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 and Sentence from the United States District Court for the Eastern District of Michigan
Southern Division

District Court Case No. 10-cr-20005

REPLY BRIEF OF DEFENDANT-APPELLANT

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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 HEARING

A. The district court never held a competency hearing

The United States suggests at several junctures that Abdulmutallab actually had a competency hearing where he was found to be competent and the district court merely declined to order a comprehensive psychiatric examination. These assertions concern the pretrial conference where the Motion for a Competency Exam (the "Motion") was discussed on August 17, 2011. In its brief, the United States argued:

> In this case, the statute did not require a hearing because the district court found no cause to question the defendant's competency. But the district court chose to conduct a hearing to allay standby counsel's concerns. At that hearing, the court found Abdulmutallab competent to stand trial.

(United States Br. at 11) The United States also argued:

> At the **competency hearing**, Abdulmutallab directly and articulately addressed the district judge on other subjects, arguing that he be permitted to receive certain personal items such as a radio.

(United States Br. at 16) (emphasis added) In the Statement of the Case section of its brief, the United States claims:

> The district court held an evidentiary hearing on August 17, 2011, at which Abdulmutallab testified. The district court denied the motion because it found that a psychiatric examination was unnecessary.

(United States Br. at 3)

Any suggestion that Abdulmutallab had a competency hearing is wrong. Abdulmutallab *never* had a competency hearing. The pretrial conference on August 17, 2011, was not a competency hearing—it was a pretrial conference to determine, *inter alia*, whether a competency hearing was necessary. The district court ultimately determined that Abdulmutallab's competency was not reasonably called into question and, therefore, a competency hearing was not necessary, which is why one was never held. (R. 66, Order Denying Motion for Competency Hearing, PgID 310) On appeal, Abdulmutallab challenges the district court's determination that a competency hearing was not necessary because his competency was not sufficiently called into doubt, not an actual finding of competence after a full hearing for the taking of proof.

On August 17, 2011, Abdulmutallab was sworn by the district court (R. 116, Transcript of Pretrial Conference, PgID 758) and, after extensively questioning him, the district court permitted standby counsel and the United States the opportunity to question him, which both declined to do. (R. 116,

Transcript of Pretrial Conference, PgID 761) However, the fact that he was sworn did not convert the pretrial conference into a competency hearing. If the August 17, 2011, pretrial conference had been a competency hearing, the parties would have had the opportunity to present testimony from other witnesses and other evidence. *See* 18 U.S.C. § 4247(d) ("The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.") A full evidentiary hearing for the taking of proof simply was not held. At the August 17, 2011, pretrial conference, the district court denied Abdulmutallab's request for funds to retain experts, preventing Abdulmutallab from obtaining expert testimony that would have been indispensable at a full evidentiary hearing.

While a district court may conduct a competency hearing without ordering a comprehensive psychiatric examination, the district court here unequivocally denied the Motion and refused to hold a competency hearing. Contrary to the United States' assertion that "the court found Abdulmutallab competent to stand trial" after the "hearing," (United States Br. at 11) and merely refused to order a psychiatric exam, the district court held 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." (R. 116, Transcript of Pretrial Conference, PgID 763) Moreover, a district court is required to appoint counsel to a defendant subject to a competency hearing and may not allow a defendant to proceed *pro se* at his own competency hearing. *United States v. Ross*, 703 F.3d 856, 869 (6th Cir. 2012). The district court did not appoint counsel for Abdulmutallab for the August 17, 2011, pretrial conference and he proceeded *pro se* with standby counsel just like every other stage of the proceedings.

The district court speaks through its written orders. The district court never made written findings of fact or conclusions of law regarding whether Abdulmutallab was, in fact, competent. If there were any lingering doubt as to the nature of the pretrial conference on August 17, 2011, the district court's only written order concerning the competency issue resolves that doubt. (R. 66, Order Denying Motion for Competency Hearing, PgID 310) The order stated:

ORDER DENYING STANDBY COUNSEL'S MOTION REQUESTING COMPETENCY EXAMINATION

At a hearing held on August 17, 2011, this matter came before the Court on Standby Counsel's motion requesting a competency hearing. Being fully advised in the premises, having read the pleadings, and for the reasons set forth on the record at the August 17, 2011 hearing, the Court DENIES Standby Counsel's motion.

