. 1141 ("once Harper's competence was put in issue, Harper could not waive his right to have his competence determined."). The district court should have held a

competency hearing to make sure that it was not faced with "a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court." *See Massey*, 348 U.S. at 108. It did not, Abdulmutallab's due process right to a fair trial as set forth in *Pate* and *Robinson* was violated, his rights under 18 U.S.C. § 4241(a) were violated, his guilty plea was not made knowingly, voluntarily, and intelligently, and he is entitled to a new trial and a "concurrent determination" of his competency.

II. THE DISTRICT COURT ERRED BY ALLOWING ABDULMUTALLAB TO REPRESENT HIMSELF WHEN HIS COMPETENCY WAS IN DOUBT

The Sixth Amendment guarantees criminal defendants the right to counsel. U.S. Const. Amend. VI. It is undisputed that a competent defendant may waive the right to counsel and choose self-representation even if the trial court believes that self-representation is not advisable. *Faretta v. California*, 422 U.S. 806, 807 (1975). Any waiver of the right to counsel must be knowingly, voluntarily, and intelligently made. *Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004). "When there is reason to doubt the defendant's competence, a court should make a competency determination before finding the waiver to be valid." *Ross*, 703 F.3d at 867 (internal quotations omitted).

Critically, the standard for competency to self-represent under *Faretta* is higher than the standard for competency to stand trial under *Dusky*. *Indiana v. Edwards*, 554 U.S. 164, 177-78 (2008); *Ross*, 703 F.3d at 869. A defendant who is competent to stand trial under *Dusky* may nevertheless have counsel imposed against his will if that defendant is not competent to conduct trial proceedings alone. *Edwards*, 554 U.S. at 177-78. Accordingly, this Court has held that "determination of the need for a hearing regarding competency to stand trial brought into question the higher standard for self-representation and should have triggered appointment of counsel at least until the competency to stand trial issue was resolved." *Ross*, 703 F.3d at 869.

Given the heightened standard for competency to self-represent and the substantial doubts surrounding Abdulmutallab's competency, the district court should have ordered a competency examination to determine whether Abdulmutallab was competent to represent himself under *Faretta* and *Edwards*. However, there is no indication that the district court even considered the heightened standard of competency for self-representation when it refused to order a competency examination. In finding Abdulmutallab competent and denying a competency examination, the district court never made detailed findings of fact or conclusions of law. It

referenced no authority to support its conclusion. It evaluated absolutely no psychiatric information or expert testimony whatsoever. Instead, it entered a conclusory order denying a hearing "for the reasons set forth on the record at the August 17, 2011 hearing." (R. 66) The primary reason set forth at the August 17, 2011 hearing was Abdulmutallab's own equivocal profession of competency.

Instead of holding a competency hearing or making detailed findings as to why one was unnecessary, the district court essentially assumed as a matter of law that Abdulmutallab was competent to proceed to trial and to represent himself. This failure to consider the heightened standard prejudiced Abdulmutallab because the district court allowed him to plead guilty to charges carrying a mandatory life sentence without counsel and without a competency determination. Against the weight of standby counsel's concerns and Abdulmutallab's bizarre behaviors, the district court accepted his guilty plea as knowingly, intelligently, and voluntarily made.

Not only did the district court commit procedural error in finding Abdulmutallab competent to self-represent without a competency examination, it also reached the wrong substantive result. The concerns of standby counsel regarding Abdulmutallab's competency, his disinterest in his defense, and his own equivocal claim of competency—all of which were

discussed at length previously in this brief and are incorporated by reference into this argument as if fully set forth herein—should have alerted the district court that there was a question as to his competency to represent himself.

Abdulmutallab's obvious difficulties and lack of thought and preparation also called into doubt his competency to represent himself. When asked whether he would voire dire the jurors, Abdulmutallab responded:

> I haven't thought about that yet. That would be something I would want to find out more about the procedure and then—

(R. 115, p. 31) The district court asked Abdulmutallab if he would make the opening argument. He responded:

> Again, I'm still not fully familiar with the jury trial process, and I'm still trying to learn that, but I would imagine I would want to make that opening statement myself.

