

DID SOLITARY CONFINEMENT MAKE UNDIEBOMBER 1.0 INCOMPETENT TO REPRESENT HIMSELF?

But, in fact, the FBI do a great job as far as eliciting information after they're Mirandizing them, and so they can get information as part of that type of negotiation with them, let them know they can in fact languish forever, or we can in fact have a dialogue about it intelligently.

– John Brennan, describing the way the FBI gets suspects to talk after Mirandizing them

Here's something you may not know: Umar Farouk Abdulmutallab, the first UndieBomber, is appealing his conviction and sentence.

He's doing so on several grounds, including that his confession made during public safety questioning while on fentanyl should not have been admissible at trial. But the most interesting issue – and the one that takes up the bulk of his appeal – argues Abdulmutallab was not competent to represent himself. (His appeal, as well as the government response and his reply only recently got unsealed by the Circuit Court.)

As the appeal notes, back in August 2011, after he had been in custody almost 20 months, his standby counsel Anthony Chambers submitted a motion requesting a competency hearing, one the judge rejected.

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.

The appeal cites consistent difficulties Abdulmutallab and attorneys tied to his case had with the Milan Correctional Facility, where he was being held in solitary confinement with communication restrictions. At almost every status hearing (save the one where he fired his court appointed lawyers), Abdulmutallab complained about the communication restrictions placed on him at Milan. ("Milan" is pronounced My-lin.)

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. He was held in solitary confinement under constant 24-hour manned observation.

[snip]

[In January 2011] Standby counsel informed the district court that he had

difficulty in communicating with and meeting with Abdulmutallab at Milan.

[snip]

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. Despite being a pretrial inmate, he was housed in Milan's Special Housing Unit.

[snip]

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.

[snip]

[On August 17, 2011, the date on which the judge had a colloquy with Abdulmutallab on whether he was competent] 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. 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.
[citations removed]

While the appeal doesn't make the case as strongly as it could, ultimately Abdulmutallab's current counsel is arguing the solitary confinement made him increasingly incompetent to represent himself as time wore on.

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.

Now, whether or not this appeal **should** work, I'm all but certain it won't.

I'm not even sure it would work for a non-terrorist defendant, but for an Islamic extremist who tried to blow up a plane, judges will almost certainly defer to the government on Abdulmutallab's appropriate treatment and they're not going to risk a terrorism conviction based on this appeal.

All that said, these details on his treatment (the references from the competency motion itself are newly unsealed, the complaints about Milan are just compiled from all the hearings) do raise real issues whether, before Abdulmutallab pled guilty, he had been driven incompetent to do so – to say nothing of his competence to represent himself generally.

It also raises one more issue, as my quotation of John Brennan's invocation of "languishing forever" suggests. The government clearly repeatedly tried to get Abdulmutallab to implicate Anwar al-Awlaki and even submitted

questionably framed documents after the fact to insist he had done so. Some of the interrogations in which the government claimed he had implicated Awlaki came during the period – leading up to the April 13, 2010 hearing – when his attorneys complained they had gotten inadequate access to him.

I get the need to ensure Abdulmutallab remained in secure confinement (I lived 19 miles away from Milan for the first eight months or so he was there). But given the government's extensive use of isolation as an interrogation tactic, given that Abdulmutallab was the first detainee the High Value Interrogation Group interrogated (they got involved after the court assigned him lawyers), it seems likely his solitary confinement – and the mental damage his standby attorney claimed it caused – was by design, part of an attempt to get him to provide evidence justifying Anwar al-Awlaki's assassination.

I'm almost certain it won't jeopardize his conviction, but it sure raises questions of whether or not it should. And whether an American citizen should have been assassinated based on his isolation induced confession.