SO ORDERED.

B. Standard of Review

The district court's decision to deny a competency hearing should be given no deference or very little deference by this Court. On appeal, the standard of review of the decision to deny a competency hearing is whether "a reasonable judge, situated as was the trial judge, should have doubted the defendant's competency." *Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012) (citing *Williams v. Bordenkircher*, 696 F.2d 464, 467 (6th Cir. 1983)). As the United States concedes, a competency hearing is required when a court has reason to doubt a defendant's competence. (United States Br. at 9-10 (citing *Godinez v. Moran*, 509 U.S. 389, 400, n. 13 (1983))).

The United States contends that this Court should give deference to the district court's decision to deny the Motion because the district court was in the best position to evaluate Abdulmutallab's behavior. (United States Br. at 11); *see also Ross*, 703 F.3d at 867 (applying abuse of discretion standard to determination of whether competency was reasonably in doubt). However, this Court should not give any deference to the district court's decision to deny a competency hearing and should review *de novo* whether a reasonable judge should have doubted Abdulmutallab's competency. The district court made no express findings of fact or conclusions of law and simply stated in a conclusory fashion that it had no reason to doubt Abdulmutallab's competency. In doing so, the district court closed its eyes to indicia of incompetency, refused the request for funds to obtain experts to develop a record, and concluded as a matter of law that there was no cause to question Abdulmutallab's competency. Absent detailed findings of fact, all that is before this Court is the district court's bare conclusion of law that Abdulmutallab was unquestionably competent. This unsupported conclusion of law should be reviewed *de novo*, not for abuse of discretion.

C. The district court had ample reason to question Abdulmutallab's competency and it should have ordered a competency examination

The United States argues that the Motion was too vague and "said little of substance," and, therefore, it did not call into doubt Abdulmutallab's competency. (United States Br. at 12) However, the Motion was very specific. The Motion stated that Abdulmutallab "demonstrated irrational behavior," suffered "a series of reoccurring mental lapses," and exhibited "spontaneously erratic behavior." (*See* Motion, Sealed Electronic Appendix) It also stated that the behaviors existed all along but had recently worsened. These allegations were sufficient to cast doubts on Abdulmutallab's rational and factual understanding of the proceedings against him because they were serious matters reported to the district court by standby counsel, who had the most interaction with Abdulmutallab and the best opportunity to observe him. Standby counsel's report that the behaviors increased in degree should have been especially concerning to the district court.

Standby counsel cannot reasonably be faulted for keeping confidential the precise details of the irrational behavior and spontaneously erratic behavior because saying more could have compromised Abdulmutallab's

trial strategy, disclosed confidential information, violated the attorney-client privilege, and otherwise undermined the defense. Standby counsel had a dilemma—he had to proceed ethically and without taking action adverse to his client but he had to notify the district court of his client's troubling behavior, which is why he filed the Motion under seal. Moreover, standby counsel could not say more because he had to preserve his working relationship with Abdulmutallab. Standby counsel properly notified the district court of the problems and provided as much detail as could reasonably be expected.

Similarly, the United States argues that standby counsel equivocated on the need for a competency hearing. Standby counsel stated he was "simply asking the Court to make a determination whether or not an exam would be appropriate" and never stated that he believed one was absolutely necessary. (R. 116, Transcript of Pretrial Conference, PgID 758) Again, the clear implication of standby counsel's hedging is that he had to preserve his working relationship with Abdulmutallab, who ultimately opposed standby counsel's Motion, and he had to limit the prejudice to Abdulmutallab's defense. Standby counsel had to walk a fine line between saying "my client is acting crazy," especially where the client disagrees with his assessment,

and continuing to work with his client to present a defense.

