

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 2:10-cr-20005

Plaintiff,

HONORABLE NANCY G. EDMUNDS

-vs-

D-1 UMAR FAROUK ABDULMUTALLAB,

Defendant.

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GOVERNMENT'S COMBINED RESPONSE AND BRIEF TO MOTION  
TO WAIVE PRESENCE OF DEFENDANT AT PRETRIAL  
CONFERENCE, AND TO MOTION FOR DISCOVERY/ RELEASE  
OF PRIOR COUNSEL'S FILE INCLUDING EXPERT REPORTS

INTRODUCTION

Defendant Abdulmutallab has been charged with a number of offenses relating to the attempted destruction of Northwest-Delta Flight 253 on December 25, 2009. Defendant Abdulmutallab has waived his right to be represented by counsel and has reiterated that decision on more than one occasion. His stand-by counsel has now filed two motions.

The first, docket entry 30, seeks to waive the defendant's presence at the next status conference, currently scheduled for January 25, 2011. The second, docket entry 31, seeks a court order directing defendant's former attorneys, the Federal Defender Office, to release their file to stand-by counsel. Because neither motion carries any indication that it is approved of by the defendant, the Court should require him, as his own attorney, to appear at all status conferences and to state whether he seeks the relief requested.

ARGUMENT

A. AS HIS OWN COUNSEL, DEFENDANT MUST  
RATIFY ANY MOTION FILED ON HIS BEHALF,  
AND MUST SPEAK ON HIS OWN BEHALF IN COURT

As the government has previously noted, see docket entry 27 (Notice of Government's Declination to Expand Protective Order), in matters occurring outside the presence of the jury, a defendant's right to self-representation is satisfied "if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between [stand-by] counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel." *United States v. Jones*, 489 F.3d 243, 248-249 (6th Cir. 2007)(citation omitted).

On the present record, there is no indication from the defendant that he does not wish to address the Court, or that he concurs in stand-by counsel's request that defendant not be required to appear for a status hearing. The Court must take all take steps to ensure that the defendant's self-representation rights are not impinged, by requiring him to appear, and speak on his behalf, and to ensure that he in fact endorses what stand-by counsel seeks in the motions. "When standby counsel is appointed, the primary concern is that appointed counsel does too much, so as to abrogate the *Faretta* right to self-representation, not too little." *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006) (citing *McKaskle v. Wiggins*, 465 U.S.168, 177 (1984)). This is particularly important because the right of self representation is not subject to a harmless error analysis. *See Wiggins*, 465 U.S. at 177 n.8 ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless.").

While stand-by counsel is certainly correct that “it is common practice in this District to waive the presence of the Defendant at the Pretrial Conference,” Brief in Support of Motion to Waive Presence of Defendant at Pretrial Conference, page 5, it is a distinctly *uncommon* practice to have a defendant represent himself, which changes the calculus considerably. If the defendant were represented by counsel, and counsel stated that he did not plan to attend the pretrial conference, it seems highly unlikely that the Court would allow the attorney to be absent. No different result should obtain here, where defendant is his own attorney. Indeed, any conference which takes place without his presence could later be characterized as an improper *ex parte* contact between the Court and the government. It seems that defendant must choose between acting as his own attorney, and thus attending all court proceedings, or being represented and having the ability to waive his presence for procedural matters. However, on the current state of the record, there is no indication that defendant understands those choices, and therefore his presence should be required.

B. THE STATUS OF DEFENDANT’S FILE IS A MATTER  
BETWEEN HIM AND HIS FORMER ATTORNEYS

The second motion requests that the Court order defendant’s former attorneys to produce their entire file for stand-by counsel. The government has no standing to make objections relating to defendant’s relationship with his former attorneys. However, it again appears that the issue raised is rooted in defendant’s self representation, and the possibility that stand-by counsel is “seeking to do too much,” *Simpson v. Battaglia*, 458 F.3d at 597. Defendant’s former attorneys’ file is attorney-client privileged. Defendant is the holder of the privilege, *United States v. Frazier*, 580 F.2d 229, 230 (6th Cir. 1978), and only he, not his former attorneys, can waive it. *Id.* Unless defendant waives the privilege and agrees to have the file delivered to stand-by counsel, a third party with whom, by

definition, he has no attorney-client relationship, it seems highly unlikely that his former attorneys will voluntarily release their file, as the privilege is not theirs to waive. Again, defendant needs to be present to make clear whether or not he consents to what is requested in the motion.

CONCLUSION

For the reasons stated above, the government respectfully requests that the Court require defendant's presence at all proceedings, to state his concurrence or lack thereof with stand-by counsel's requests.

Respectfully submitted,  
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Dated: January 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Anthony Chambers. I further certify that I have caused a copy of this filing to be mailed to the defendant, Umar Farouk Abdulmutallab, Register No. 44107-039, Federal Detention Center, East Arkona Road Milan, Michigan.

s/Jonathan Tukel  
JONATHAN TUKEL  
Assistant U.S. Attorney