

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LUKE WENKE,

Defendant.

22-CR-35-JLS

**DEMAND FOR DISCOVERY
AND DISCLOSURE**

FRANK PASSAFIUME, ESQ., affirms under penalty of perjury that:

1. I am an attorney with the Federal Public Defender's Office located at 300 Pearl Street, Suite 200, Buffalo, New York 14202, and I represent the defendant, Luke Wenke, in the instant matter.

2. Pursuant to Rule 32.1(b)(2)(B) of the Federal Rules of Criminal Procedure and in anticipation of the revocation hearing on a Petition for Offender Under Supervision set for October 26, 2023, the defendant requests disclosure of all discovery relevant to the hearing. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782-86 (1973) (Due process requires that revocation proceedings be conducted according to the principles of fundamental fairness as they involve a potential "loss of liberty."); *see also Morrissey v. Brewer*, 408 U.S. 471 (1972).

3. A defendant subject to revocation proceedings is entitled to an opportunity to prove that he did not violate the conditions of supervision, that there was a justifiable reason for violating the conditions, or that revocation is not the appropriate remedy. *See Morrissey*, 408 U.S. at 487. Inherent in these due process rights, a defendant must have an opportunity to refute

or impeach the evidence against him to assure that only verified facts will be relied upon in finding a violation. *See United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993).

4. Furthermore, as revocation proceedings are not one of the excluded proceedings set forth in Rule 1(a)(5) of the Federal Rules of Criminal Procedure, the discovery provisions of Rule 16 are also applicable. Accordingly, the defendant demands discovery of the following items and information pursuant to Rule 16(a)(1)(A)-(G):

a. The substance of any oral statement made by the defendant in response to interrogation by a person the defendant knew was a government agent. Fed. R. Crim. P. 16(a)(1)(A). Any question reasonably likely to elicit an incriminating response qualifies as an interrogation. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

b. All relevant written or recorded statements made by the defendant. Fed. R. Crim. P. 16(a)(1)(B). This is not limited to statements made in response to interrogation or to statements the government intends to introduce at trial; rather, all written or recorded statements, regardless of how and to whom they were made, are subject to disclosure. *See, e.g., United States v. Thomas*, 239 F.3d 163, 168 (2d Cir. 2001) (transcript of defendant's statements made during prior administrative hearing is discoverable); *United States v. Stevens*, 985 F.2d 1175, 1179 (2d Cir. 1993) (taped conversation between defendant and confidential informant is discoverable).

c. A copy of the defendant's prior criminal record, if any. Fed. R. Crim. P. 16(a)(1)(D). This request extends to any co-defendant or government witness criminal records. *See United States v. Deardoff*, 343 F. Supp. 1033, 1044 & n.12 (S.D.N.Y. 1971)

(ordering disclosure of criminal record of defendant and all coconspirators named in indictment).

d. All books, papers, documents, data, photographs, or other tangible objects, buildings, or places if they are material to the preparation of the defense, the government intends to introduce them as evidence, or they were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E). This includes objects or documents in the possession of the government's investigative agencies. *See United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). This also includes the government agency's internal rules and regulations. *See United States v. Caceres*, 440 U.S. 741, 749 (1979). Lastly, Rule 16(a)(1)(E)(iii) permits disclosure of documents, or tangible objects that were taken from, or belong to the defendant (without any showing of materiality). *See United States v. Rodriguez*, 799 F.2d 649, 654 (11th Cir. 1986).

e. All results and/or reports of any physical or mental examination, or scientific experiment, that is material to the defense or that the government intends to introduce as evidence. Fed. R. Crim. P. 16(a)(1)(F). This includes, but is not limited to, autopsy reports; narcotic reports; drug laboratory reports; ballistic reports; handwriting, hair, fingerprint, or voice comparisons; the results of any physical or mental health examinations; computer forensic reports; and, DNA reports. This also includes the underlying data used in the government reports and tests. *See United States v. Yee*, 129 F.R.D. 629, 635-36 (N.D. Ohio 1990).

f. A written summary of any testimony that the government intends to introduce as evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence relating to expert witness testimony. Fed. R. Crim. P. 16(a)(1)(G). The summary must

include the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. *Id.*

5. Based on the foregoing, Mr. Wenke requests the following items of discovery to which he is entitled:

- (1) chronology reports (the "chronos") from the date supervision commenced on August 10, 2023, to the filing of the Petition on October 3, 2023;
- (2) U.S. Probation field or rough notes from August 10, 2023, to October 3, 2023;
- (3) reports documenting and/or the sum and substance of communications between U.S. Probation and the defendant from August 10, 2023, to October 3, 2023;
- (4) reports documenting and/or the sum and substance of communications between U.S. Probation and the government regarding the Petition;
- (5) reports documenting and/or the sum and substance of witness interviews by the government and Probation;
- (6) copies of all the letters referenced in the Petition; and,
- (7) copies of the defendant's posts on social media (such as Twitter/X) referenced in the Petition.

6. A defendant is entitled to cross-examine witnesses in a revocation proceeding unless the court finds "good cause" for not allowing confrontation. *See* Fed. R. Crim. P. 32.1(b)(1)(B)(iii). The burden is on the government to demonstrate good cause to deny this right. *See United States v. Sutton*, 916 F.3d 1134, 1138-39 (8th Cir. 2019). In making this determination, the court must consider the importance of the evidence to the court's finding, the defendant's opportunity to refute evidence, the consequences of the court's finding, the difficulty and expense of procuring witnesses, and the traditional indicia of reliability borne by the evidence. *See Martin*, 984 F.2d at 311-12. The court's failure to weigh the defendant's right to

confrontation against the government's "good cause" for denying it, is error. *See United States v. Reynolds*, 49 F.3d 423, 426 (8th Cir. 1995).

7. Based on the foregoing, Mr. Wenke requests that the following witnesses give testimony at the revocation hearing:

- (1) referenced in Charge No. 1;
- (2) "Katie" referenced throughout the Petition, including Charge No. 3;
and,
- (3) "Brett" referenced in Charge No. 2.

WHEREFORE, the defendant demands discovery and disclosure in anticipation of the preliminary hearing.

DATED: October 16, 2023, Buffalo, New York.

Respectfully submitted,

/s/Frank R. Passafiume

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