

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

v.

No. 5:06-HC-02195-BR

GRAYDON EARL COMSTOCK, JR.,

Respondent.

Bench Trial - Vol. II
HON. BERNARD A. FRIEDMAN, Judge
November 29, 2011
8:30 a.m. - 7:15 p.m.
Raleigh, North Carolina

REPORTED BY: Joseph C. Spontarelli, CCR

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23 On behalf of the Respondent
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INDEX TO WITNESSES

Witness:	Direct	Cross	Redirect	Recross
Lela Demby, Ph.D. (Via Video)	--	--	--	--
George P. Corvin, M.D.	276	307	317	
Terence W. Campbell, Ph.D.	321	376	394	
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1 they have been through the criminal justice system
2 and after they have been punished have they
3 learned their lesson.

4 This really is his first second chance.
5 He's never been punished before. Here he is 69
6 years old, in poor health -- he's not sexually
7 dangerous Your Honor.

8 The government has failed utterly in
9 their burden and the Court should so find.

10 THE COURT: Thank you.

11 We'll stand in recess.

12

13 (Recess.)

14

15 THE COURT: Let me apologize for
16 keeping everybody waiting. It's been a long time
17 since I've written out and done a bench opinion
18 quite like this but I thought it was important as
19 I told you before. I'm so used to dictating and
20 my secretary doing it and with my shorthand and my
21 law clerks know what I'm talking about and getting
22 it back on my desk a short time later. It took me
23 a little bit longer. I apologize up front.

24 Hopefully it is thorough and complete and will

25 answer all questions that need to be answered and

1 will cover all the issues that are important to be
2 covered.

3 I think it's important in this
4 particular case to get an opinion out ASAP. The
5 case has been going on a long time for everybody.

6 When I first got this assignment I knew
7 it would be a difficult assignment. I had never
8 heard of the statute. I didn't even think one of
9 these kind of statutes could even be in existence
10 very frankly until I started reading the law and
11 seeing what's going on and then I kind of
12 questioned whether or not at this stage of my
13 career I should be involved in these kind of cases
14 where the decisions are rough and the stakes are
15 high but that's what I get paid for and I'm glad
16 to do it and it's my intention to do it and to do
17 it as best I possibly can.

18 With that said I'll be handling these
19 cases on a fairly regular basis. I know the bar
20 is limited on both sides because of the nature of
21 the cases, the experts are limited because of the
22 nature of the cases. Each case as I see it I'm
23 going to call it. What I might decide in one case
24 may not overlap other than the law will be the
25 same. In another case I don't want anybody to

1 think that I'm telegraphing or saying anything
2 that would affect any other case -- it absolutely
3 won't. The issues of expert reports, the issues
4 of credibility -- all of those things I think each
5 case has to be treated separately.

6 I understand that the bar is limited in
7 terms of respondents, it's limited in terms of
8 petitioners, it's limited in terms of experts. I
9 will absolutely consider each one individually and
10 I don't want anybody to think that I may comment
11 on a credibility issue or anything. Each case I
12 am going to look at as an individual case because
13 I think it has to be done so with the realization,
14 however, that I'm going to probably hear
15 cumulative testimony but each one will be
16 different.

17 Also I think that it's important to say
18 that in deciding this case that I'm deciding it on
19 this case only; the law of this case, the facts of
20 this case as I heard them here in the four corners
21 of this transcript. I heard lots of other things
22 and I'm certainly aware of lots of things that
23 happened.

24 I find the conduct of Mr. Comstock
25 deplorable. I think we all do. That's not going

1 to influence what's going to happen here. Very
2 frankly, if I was the sentencing Judge and knew
3 what I knew here -- I don't think the sentencing
4 Judge knew all of these things -- I'm just being
5 up front -- we wouldn't be here. He would still
6 be in prison. We wouldn't be discussing this as
7 an issue. That's my philosophy of sentencing and
8 so forth. However, that's not why we're here and
9 I don't intend to let that interfere with my
10 decision in any way whatsoever.

11 I have respect for what I do, I have
12 respect for the parties and I have respect for the
13 law and I have become very familiar now with
14 4248 -- four numerals I had never known before.
15 Every time I talk to somebody, a lawyer, a
16 colleague, the U.S. Attorney in Michigan who is my
17 former law clerk and anyone else about it there
18 are very few people that know about 4248 but we're
19 getting to know it very well.

20 With all of that said I'm going to try
21 to take my time. Sometimes I have a difficult
22 time reading my own writing, but I certainly know
23 what's in my head so I'll try to get it out as
24 best I can.