The United States argues that the *Drope* factors support the district court's determination not to order a competency hearing. First, the United States argues that Abdulmutallab did not demonstrate any irrational behaviors. (United States Br. at 14-15) However, he demonstrated irrational behaviors that should have cast doubt on his rational and factual understanding of the proceedings against him, especially in light of the serious allegations of the Motion. He repeatedly refused to wear a suit that had been provided for him and chose instead to appear in a t-shirt. (R. 117, Transcript of Suppression Hearing, PgID 787) He stated that the request for a competency hearing was initially his idea but he then decided to oppose the request. (R. 116, Transcript of Pretrial Conference, PgID 762)

Abdulmutallab requested that his standby counsel not receive a copy of his discovery materials. (R. 33, Transcript of Pretrial Conference, PgID 120) Perhaps most importantly, he attempted to waive his presence at pretrial conferences even though he represented himself. (R. 30, Waiver of Defendant's Presence at Pretrial Conference, PgID 90; R. 35, Order Denying Defendant's Request to Waive Presence at Pretrial Conference, PgID 128) He filed motions with legally uncognizable arguments. (R. 79, Motion for

Detention Hearing, PgID 391) He refused to change out of his prison clothes and requested to wear a Yemeni belt and dagger while he conducted voire dire of the jury. (R. 143, Jury Trial Transcript, Vol. I, p. 3) He attempted to plead guilty on the first day of trial, he was apparently talked out of doing so by standby counsel, (R. 119, Transcript of Jury Trial, Vol. IV, PgID 994) and then he pled guilty on the second day of trial. (R. 114, Transcript of Jury Trial, Vol. V, PgID 693)

These irrational behaviors called into question Abdulmutallab's understanding of the proceedings against him. *See Torres v. Prunty*, 223 F.3d 1103, 1109-10 (9th Cir. 2000) ("defendant's unusual and self-defeating behavior in the courtroom suggested that an inquiry into competency was required."). The United States points out that Abdulmutallab was very intelligent—he attended the University College of London, ranked the 4th best university in the world in 2013, he was articulate, he made comprehensible legal arguments, and he conducted voire dire of a juror. While Abdulmutallab's academic credentials may be impressive and he sometimes assisted in his defense in a constructive way, a *per se* competent defendant does not ordinarily request to wear prison clothes and a Yemeni belt and dagger to voire dire the jury or attempt to waive his presence when

he represents himself. *See McGregor v. Gibson*, 248 F.3d 946, 959-62 (10th Cir. 2001) (en banc) (finding error where defendant engaged in bizarre behaviors including an emotional outburst where he was provided a shirt with no pocket). These bizarre and self-defeating behaviors, coupled with his inconsistent and increasingly dismissive attitude toward his defense, should have caused the district court to question his rational and factual understanding of the proceedings against him.

As for the second *Drope* factor, the United States argues that Abdulmutallab's demeanor at trial was normal and respectful. (United States Br. at 15) However, Abdulmutallab demonstrated some disruptive behavior, including repeatedly shouting "Allahu Akbar" in court. (R. 139, Sentencing Transcript, PgID 1244) At one point in sentencing, the following disruptive exchange occurred:

> [THE DEFENDANT]: Allahu Akbar.
>
> [U.S. ATTORNEY]: This [video] is slow motion, Your Honor.
>
> [THE DEFENDANT]: Allahu Akbar.
>
> [U.S. ATTORNEY]: Your Honor, this is what the defendant referred to in the plea as a blessed weapon. . . .
>
> [THE DEFENDANT]: Allahu Akbar.

> [THE COURT]: I'm sorry, [standby counsel], do you know what it is that the defendant is saying?
>
> [STANDBY COUNSEL]: God is great, Your Honor.
>
> [THE COURT]: Thank you.

(R. 139, Sentencing Transcript, PgID 1246-47) This exchange shows that the district court did not understand many of Abdulmutallab's disruptive behaviors. While not extreme, when viewed in the totality of the circumstances, including standby counsel's concerns, the disruptive behavior should have caused the district court to question his rational and factual understanding of the proceedings against him.

