

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:06-HC-2195-BR

UNITED STATES OF AMERICA

v.

GRAYDON COMSTOCK

MOTION FOR IN-COURT HEARING

Respondent, Graydon Comstock, by and through undersigned counsel, moves this Court to conduct all proceedings related to this action under 18 U.S.C. § 4248 in person and to refrain from conducting any proceedings via video conference. As will be demonstrated below, (1) this court should grant Mr. Comstock's motion as a prudential matter because both the court and the litigants will benefit from in-person proceedings; (2) substantive due process mandates that this Court allow Mr. Comstock to be present in person at these commitment proceedings; and (3) Mr. Comstock has considered and accommodated the practical concerns that in-person proceedings may raise.

**Prudential Considerations Indicate that This Court
Should Conduct In-Person Proceedings**

Nothing, of course, forbids this Court from conducting in-person proceedings as opposed to video conference proceedings. While *Baker v. United States*, 45 F.3d 837 (4th Cir. 1995), *allowed* this Court to conduct proceedings under 18 U.S.C. § 4245 via video conference, nothing *mandates* that this Court conduct any civil commitment proceedings via video conference. Decisions about trial management are left to this Court's discretion, subject only to Constitutional or statutory

limitations. *See, e.g., Geders v. United States*, 425 U.S. 80, 86-87 (1976); *Swift v. Southern Railway Co.*, 307 F.2d 315, 321 (4th Cir. 1962).

And, of course, conducting judicial proceedings in-person constitutes the almost universally applied rule, while video conference proceedings constitute a very narrow exception. In person proceedings help preserve both the transparency and the equity on which our judicial system relies. Both parties, as a matter of fundamental fairness, should have the same access to the courtroom, the Judge, the witnesses, and the other party. Only the most exceptional circumstances should operate to deprive a litigant of his literal day in court. Those circumstances do not apply to the present proceeding, and this Court should not, therefore, apply the narrow video conference exception to the respondent's right to attend his hearing.

Conducting the present proceeding in-person makes practical sense for several reasons. First, undersigned counsel and her colleagues have been working with video conference proceedings for the eleven years since *Baker* and understand firsthand the limitations of the technology. Counsel, for instance, cannot properly judge the reactions that her direct and cross examinations elicit from the Court, the witness, and the prosecution because the technology limits her view of the proceedings to one camera angle at a time. In one particular § 4245 hearing, counsel was completely unaware that her witness, testifying in the Raleigh courtroom, was in tears until counsel heard her sobbing because the camera remained focused on the bench. In this instance, counsel did not intend to reduce this witness, who was the daughter of the respondent, to tears; to the contrary, counsel then worried that this line of questioning appeared unduly heartless to the court when that was not the intent. Simply put, requiring defense counsel to choose between viewing the in-court witness, the bench, or the government attorney when the government can easily view all the individuals in the courtroom as well as the respondent and counsel on the screen is fundamentally inequitable.

This inequity, in addition to diminishing the quality of the representation provided to respondents, also wastes the time and energy of the Court and the attorneys because counsel cannot see cues from the Court concerning what may or may not be an efficient line of questioning. In addition, counsel's absence from the courtroom prevents the court and the attorneys from easily and efficiently engaging in housekeeping matters which may speed up or otherwise improve the proceedings. And, as this Court is aware, the technology used, even after a decade of tweaks, still malfunctions with some regularity, causing unnecessary delay and otherwise disrupting the docket.

In addition, a proceeding under § 4248 does not involve the type of respondent typically seen in a § 4245 or § 4246 hearing. Due to the nature of both § 4245 and § 4246 hearings, the respondent may suffer from a form of mental illness that can make it difficult both to transport the respondent from FMC-Butner to court in Raleigh and to manage the respondent once he is present at court in Raleigh.¹ Mr. Comstock recognizes that, in those instances, prudential concerns may favor using video conferencing equipment in order to facilitate the proceedings. Section 4248 hearings, however, present no such concerns. The typical respondent in a § 4248 hearing does not suffer from a mental illness that would make him difficult to transport or to manage in court. Mr. Comstock is incarcerated at FCI-Butner, and has managed well in open population. Counsel has met with him in the general visiting room on a number of occasions and believes that he will conduct himself appropriately in the Raleigh courtroom. He does not differ in any meaningful way from the typical criminal defendant who is brought before this Court every day without incident.

¹*See, e.g.*, 18 U.S.C. § 4246(a) (noting that a respondent in a § 4246 proceeding must have been certified as one who might “create a substantial risk of bodily injury to another person or serious damage to property of another”).

In short, conducting § 4248 hearings in person introduces several efficiencies and equities into the system and allows for the provision of more effective representation than do video conference hearings. In addition, § 4248 respondents do not present any problems to this Court that a video conference hearing would solve. Prudentially, in-person hearings make sense.