This exchange should have called into question Abdulmutallab's competency to self-represent and should have led to a competency examination.

"Assurance that the defendant has counsel is especially important where, as here, the steadfast belief of the defendant in his own competency—both to stand trial and to defend himself—is belied by his

continuing bizarre behavior." *Ross*, 703 F.3d at 870. While the district court was confronted with credible allegations of bizarre behavior and substantial evidence of Abdulmutallab's incompetency, it dismissed them offhand and concluded that Abdulmutallab was competent to represent himself as a matter of law and without a competency examination. It accepted his pro se guilty plea to charges carrying a life sentence as knowingly, intelligently, and voluntarily made without a finding that he was competent to represent himself under *Faretta* and *Edwards*. The procedure and the substantive result constitute error.

III. THE DISTRICT COURT ERRED BY FAILING TO SUPPRESS ABDULMUTALLAB'S INVOLUNTARY STATEMENTS

Ordinarily, a voluntary and unconditional guilty plea "bars any subsequent non-jurisdictional attack on the conviction." *United States v. Martin*, 526 F.3d 926, 932 (6th Cir. 2008) (quoting *United States v. Pickett*, 941 F.2d 411, 416 (6th Cir. 1991)). Abdulmutallab pleaded guilty without a conditional guilty plea or other Rule 11 plea bargain and such a plea would normally bar appellate consideration of any suppression issue. However, Abdulmutallab's competency was in doubt and, therefore, the suppression issue is not waived. *See Pate*, 383 U.S. at 381 (holding that it is contradictory "to argue that a defendant may be incompetent, and yet

knowingly or intelligently 'waive'" a right). In the interests of judicial economy and efficiency, this Court should reach this issue even if it determines that Abdulmutallab is entitled to a new trial as a result of the district court's failure to hold a competency hearing.

The district court erred when it failed to suppress Abdulmutallab's statements at the University of Michigan Hospital after holding that those statements were voluntary. (R. 94) Abdulmutallab made numerous incriminating statements at the University of Michigan Hospital, including that he was sent by al Qaeda to destroy an aircraft, while in custody and without being Mirandized. (R. 117, p. 75)

However, the Fifth Amendment prohibits the use of the defendant's compelled testimony. *Ledbetter v. Edwards*, 35 F.3d 1062, 1067 (6th Cir. 1994). "When a defendant claims that a confession was coerced, the government bears the burden of proving by a preponderance of the evidence that the confession was in fact voluntary." *United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999). A coerced statement is involuntary if (1) the police activity was objectively coercive, (2) the coercion in question was sufficient to overbear the defendant's will, and (3) the alleged police misconduct was "the crucial motivating factor" in the defendant's decision to offer the statement. *Id*. On appeal, the district court's determination as to the

voluntary nature of an inculpatory statement is reviewed de novo. *Id*.

First, there is little question that the police activity was objectively coercive. At the suppression hearing, Agent Waters of the FBI, the primary interrogator, admitted that Abdulmutallab was in custody at the time of the interrogation and that he never received a Miranda warning. (R. 117, p. 77 & 82) Authorities purposefully withheld the Miranda warning because they believed the warnings confused persons not familiar with the legal system and they believed they were confronted with an emergency situation where they needed to get information regarding other possible attacks immediately. Authorities knew that they were interrogating a foreign national at a hospital while he was injured and sedated without Miranda warnings or access to legal counsel or consular officials.

Second, the coercion in question was sufficient to overbear Abdulmutallab's will. He suffered serious burns to his body and the questioning occurred at the hospital while he was being treated on an emergency basis for these injuries. Nurse Longenecker had to administer 300 micrograms of fentanyl to sedate him. (R. 117, p. 25) The United States' own expert admitted that fentanyl is 100 times more powerful than morphine. (R. 118, p. 4) The fentanyl put Abdulmutallab to sleep at one

point. (R. 118, p. 23-24) The coercion was sufficient to overcome Abdulmutallab's will because he lacked the ability to stay awake—let alone to resist the questioning.