As for the final *Drope* factor, the United States points out that previous medical opinion on Abdulmutallab's competency was lacking. It is hardly surprising that there was no previous medical opinion on a foreign national who spent little time in the United States and allegedly trained in remote terrorist bases. The district court should have ordered a competency hearing and granted standby counsel's request for funds to retain experts to obtain medical opinion.

Perhaps most importantly, the United States cites no authority where a defendant's lawyer informs the court about credible and serious doubts regarding the defendant's competency, the court refuses to hold a

competency hearing where bizarre and disruptive behaviors are clearly on display, and this refusal is upheld on appeal. Where there are credible and serious allegations concerning the defendant's competency raised by defense counsel, the trial court must hold a competency hearing. *Torres*, 223 F.3d at 1109-10; *McGregor*, 248 F.3d at 959-62 (finding doubts as to competency where defense counsel reported that defendant could not assist his defense, defendant engaged in outburst over being provided a shirt with no pocket, defendant disrupted voire dire by offering to play basketball with a potential juror, and there was little contemporaneous medical opinion on the issue of competency); *Mata v. Johnson*, 210 F.3d 324, 332 (5th Cir. 2000) (finding doubts as to competency where defendant changed his mind regarding pursuing collateral attack on murder conviction and death sentence after multiple suicide attempts). The overwhelming weight of authority is against the United States' position because defense counsel is in the best position to interact with the defendant and credible reports of questionable competency from defense counsel necessarily cause a reasonable judge to doubt the defendant's competency.

D. A concurrent determination of competency was required

The United States argues that the district court properly refused to

hold a competency hearing because standby counsel agreed with the district court that Abdulmutallab was competent to proceed when he entered his guilty plea. (United States Br. at 14 (citing R. 114, Transcript of Jury Trial, Vol. V, PgId 678)). The United States also argues that Abdulmutallab's competency was not reasonably in doubt because his attorneys from the Federal Public Defender's Office never questioned his competency before the district court. (United States Br. at 19)

However, there must always be a concurrent determination of competency. *Pate v. Robinson*, 383 U.S. 375, 387 (1966); *Torres*, 223 F.3d at 1110 (holding that trial court should have held a competency hearing in the face of continued bizarre behavior even though there was a prior medical opinion that defendant was competent). Whenever a defendant's competency is called into doubt, the district court should hold a competency hearing before proceeding further. *Pate*, 383 U.S. at 387. Even if Abdulmutallab were fully competent at the time of his guilty plea, the district court erred by allowing him to proceed to that point with doubtful competency. *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). A retrospective determination of competency simply cannot be made, especially where there is no record and the district court summarily denied a

competency hearing and funds for experts.

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

A. A higher standard of competency applies when a defendant seeks to waive his right to counsel and proceed to trial

The United States argues that the *Dusky* standard for competency applies both to Abdulmutallab's decision to plead to guilty and to his decision to waive counsel and represent himself at trial. (United States Br. at 20) The United States emphasizes that *Godinez* calls for the application of the *Dusky* standard to Abdulmutallab's decision to waive the right to counsel and to plead guilty. However, a higher standard of competency is required for a defendant who seeks to waive the right to counsel to represent himself at trial than a defendant who merely seeks to waive the right to counsel to plead guilty. *Indiana v. Edwards*, 554 U.S. 164, 173 (2008); *Ross*, 703 F.3d at 869. In *Edwards*, the Supreme Court explained the different standards as follows:

> In *Godinez*, the higher standard sought to measure the defendant's ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant's ability to conduct trial proceedings. To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue.

Edwards, 554 U.S. at 173.

Under *Godinez*, the lower *Dusky* standard applies to a defendant who seeks to fire his attorneys and enter guilty plea. *Godinez*, 509 U.S. at 391 ("At this time respondent informed the court that he wished to discharge his attorneys and change his pleas to guilty."). Under *Edwards*, the higher standard of competency applies to a defendant, such as Abdulmutallab, who seeks to fire his attorneys and represent himself at trial. This Court has recognized the different standards and 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.