Due Process Mandates an In-Person Hearing

In addition to the prudential concerns outlined above, due process concerns mandate an in-person hearing under § 4248. *Baker* provides the appropriate framework through which this Court should analyze the due process considerations concerning an in-person hearing. As an initial matter, *Baker* holds that Mr. Comstock has a due process right to be “present” at his § 4248 hearing. *Baker*, 45 F.3d at 843-44. In determining whether the government has the right to force a defendant to be present only via video conference, this Court must consider three factors: (1) the private interest that will be affected by the official government action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the administrative burdens upon the government that additional proceedings would entail. *Id.* at 843 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The Fourth Circuit held in *Baker* that “the deprivation [arising from a successful § 4245 civil commitment] is great, meaning that the government’s interest in conducting the hearings by means of video conference technology must be great, and the risk of erroneous deprivation of liberty small for the government to prevail.” *Id.* at 844.

The present proceeding involves a liberty interest even greater than that at issue in *Baker*. Specifically, *Baker* concerned a § 4245 hearing which adjudicated a statutorily limited period of

incarceration.² Section 4245 only allows for the civil confinement of one already serving a criminal sentence. Moreover, the § 4245 commitment expires whenever he no longer needs treatment or at the end of his criminal sentence, whichever comes first. 18 U.S.C. § 4245(b). Thus, a video hearing for a § 4245 proceeding does not present the risk of erroneous deprivation of liberty beyond the individual's prison term. Unlike the hearing at issue in *Baker*, the use of video conferencing in a § 4248 hearing risks the imposition of an erroneous, indefinite, life-long term deprivation of liberty well beyond any criminal sentence imposed. 18 U.S.C. § 4248(d)(e). Because a § 4248 proceeding implicates a far more significant liberty interest on the part of respondent than does a § 4245 hearing, the government's interest in conducting the hearings via video conference must be correspondingly great, and, more importantly, the risk of an erroneous deprivation of liberty must be correspondingly slight. They are not.

Applying *Baker's* analysis of the § 4245 hearing to a § 4248 hearing demonstrates that conducting the present hearing by video conference creates a great risk of an erroneous deprivation of liberty. First, the *Baker* Court emphasized that, in the context of the § 4245 hearing before it, the sole goal of the proceedings is to determine "whether the respondent is mentally competent." *Id.* at 844. The Court noted that a decision maker can make this medical determination based almost entirely on the reports of the experts testifying and that the differing testimony "will not differ factually, but only in their theoretical premises." *Id.* at 845.

In stark contrast to a § 4245 hearing, § 4248 hearings expressly involve a factual dispute in addition to a medical and psychological dispute. Specifically, in order to obtain a commitment

²The *Baker* court expressly noted that it limited its opinion to the particular § 4245 hearing at issue in that case and did not create a rule that applied to federal civil commitment hearings under any other statutory section. *Baker*, 45 F.3d at 840 n.1.

under § 4248, the government must demonstrate, inter alia, that the respondent “has engaged or attempted to engage in sexually violent conduct or child molestation.” 18 U.S.C. § 4247(a)(5). In other words, § 4248 hearings require the judge to make a specific factual finding, not just about the state of mind of the respondent, but about a discrete factual event that occurred sometime in the past. Like all disputed factual findings, this finding may involve the testimony of conflicting occurrence witnesses and, accordingly, “the demeanor of the [witnesses] while testifying” becomes an essential part of the respondent’s case. *Baker*, 45 F.3d at 845.

In addition, the question of whether an individual is a recidivist violent sex offender involves much less settled “science” than does the question of whether an inmate should receive treatment. In a § 4245 proceeding, the Court must determine whether the respondent “is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.” 18 U.S.C. § 4245(d). In other words, the Court must ascertain whether the respondent could benefit from unwanted mental health treatment. In contrast, a § 4248 hearing requires the Court to determine whether the respondent “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.” 18 U.S.C. § 4247(a)(6). Accordingly, the *Baker* Court’s assumption—based solely on § 4245—that sorting through the science will involve no credibility determinations and only a basic dispute about “theoretical premises” severely over-simplifies the task before this Court, as a matter both of science and of law. The probative value of having all of the experts present in person for detailed examination and cross-examination to discuss these scientific issues strongly favors mandating their presence.

The *Baker* Court also emphasized that, in a § 4245 hearing, “the district judge’s impression of the respondent is not generally the factor upon which a commitment decision turns. . . . This is

true in a civil commitment hearing as opposed to a criminal trial because, as discussed above, a commitment hearing is not so concerned with factfinding as is a criminal trial.” *Id.* at 845-46. Section 4248 hearings, in contrast, implicate both of these considerations not present in *Baker*. As discussed above, a Section 4248 hearing, unlike other civil commitment hearings in the federal system, requires the district judge to make a specific finding about what the defendant *did* in the past, not just his state of mind at the time. This hearing involves factfinding and, as a result, the respondent’s presence becomes a significant factor for consideration.

In addition, the respondent’s presence in a § 4248 hearing becomes important because the district judge’s impression may very well be a factor on which the decision turns. To speak plainly, a § 4245 hearing is concerned only with whether the defendant is *mad* and in need of treatment, an almost entirely medical decision. Section 4248, on the other hand, asks the district court to determine on some level whether the respondent is *bad*,³ a decision involving complex, subtle, and multi-faceted components simply not present in a § 4245 hearing. Incapacitating the bad fundamentally differs from treating the mad.