Finally, the police misconduct was "the crucial motivating factor" in Abdulmutallab's decision to offer statements. He was injured in the incident onboard the aircraft and needed medical attention. However, agents questioned him at the hospital while he was sedated and receiving emergency treatment. The situation presented here is analogous to that of *Mincey v. Arizona*, 437 U.S. 385, 401 (1978), where the Supreme Court held that involuntary statements were inadmissible where the defendant was "weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious." Like the defendant in *Mincey*, Abdulmutallab was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious. Therefore, the police misconduct was the crucial motivating factor in Abdulmutallab's decision to offer the statements, the statements were involuntary, and the statements should have been suppressed.

IV. ABDULMUTALLAB'S LIFE SENTENCE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENTS

The Eighth Amendment to the United States Constitution states that

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. The Supreme Court has interpreted the Eighth Amendment to contain a "narrow proportionality principle" in non-death penalty cases. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring); *United States v. Moore*, 643 F.3d 451, 454 (6th Cir. 2011). The Eighth amendment does not require "strict proportionality" between crime and sentence. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) However, the Supreme Court struck down a sentence of life imprisonment without the possibility of parole as "significantly disproportionate" under the Eighth Amendment where a defendant was convicted of uttering a no account check for $100.00 and had numerous prior felony convictions. *Solem v. Helm*, 463 U.S. 277, 303 (1983). To determine whether a particular sentence constitutes cruel and unusual punishment, courts look to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii) & 924(c)(1)(C)(ii) dovetail to provide for a mandatory life sentence for a "second or subsequent" conviction for using and carrying a firearm/destructive device during and in relation to a crime of violence or possession of a

firearm/destructive device in furtherance of a crime of violence. Here, these statutes provided for mandatory life sentences for Abdulmutallab as a result of his conviction on Counts 2, 4 and 6. Similarly, Counts 1 and 7 provided for a maximum of imprisonment for life, which was imposed. The life sentence on Counts 1 and 7 was discretionary, unlike the mandatory sentence for conviction on Counts 2, 4 and 6. Abdulmutallab raised the Eighth Amendment issue before the district court (R. 131) but the district court held at sentencing that his punishment was constitutional.

Abdulmutallab concedes that the weight of authority is against his position. Nevertheless, Abdulmutallab submits that the evolving standards of decency prohibit a life sentence where no one (other than himself) was physically injured, most of the passengers believed that the detonation was the result of firecrackers, and he had no prior criminal history. While Abdulmutallab's offense conduct had the potential to cause great destruction and loss of life, it did not. Thus, as in *Solem*, his life sentence is "significantly disproportionate" to his offense and, if he is not granted a new trial, he should be resentenced consistent with the Eighth Amendment.

V. 18 U.S.C. §§ 924(c)(1)(A), 924(c)(1)(B)(ii), & 924(c)(1)(C)(ii)—USE AND CARRYING OF A FIREARM/DESTRUCTIVE DEVICE DURING AND IN RELATION TO A CRIME OF VIOLENCE AND POSSESSION OF A FIREARM/DESTRUCTIVE DEVICE IN FURTHERANCE OF A CRIME OF VIOLENCE ARE UNCONSTITUTIONAL BECAUSE CONGRESS LACKED THE POWER TO ENACT THEM UNDER THE COMMERCE CLAUSE

Constitutional challenges to the validity of a criminal statute present questions of law that are reviewed de novo. *United States v. Suarez*, 263 F.3d 468, 476 (6th Cir. 2001). Pursuant to the Commerce Clause, Article I Section 8 of the United States Constitution, Congress may regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of, or persons or things in interstate commerce, and (3) activities substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *Lopez*, the Supreme Court struck down the Gun-Free School Zones Act of 1990, which prohibited possession of a gun in a school zone, as exceeding Congress's Commerce Clause powers because the law "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce." *Id*. at 551.

Here, similar to *Lopez*, the activity regulated by the applicable subsections of the statute, 18 U.S.C. § 924—"use and carrying" and "possession" of a "destructive device" in connection with a "crime of

violence"—is not commercial activity. Here, similar to *Lopez*, there is no requirement that the "use and carrying," "possession," or "crime of violence" be connected in any way to interstate commerce. Here, as in *Lopez*, the statute is unconstitutional. Counts 2, 4 and 6 should be dismissed with prejudice and Abdulmutallab's life sentences should be vacated.