Other authorities support a higher standard of competency to self-represent at trial. In *Massey v. Moore*, 348 U.S. 105, 108 (1954), the Supreme Court held that a defendant should have been given a competency hearing relating to his desire to represent himself because "[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel." In *Westbrook v. Arizona*, 384 U.S. 150, 150-51 (1966) (per curiam), the Supreme Court found error

where "[a]lthough petitioner received a hearing on the issue of his competence to stand trial, there appears to have been no hearing or inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel and proceed, as he did, to conduct his own defense." As the Supreme Court has repeatedly recognized in *Massey*, *Westbrook*, and *Edwards*, and as this Court acknowledged in *Ross*, a standard of competency higher than the *Dusky* standard applies to a defendant who seeks to waive the right to counsel to represent himself at trial than a defendant who merely seeks to waive the right to counsel to plead guilty, as in *Godinez*.

Here, Abdulmutallab sought to represent himself at trial, which triggered the higher standard for competency under *Edwards*. While he ultimately pled guilty during trial, there must always be a concurrent determination of competency when competency is reasonably called into question. *Pate*, 383 U.S. at 387. Unlike the *Godinez* defendant, Abdulmutallab sought to fire his attorneys and represent himself long before announcing an intention to plead guilty. Further, he actually conducted trial proceedings, such as participating in the voire dire of potential jurors. Because he did not immediately seek to plead guilty upon firing his attorneys, the *Godinez*/*Dusky* standard for competency to self-represent did

not apply. At the instant Abdulmutallab announced that he wanted to represent himself at trial, the district court should have recognized the higher standard of competency and concurrently evaluated whether Abdulmutallab's competency to represent himself was reasonably in doubt in light of the higher standard. It did not.

While Abdulmutallab had standby counsel, he unequivocally represented himself. The district court refused to allow him to waive his presence at a pretrial conference because he was a self-represented party and any proceedings conducted in his absence would be ex parte. (R. 35, Order Denying Defendant's Request to Waive Presence at Pretrial Conference, PgID 128) The district court repeatedly acknowledged that he represented himself and asked him if he would like standby counsel to assume the duties of regular counsel. Abdulmutallab always declined. (*E.g.*, R. 73, Transcript of Pretrial Conference, PgID 358-59) Although Abdulmutallab received substantial assistance from standby counsel, he represented himself, the higher *Edwards* standard for competency applied, and the district court should have doubted his competency based on the higher *Edwards* standard.

B. The district court should have ordered a competency examination in light of the higher standard and Abdulmutallab's indifference toward his defense

Under the higher *Edwards* standard, the district court should have questioned Abdulmutallab's competency and ordered a competency hearing because of the allegations of the Motion, Abdulmutallab's rambling and equivocal profession of competency, his bizarre and disruptive behaviors, and, above all, his ambivalence and increasing disinterest in presenting a defense. It is axiomatic that a defendant who has an equivocal attitude and little interest in presenting a defense should not be permitted to represent himself without the benefit of a competency hearing. "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*, 348 U.S. at 108. Yet that is exactly what happened here when the district court allowed Abdulmutallab to represent himself without first holding a competency hearing.

Abdulmutallab displayed an inconsistent attitude toward his defense and demonstrated declining interest in presenting a defense as his case proceeded to trial.

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) Abdulmutallab requested that his standby counsel not receive discovery because he did not believe "it was necessary," a request the district court denied. (R. 33, Transcript of Pretrial Conference, PgID 120) He also attempted to waive his presence at a pretrial conference but the district court required him to attend since he was representing himself. (R. 30, Waiver of Defendant's Presence at Pretrial Conference, PgID 90; R. 35, Order Denying Defendant's Request to Waive Presence at Pretrial Conference, PgID 128) 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, Motion for Detention Hearing, PgID 391) 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, Transcript of Pretrial Conference, PgID 743)

On the first day of trial, Abdulmutallab stood up and said "I don't want to contest the charges." (R. 119, Transcript of Jury Trial, Vol. IV, PgID 993-94) 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 not to plead guilty and to continue with the trial. (R. 119, Transcript of Jury Trial, Vol. IV, PgID 995) 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. (R. 114, Transcript of Jury Trial, PgID 693) He engaged in disruptive behaviors at his sentencing, including repeatedly shouting "Allahu Akbar." (R. 139, Sentencing Transcript, PgID 1246-47) As the United States discusses in its brief, Abdulmutallab often made jihadi statements throughout the proceedings instead of presenting cognizable and serious legal arguments. (United States Br. at 25)

