HOW DOES A COMPETENT JIHADI ACT AFTER 21 MONTHS OF SOLITARY CONFINEMENT?

I would be shocked if, after today's appeal hearing in Umar Farouk Abdulmutallab's trial, he were granted a new trial on competency grounds. On the panel, David McKeague seemed completely skeptical on legal grounds, Jane Branstetter Stranch seemed skeptical on the central competency issue, leaving Curtis Collier (a District Judge on loan from E TN) with the only apparent sympathy for the argument at hand in the least.

As I explained back in May, The central question was whether Abdulmutallab was competent to defend himself. He had fired his federal defenders in September 2010 and the court named a standby counsel, Anthony Chambers, for him. In August of the next year, Chambers submitted a sealed motion arguing Abdulmutallab was not competent. Judge Nancy Edmunds had a hearing on August 17, 2011 and while she addressed several questions to Abdulmutallab, she did not have him evaluated for competency. When he plead guilty on October 12, 2012, she asked standby counsel if he thought Abdulmutallab was competent to plead guilt and after he assented, she accepted the guilty plea.

Both Judge McKeague, to a lesser degree Stranch, and prosecutor Jonathan Tukel emphasized that last point in their discussion: given that the same standby counsel who had submitted the motion on competence did not re-raise it at the plea, they argued, it suggests the counsel agreed with Edmunds' determination that Adbulmutallab was competent. Abdulmutallab's attorney Travis Rossman argued that the Chambers could not, at that point, argue his client was

totally crazy. Moreover, he argued, the standard for a defendant representing himself was higher and must be concurrent determination (meaning if he were crazy in August 2012 but competent in October 2012, it would still be an issue for a defendant representing himself). But that detail will almost certainly be the one the judges point to to reject this appeal.

Judges McKeague and Stranch also examined a different question. Some of the most obviously crazy things Abdulmutallab did (though this wasn't and couldn't have been Chambers' original argument) came leading up to trial, most notably his bid to wear a Yemeni dagger to his trial. Abdulmutallab intended to martyr himself, Stranch noted, couldn't these actions be interpreted as an effort to use the trial to make a point of his faith? McKeague pointed out that Abdulmutallab had done some pretty "well thought out logical things" leading up to his attack. He later asked whether his conduct at trial wasn't consistent with what you'd expect a jihadi to do, to use the trial as a platform to present his views?

Rossman contested that point – noting that had Abdulmutallab let the trial play out, he would have had many more opportunities to parade his jihadi views. McKeague responded that refusing counsel left Abdulmutallab more empowered to make jihadi statements rather than mount a defense. Rossman correctly pointed out this was all getting into speculation about how a competent jihadi would act.

While it didn't come up in the hearing, remember that the statement Abdulmutallab ultimately made was remarkably muted and took up less than 15 minutes, so by measure of his exploitation of his soapbox, the UndieBomber failed.

All that's a way of saying that much of the hearing focused on how a competent jihadi would use his decision to represent himself to further his goals of jihad.

There is, however, a significant weakness in the

government's case, one Tukel made obvious with the central ploy he made in his argument.

The question wasn't whether Abdulmutallab was competent on August 17, 2011, Tukel suggested, when Edmunds did not call for a competency hearing, nor whether he was competent on October 12, 2011, when he plead guilty. Rather, it was whether he was competent on September 13, 2010, when he fired his defense attorneys. This was part of what seemed a broader government strategy to obscure the timing issues. He also argued all Abdulmutallab's most bizarre behavior post-dated the August 2011 hearing. He argued that because Abdulmutallab attended college in England, he must be competent (!). He also argued that US v. Miller weighs against the standard on concurrent determination.

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

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

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

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

> 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.

After all, the exterior signs of mental impairment from solitary confinement may well be far different from those of a jihadi attempting to use his trial as a platform for propaganda.

In fact, Rossman's biggest mistake probably came when he asserted Abdulmutallab "did not have hallucinations." I'm not sure we know that. That's the entire point of having a competency examination, and one known potential impairment from solitary is hallucination. In any case, if you're arguing your client should have been evaluated, don't offer up layperson assessments about what he did and didn't have.

Now, frankly, there is evidence Abdulmutallab was crazy before he tried to down a Northwest flight (that's what people in Yemen told Jeremy Scahill, for example), though probably not so much that it would vacate his conviction.

The question before the court is not just whether Abdulmutallab was crazy on Christmas Day in 2009. Rather. It's also whether he was made crazy (or, more likely, crazier) by his conditions of incarceration. McKeague even invited Rossman to present evidence that something happened between the time when he competently attempted to bomb a plane and incompetently (his defense argues) failed to mount a defense.

But no one wanted to — or did — discuss that issue.