The *Baker* Court’s holding about cross-examination also counsels this Court to grant an in-person hearing in this case. Again relying on the non-factual nature of a § 4245 hearing, the *Baker* Court held that it was not important for respondent’s counsel to be able to ascertain facts on direct and cross-examination and to provide the district judge with the benefit of witnessing in-person direct and cross-examinations. *Id.* at 846. As noted above, a § 4248 hearing raises exactly these concerns. Both respondent and the government will be attempting to develop a factual record about

³*See* 18 U.S.C. § 4248(d) (noting that the court must determine whether respondent is a “sexually dangerous person”).

what happened in the past, as well as trying to make a case based on new and speculative science. In person direct and cross-examination will prove beneficial to both parties and to the Court.

Finally, as noted briefly above, eleven years of experience with video conference hearings since *Baker* has provided undersigned counsel with a better understanding of its limitations than either courts or litigants had in 1995. Due to the limitations of the technology, counsel cannot simultaneously watch her client, the bench, the witness, and opposing counsel during the proceedings. This artificially limited sight has had a tangible negative impact on the level of representation that counsel can provide to respondents in a video conference proceeding. *Baker*, understandably, had only a limited factual record on which to make its legal determination. Now, with the benefit of a decade of experience, counsel can attest that the video conference proceedings increase “the risk of an erroneous deprivation of liberty” in a manner that the *Baker* court could not anticipate. *Id.* at 843 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Finally, the government’s interest in conducting video conferencing hearings in the present case is, unlike in *Baker*, almost non-existent. In *Baker*, the Fourth Circuit held that:

From an administrative standpoint, it is difficult to transport potentially mentally unstable persons to a courthouse. Many such persons require medication and supervision. Thus, any such transport is both hazardous to the respondents and a burden to prison and courthouse officials. Further, the safety concerns inherent in transporting a potential mentally unstable person to a courthouse, with respect to the respondent and other parties, are substantially alleviated by the use of the video conferencing procedure.

Id. at 847. As noted above, those concerns simply do not exist in the present action. Unlike a hearing under §§ 4245 or 4246, in which the respondent’s suspected mental illness often manifests itself in violent ways and may require medication, the typical § 4248 respondent’s suspected mental condition does not manifest itself in violent behavior or require medication. The safety,

supervisory, and administrative concerns surrounding the typical § 4248 respondent do not differ in any way from the safety, supervisory, and administrative concerns surrounding the typical criminal defendant who the government brings before this Court without incident every day.

In short, Mr. Comstock has a weighty interest in being present in person at his § 4248 proceedings, even weightier than that present in *Baker*. The risk that video conference proceedings will erroneously deprive him of his liberty interest is great, and the government's interest in conducting video conference proceedings is almost non-existent. Under the *Matthews v. Eldridge* test utilized in *Baker*, due process demands that this Court conduct these proceedings in person and not via video conference.

Practical Considerations For In-Person Hearings

Undersigned counsel recognizes that, in certain situations, in-person hearings may create administrative difficulty for the Court concerning staffing and other issues. Counsel, and the Office of the Federal Public Defender, will work with the Court to reduce or eliminate those administrative burdens. If, for example, there are § 4245 or § 4246 hearings set for FMC-Butner or other FMC facilities the same day as the § 4248 hearings, the Office of the Federal Public Defender will have counsel present at the pertinent facility for those respondents.

Conclusion

For the foregoing reasons, both prudential concerns and due process concerns indicate that Mr. Comstock must be allowed to be present at his § 4248 hearing in person. Accordingly, he respectfully requests that this Court grant his motion and allow him to attend the proceedings in person instead of via video conference.

Respectfully requested this 13th day of February, 2007.

THOMAS P. McNAMARA
Federal Public Defender

/s/ Jane E. Pearce
JANE E. PEARCE
Assistant Federal Public Defender
Attorney for Defendant
Office of the Federal Public Defender
150 Fayetteville Street
Suite 450, Wachovia Capital Center
Raleigh, North Carolina 27601
Telephone: 919-856-4236
Fax: 919-856-4477
E-mail: Jane_Pearce@fd.org
N.C. State Bar No. 25453
LR 57.1 Counsel
Appointed

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served upon:

MICHAEL BREDENBERG
Assistant United States Attorney
Suite 800, Federal Building
310 New Bern Avenue
Raleigh, NC 27601-1461

by electronically filing the foregoing with the Clerk of Court on February 13, 2007, using the CM/ECF system which will send notification of such filing to the above.

This the 13th day of February, 2007.

/s/ Jane E. Pearce
JANE E. PEARCE
Assistant Federal Public Defender
Attorney for Defendant
Office of the Federal Public Defender
150 Fayetteville Street
Suite 450, Wachovia Capital Center
Raleigh, North Carolina 27601
Telephone: 919-856-4236
Fax: 919-856-4477
E-mail: Jane_Pearce@fd.org
N.C. State Bar No. 25453
LR 57.1 Counsel
Appointed