Abdulmutallab raised this argument before the district court (R. 131) The United States argued that *United States v. Ricketts*, 317 F.3d 540 (6th Cir. 2003), foreclosed Abdulmutallab's argument by upholding 18 U.S.C. § 924 against a Commerce Clause challenge. (R. 132, p. 6-7). However, *Ricketts* is distinguishable because it involved a drug conspiracy, which the defendants admitted affected interstate commerce. *Id*. at 543. Thus, the as-applied challenge in Ricketts failed because drug conspiracies unquestionably affect the interstate market for drugs, which Congress unquestionably has the power to regulate. However, *Ricketts* does not answer the question presented here—whether the portion of 18 U.S.C § 924 that criminalizes the "use or carrying" and "possession" of a destructive device is unconstitutional when it is connected only to a generic "crime of violence" and not limited to or tied in any way to situations substantially affecting interstate commerce.

The United States argued to the district court that Abdulmutallab's guilty plea and his admission that the interstate commerce requirement was satisfied foreclose any challenge to the facial constitutionality of the statute. (R. 132, p. 7) However, the United States' argument lacks merit in light of *Waucaush v. United States*, 380 F.3d 251 (6th Cir. 2004). In *Waucaush*, this Court held that the defendant's guilty plea to RICO charges was not knowingly and intelligently made when defendant misunderstood the scope of "affecting" interstate commerce requirement where subsequent Supreme Court decisions limited the application of that element. "Contrary to the positions of the Government and the district court, Waucaush may be actually innocent even though he admitted as part of his plea that his activities 'affected interstate commerce.'" *Id*. at 255. This Court reasoned that "the requirement that a guilty plea be intelligent would evaporate if intelligence is defined only as the ability to articulate the governing legal rule." *Id*. at 258. This reasoning applies with equal force to Abdulmutallab's plea statements regarding the interstate commerce element and this Court should reach the issue on the merits. His conviction on Counts 2, 4, and 6 and his life sentences under § 924 should be vacated.

VI. ABDULMUTALLAB'S SENTENCE IS SUBSTANTIVELY UNREASONABLE

This Court reviews criminal sentences for both procedural and substantive reasonableness. *Gall v. United States*, 552 U.S. 38, 51 (2007). "Reasonableness is determined under the deferential abuse-of-discretion standard." *United States v. Battaglia*, 624 F.3d 348, 350 (6th Cir. 2010). Where, as here, the sentence falls within the Guidelines range, this Court applies a presumption of reasonableness. *United States v. Anderson*, 695 F.3d 390, 402 (6th Cir. 2012).

A sentence is substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, or gives an unreasonable amount of weight to any pertinent factor. *United States v. Cochrane*, 702 F.3d 334, 345 (6th Cir. 2012). Substantive reasonableness review focuses on whether a sentence is adequate, but not "greater than necessary" to accomplish the sentencing goals identified by Congress in 18 U.S.C. § 3553(a). *Id*. In reviewing for substantive reasonableness, this Court inquires into the length of the sentence and the factors evaluated by the district court in reaching its sentencing determination. *Id*. This Court will "take into account the totality of the circumstances, including the extent of any variance from the Guidelines

range." *United States v. Petrus*, 588 F.3 347, 353 (6th Cir. 2009). This Court gives deference to the district court's determination of the length of the sentence so long as the sentence is justified in light of the § 3553(a) factors. *Cochrane*, 702 F.3d at 345.

Abdulmutallab submits that his life sentence is substantively unreasonable in light of the nature and circumstances of his offense. 18 U.S.C. § 3553(a)(1). His offense resulted in no physical harm to anyone other than himself and most of the passengers believed that someone was setting off firecrackers. Moreover, his life sentence is substantively unreasonable in light of the history and characteristics of the defendant. Abdulmutallab is a young man who was in his early 20s when he allegedly committed the offense conduct. Imprisoning him for the rest of his life is an extraordinarily harsh punishment that inappropriately rules out any possibility of rehabilitation far too early for a young man with absolutely no criminal history whatsoever other than the charged conduct. In light of the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment, a lengthy term of imprisonment other than a life sentence would be sufficient. 18 U.S.C. § 3553(a)(2)(A). A sentence of imprisonment for life under these circumstances is excessively harsh.