Abdulmutallab represented himself, he conducted trial proceedings, the higher standard of competency to self-represent under *Edwards* applied, the district court should have recognized that the higher standard applied in determining whether Abdulmutallab's competency was reasonably in doubt, it should have ordered a competency hearing to resolve the doubts raised by Abdulmutallab's dismissive approach to his defense, it did not, and it committed reversible error.

III. ABDULMUTALLAB DID NOT WAIVE APPELLATE REVIEW OF THE SUPPRESSION ISSUE AND HIS INVOLUNTARY STATEMENTS SHOULD HAVE BEEN SUPPRESSED

The United States contends that Abdulmutallab waived his right to appeal the suppression issue by pleading guilty. Abdulmutallab concedes that an unconditional guilty plea ordinarily waives the right to appeal an adverse ruling on a motion to suppress and ordinarily waives any other subsequent non-jurisdictional attack on the conviction. *See, e.g., United States v. Martin*, 526 F.3d 926, 932 (6th Cir. 2008). Abdulmutallab also concedes that he pleaded guilty without a plea agreement and without preserving the right to appeal the adverse ruling on the motion to suppress.

However, a defendant whose competency is in doubt cannot knowingly and intelligently waive any right, including the right to appeal. *Pate*, 383 U.S. at 381. As discussed at length earlier, there were bona fide doubts as to Abdulmutallab's competency, the district court erred by ignoring these doubts and accepting his guilty plea without first holding a competency hearing, and Abdulmutallab should receive a new trial under *Pate* and *Drope*. Therefore, any waiver associated with his guilty plea is invalid. As the waiver is invalid, Abdulmutallab requests that this Court review the suppression issue in the interests of judicial economy and

efficiency so that statements he gave involuntarily may not be used against him if he is granted a new trial. It would be a waste of judicial resources to allow the failure to suppress involuntary statements to stand undisturbed if Abdulmutallab is granted a new trial because admission of the involuntary statements would constitute error that would require a second appeal and a third trial. Accordingly, this Court should reach the suppression issue on the merits.

The United States relied exclusively on its waiver argument and did not address the merits of the suppression issue. As discussed at length in the Principal Brief, *Mincey v. Arizona*, 437 U.S. 385 (1978), requires suppression of Abdulmutallab's involuntary statements made at the University of Michigan Hospital while receiving emergency treatment for serious injuries. The primary interrogator from the FBI admitted that he intentionally withheld Miranda warnings even though Abdulmutallab was unequivocally in custody. (R. 117, Transcript of Suppression Hearing, PgID 915) Abdulmutallab was sedated with fentanyl, a drug 100 times more powerful than morphine, while he received treatment for his burns (R. 118, Transcript of Suppression Hearing, PgID 955), he was isolated from legal counsel and consular officials, and he actually fell asleep while receiving

treatment. (R. 118, Transcript of Suppression Hearing, PgID 975)

These facts show that the police activity was objectively coercive, the coercion was sufficient to overbear Abdulmutallab's will, and the police misconduct was the crucial motivating factor in Abdulmutallab's decision to offer the statements. *See United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999). If the police had simply allowed Abdulmutallab to receive treatment and to fall asleep when sedated with an exceptionally powerful drug, he never would have given the statements. Therefore, the statements were given involuntarily and should be suppressed if Abdulmutallab is given a new trial.