25 I think starting off there is no

1 dispute as to two requirements of the act. Number
2 one, that Mr. Comstock does not contest that he
3 has engaged in child molestation in the past and
4 that the government has established by clear and
5 convincing evidence this element. I don't think
6 there is any dispute as to that.

7 Number two, there is no disagreement
8 that Mr. Comstock suffers from pedophilia and that
9 this is a serious mental illness, abnormality or
10 disorder and that the government has established
11 this by clear and convincing evidence.

12 The issue I have before me is would
13 respondent have serious difficulty in refraining
14 from sexually violent conduct or child molestation
15 if released. Serious conduct is serious behavior
16 that would be difficult for the defendant to
17 control.

18 The Court finds that the past
19 activities of respondent were designed and
20 executed to fulfill his needs both emotionally and
21 physically. That respondent has changed his
22 opinion of his actions and their effects on the
23 victim recently and society's views and so forth.

24 That the respondent is not going to
25 seek additional counseling or treatment

1 voluntarily. I think he's made that pretty clear
2 from the record. That he's going to rely upon his
3 own motivations and perceptions of his ability to
4 control and other things within his environment at
5 the time.

6 The Court finds that the respondent
7 also suffers from many kinds of things. He
8 suffers from major depression disorder which
9 appears to be in remission at this time; as well
10 as the fact he had a stroke at age 39 the results
11 of which both affected him physically as well as
12 mentally. His heart condition, heart attack,
13 triple bypass, diabetes, prostate cancer, high
14 blood pressure, memory declining -- I think there
15 is no dispute as to the medical condition of the
16 respondent in this matter.

17 The Court has been impressed with the
18 credibility of the witnesses in this particular
19 matter and the testimony as it relates to this
20 particular case and finds that the psychologists
21 have one common thread in that they all agree that
22 Mr. Comstock had a score on the Static-99R for
23 self-offender of a two. I'm not sure from that
24 point on other than the two petitioner's experts
25 they agree on a whole lot.

1 The Court heard a lot of testimony from
2 the expert testimony from both sides why the two
3 may not be the appropriate key in this case.

4 We heard from petitioner's witnesses
5 that the age reduction in this case is not
6 appropriate because of several reasons; the
7 primary of which were the age of 58 when his
8 offense occurred and the health issues according
9 to petitioner's experts were not a major
10 mitigating factor.

11 The Court heard testimony of Dr.
12 Campbell and he opined on several issues. The one
13 that the Court believes is somewhat relevant and
14 important in this particular matter is that it has
15 been established -- there's been no
16 counter-evidence to it -- on page 37 of Dr.
17 Campbell's report where he is laying out the
18 evidence and the statistics and so forth -- he
19 opines and shows at his table that after age 70
20 there is zero chance of recidivism. I think
21 that's an important consideration in the findings
22 of facts and conclusions in this particular
23 matter.

24 I also think it's important to discuss
25 in some detail the testimony of Dr. Corvin. Dr.

1 Corvin's orientation was somewhat different than
2 the other experts that testified in this case.
3 They were psychologists who are very highly
4 trained and well qualified. Dr. Corvin's
5 orientation was more of a medical orientation, and
6 also he was presented as an expert in that area as
7 opposed to other areas. The Court believes that
8 his conclusions that due to the respondent's age,
9 medications, medical conditions that this has
10 decreased his sexual stimulation. He has sexual
11 dysfunctions, he has lower libido. Dr. Corvin
12 opined that the likelihood of engaging in child
13 molestation or similar kinds of conduct would be
14 substantially decreased.

15 The Court finds that is certainly
16 consistent with the literature that he cited and
17 with his own evaluations and so forth and that is
18 another aspect that I think is a very important
19 aspect in this particular matter.

20 The Court believes from the limited
21 amount that I've heard here today and yesterday
22 that this isn't a textbook case. If it was a
23 textbook case it would certainly be perhaps much
24 more level but it isn't a textbook case. All the
25 psychologists agree statistically in terms of the

1 two and so forth that there's reasons to have
2 other considerations other than just the
3 statistical analysis. That the 2002-R in this
4 particular case has facets that should also be
5 considered.

6 I think it's important and I listened
7 very carefully to Dr. Demby. She said the
8 respondent would have to turn around 180 degrees
9 to get his needs met in a different way and
10 manner. I think that was very telling, but I also
11 think from listening to the testimony and find in
12 this particular matter that because of Dr.
13 Corvin's testimony in terms of his conditions and
14 likelihood of him even having that need in any
15 kind of compulsive inappropriate way would be very
16 greatly deminished.

17 His former MO was to cultivate
18 relationships and friendships through his work and
19 gain confidence both of the kids as well as their
20 parents. The Court believes this position or his
21 MO is no longer viable; that he does not have the
22 ability to do so, does not the have the
23 wherewithal to do so.