CONCLUSION

For the foregoing reasons, Appellant Umar Farouk Abdulmutallab's conviction should be reversed, Counts 2, 4, and 6—which turn on § 924(c)—should be dismissed with prejudice, and this matter should be remanded to the district court for a new trial and a concurrent competency determination, or, in the alternative, his sentence should be vacated and this matter should be remanded for resentencing.

DATED: February 28, 2013

/s/ Travis A. Rossman

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 37(a)(7)(C), I, Travis Rossman, attorney for Appellant Umar Farouk Abdulmutallab, hereby certify that this brief contains 11,914 words.

DATED: February 28, 2013 /s/ Travis A. Rossman
Travis A. Rossman (KY Bar No. 92344)

CERTIFICATE OF SERVICE

I, Travis Rossman, hereby certify that on February 28, 2013, I served the foregoing Principal Brief of Appellant Umar Farouk Abdulmutallab upon the following:

Via CM/ECF:

All counsel of record

DATED: February 28, 2013 /s/ Travis A. Rossman
Travis A. Rossman (KY Bar No. 92344)

ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellant Umar Farouk Abdulmutallab designates the following relevant documents from the electronic record in the district court:

Docket Item Number	Document	Date
	Docket Sheet	
7	Indictment	January 6, 2010
23	Transcript of Pretrial Conference	September 13, 2010
28	First Superseding Indictment	December 15, 2010
30	Waiver of Defendant's Presence at Pretrial Conference	January 10, 2011
33	Transcript of Pretrial Conference	October 14, 2010
35	Order Denying Motion to Waive Presence at Pretrial Conference	January 19, 2011
55	Motion to Suppress	August 5, 2011
56	Motion for Disclosure of Grand Jury Transcripts and Exhibits	August 5, 2011
57	Motion to Change Venue	August 5, 2011
58	Motion for Individual Voire Dire Examination	August 5, 2011

59	Motion to Suppress Statements Made to Government Agents at the Milan Correctional Facility	August 5, 2011
64	Motion for Immediate Hearing to Determine Defendants Concurrence with, and to Address Subject Of, Standby Counsel's Sealed Motion	August 12, 2011
66	Order Denying Standby Counsel's Motion Requesting Competency Examination	August 17, 2011
70	Transcript of Arraignment Hearing	January 8, 2010
73	Transcript of Pretrial Conference	January 25, 2011
74	Transcript of Pretrial Conference	April 7, 2011
76	Order granting Motion for Individual Voire Dire Examination	August 19, 2011
78	Motion for No Use of Excessive Force	August 25, 2011
79	Motion for Detention Hearing	August 25, 2011
94	Order Denying Motion to Suppress	September 16, 2011
114	Transcript of Plea Hearing	October 12, 2011

115	Transcript of Motion Hearing and Pretrial Conference	July 7, 2011
116	Transcript of Pretrial Conference, Motion for Competency Review, and Defendant's Request for Additional Discovery	August 17, 2011
117	Transcript of Motion Hearing and Evidentiary Hearing, Volume I	September 14, 2011
118	Transcript of Motion Hearing and Evidentiary Hearing Volume II	September 15, 2011
119	Transcript of Jury Trial, Volume IV	October 11, 2011
126	Order Denying Motion to Appoint New Standby Counsel	January 6, 2012
130	Sentencing Memorandum by United States of America	February 10, 2012
131	Motion to Hold Mandatory Life Sentence Unconstitutional as it is Cruel and Unusual Punishment, and Violative of the Commerce Clause as Applied and for a Sentence Notwithstanding the Advisory Guidelines Range	February 13, 2012

132	Response by the United States to Abdulmutallab's Motion	February 15, 2012
136	Judgment as to Umar Farouk Abdulmutallab	February 16, 2012
137	Notice of Appeal	February 17, 2012
139	Transcript of Motion Hearing and Sentencing	February 16, 2012
142	Transcript of Initial Appearance	December 26, 2009
145	Transcript of Status Conference	April 13, 2010