IV. ABDULMUTALLAB'S SENTENCE IS CRUEL AND UNUSUAL PUNISHMENT

Abdulmutallab concedes that the weight of authority is against his position that his mandatory and discretionary life sentences constituted cruel and unusual punishment in violation of the Eighth Amendment. Nevertheless, the district court should have struck down the life sentences because evolving standards of decency in a maturing society, *see Estelle v. Gamble*, 429 U.S. 97, 102 (1976), prohibit the imposition of a life sentence where no one other than Abdulmutallab was seriously injured (R. 28,

Superseding Indictment, PgID 88), the passengers thought that someone had set off firecrackers, and Abdulmutallab had absolutely no prior criminal history whatsoever. Abdulmutallab was 23 years old on the date of the alleged offense conduct and punishing him with imprisonment for life with no possibility of release is significantly disproportionate to the harm caused by the offense conduct. *See Solem v. Helm*, 463 U.S. 277, 303 (1983) (striking down life sentence for uttering a no account check as "significantly disproportionate").

V. 18 U.S.C. § 924(c) CANNOT APPLY TO ABDULMUTALLAB

The United States argues that Abdulmutallab's as-applied challenge to 18 U.S.C. § 924(c) must fail because the "use and carrying," "possession," or "crime of violence" is limited to situations "for which the person may be prosecuted in a court of the United States" and therefore necessarily related to interstate or foreign commerce. Abdulmutallab submits that this language is insufficient as-applied to the unique circumstances of his case to establish the requisite nexus to the Commerce Clause because it is too vague and it does not specifically tie the "use and carrying" or "possession" of a "destructive device" to interstate or foreign commerce. Thus § 924(c) may

not be applied to Abdulmutallab under *United States v. Lopez*, 514 U.S. 549 (1995).

The United States also argues that "Abdulmutallab specifically acknowledged the interstate and foreign commerce elements of the offenses" when he pled guilty. (United States Br. at 46) However, under *Waucaush v. United States*, 380 F.3d 251 (6th Cir. 2004), this admission is not conclusive. Further, Abdulmutallab's competency was in question when he pled guilty, rendering the admission unreliable and of no legal consequence whatsoever. *See Pate*, 383 U.S. at 381 (holding that a person whose competency is in doubt may not knowingly, voluntarily, and intelligently waive a right).

VI. ABDULMUTALLAB'S SENTENCE IS SUBSTANTIVELY UNREASONABLE

The United States argues that Abdulmutallab's sentence is substantively reasonable because a statutorily mandated sentence is per se reasonable and the § 3553(a) factors do not apply to congressionally mandated sentences. These arguments fail because Abdulmutallab's life sentences constitute cruel and unusual punishment in violation of the Eighth Amendment and 18 U.S.C. § 924(c), the statute that provided for the

mandatory life sentences, should not apply to Abdulmutallab because it does not tie the "use or carrying" or "possession" of a destructive device to situations affecting interstate commerce. As the statutory life sentences should not have applied, the sentence is not per se reasonable.

The district court should have been free to consider the § 3553(a) factors and impose a sentence less than life imprisonment. Because the district court erroneously believed it was bound by statute to impose a life sentence, it based Abdulmutallab's sentence on "impermissible factors" and the sentence is substantively unreasonable. *See United States v. Cochrane*, 702 F.3d 334, 345 (6th Cir. 2012) (stating that a sentence is substantively unreasonable where, *inter alia*, it is based upon impermissible factors). Regardless of the Guidelines range, the district court's decision to impose a life sentence on a young man in his early 20s with no prior criminal history who caused no serious physical injury to anyone other than himself constituted an abuse of discretion.

CONCLUSION

For the foregoing reasons, Appellant Umar Farouk Abdulmutallab's conviction should be reversed 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: May 20, 2013

/s/ Travis A. Rossman

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 37(a)(7)(B)(ii), I, Travis Rossman, attorney for Appellant Umar Farouk Abdulmutallab hereby certify that this brief contains 5,949 words.

DATED: May 20, 2013

/s/ Travis A. Rossman
Travis A. Rossman (KY Bar No. 92344)

CERTIFICATE OF SERVICE

I, Travis Rossman, hereby certify that on May 20, 2013, I filed the foregoing Reply Brief of Appellant Umar Farouk Abdulmutallab via CM/ECF, which should cause a copy to be served on all counsel of record, and served the foregoing by first class mail on:

Jonathan Tukel
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DATED: May 20, 2013

/s/ Travis A. Rossman
Travis A. Rossman (KY Bar No. 92344)