24 The Court finds that respondent no
25 longer has not only the ability or the resources

1 to do so but the Court finds that a major
2 deterrent is in place in this case and that is the
3 realization of substantial and great punishment.
4 I think taking that into consideration along with
5 the other testimony is a very important
6 consideration.

7 The Court is not impressed at all with
8 the relapse prevention plan contained in
9 Respondent's Exhibit 5, but I am impressed with
10 some other things that I think are very good
11 relapse prevention plans. Number one is I'm
12 impressed with the relapse prevention plan of the
13 respondent's sister. I think she is going to keep
14 a watchful eye upon him. Respondent is going to
15 have a supportive living arrangement upon which he
16 can rely. I think his sister has made it very
17 clear that she is going to keep a close eye on
18 him. I think she has also made it very clear that
19 she realizes what her responsibilities are and
20 that her responsibilities even go further than
21 just as a loving relative but go to her own
22 profession and her own sense of right and wrong.
23 The Court believes that she does have the
24 financial ability to do that which she has
25 indicated that she would do.

1 The Court also believes a very good
2 relapse prevention plan is the 6500 sets of eyes
3 in the town. Dr. Phenix I think hit the nail on
4 the head from what I understand her testimony was
5 and that was it is very difficult especially for
6 what she characterizes as Class 4 -- which I'm not
7 familiar with either way -- to exist in a
8 community where the community knows of this and
9 she even gave us some examples. I think that is
10 part of the plan in this particular matter. 6500
11 eyes in a town as described to me I think is a
12 very important consideration.

13 I think part of that plan also is the
14 three-year supervised release that the respondent
15 will be subjected to should he be released.

16 The Court has had an opportunity to
17 review the conditions. They are part of an
18 exhibit in this particular matter Bates stamped
19 000006. The conditions are not only the standard
20 conditions of supervised release as we all know
21 them, but also some very specific conditions
22 including to abide by all the laws, that he shall
23 not have a computer, that he will not have contact
24 with minors. I know that those are all
25 theoretically good and I think it's part of this

1 whole prevention program.

2 I think the other part of it is his
3 medical condition as Dr. Corvin testified to and I
4 think as has been testified to here on several
5 occasions. I think another one is his failing
6 health. All of these the Court believes are all
7 part of the plan that should be implemented.

8 Taking all of these into consideration
9 and taking all of the testimony that the Court has
10 heard and the law as I have just indicated the
11 Court finds that the government has failed to
12 establish by clear and convincing evidence -- when
13 I say clear and convincing evidence I have used
14 several standards in trying to formulate this.
15 The case law talked about firm belief using that
16 as a standard. The courts have spoken about
17 highly probable. I've used that as a standard.
18 Of course the more traditional definition is more
19 than preponderance but less than beyond a
20 reasonable doubt.

21 Taking all of those things and looking
22 at it and taking the testimony and the evidence
23 and determining credibility, determining the kinds
24 of things that are necessary by clear and
25 convincing evidence the Court finds that the

1 government has not established by clear and
2 convincing evidence that respondent would have
3 serious difficulty in refraining from sexually
4 violent conduct or child molestation if released
5 and so for those reasons the Court will enter an
6 order that the defendant be released from custody
7 on this case. I'm not sure what's happening on
8 his other case or anything of that nature.

9 Starting with the petitioner is there
10 anything that you think that I have not included
11 that should be included?

12 MR. ROYSTER: No, Your Honor.

13 THE COURT: Defense?

14 MS. GRAVES: No, Your Honor.

15 THE COURT: I want to thank both sides.
16 I have not had an opportunity to appear before
17 this bar before. I think both of you have done a
18 phenomenal job for your clients.

19 The preparation of this case was some
20 of the finest preparation that I have seen. I
21 told Judge Gates the same thing. I said I have
22 been traveling for 23 years to courts outside of
23 ours. This year we've probably been in three or
24 four different courts including our own. The
25 quality of preparation and the quality of

1 documents that have been filed are outstanding
2 under any standard around the country that I have
3 seen. That includes the preparation of witnesses,
4 the reports that have been submitted by experts.

5 It's an all around pleasure to come in
6 and to be able to just have the luxury of trying a
7 case that is so prepared and we had an opportunity
8 to see such great pleadings. With that said we'll
9 stand in recess. Thank you very much.

10
11 (Court adjourned for the day at 7:15
12 p.m.)

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REPORTER'S CERTIFICATE

I, Joseph C. Spontarelli, court reporter,
do hereby certify that the pages contained herein
accurately reflect the notes taken by me, to the
best of my ability, in the above-styled action.

Joseph C. Spontarelli
Joseph C. Spontarelli,
Court Reporter