25-1165-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

LUKE MARSHALL WENKE,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
LUKE MARSHALL WENKE

TIMOTHY P. MURPHY
Federal Public Defender's Office
Western District of New York
300 Pearl Street, Suite 200
Buffalo, New York 14202
Telephone: (716) 551-3341
Attorney for Defendant-Appellant
Luke Marshall Wenke

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Jurisdictional Statement

Appellant Luke M. Wenke was charged in a one-count complaint on January 27, 2022, with transmitting electronic threats, which triggered the subject matter jurisdiction of the United States District Court for the Western District of New York under 18 U.S.C. § 3231. A 4.[1]

The appellant is presently subject to a provisional sentence under 18 U.S.C. § 4244(d). This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291. *See Corey v. United States*, 375 U.S. 169, 172-174 (1963) (finding order to be final for appellate purposes under the analogous, but now-repealed, 18 U.S.C. § 4208(b)). Should this Court, however, not deem a § 4244(d) provisional sentence a final order for appellate purposes, as other Circuits have,[2] jurisdiction still lies under the collateral order doctrine.

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[1] Materials in the Joint Appendix will be cited as "A __ ."

[2] *See United States v. Ewing*, 494 F.3d 607, 613-615 (7th Cir. 2007), citing *Corey*, 375 U.S. at 172-174; *see also United States v. Abou-Kassenn*, 78 F.3d 161, 167-168, n.29 (5th Cir. 1996) (also citing *Corey*, concluding "[t]he Supreme Court has indicated inferentially that a

Generally, this Court's jurisdiction in a criminal case begins only upon the entry of final judgment by the district court, and defendants must await conviction and the imposition of sentence to appeal interim adverse rulings. *See United States v. Gold*, 790 F.2d 235, 237 (2d Cir. 1986). However, the "collateral order" doctrine allows for immediate review of a small class of interlocutory orders that conclusively settle important issues distinct from the merits of a case. *Gold*, 790 F.2d at 237-238 (finding § 4241 incompetency order immediately appealable), citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify as collateral an order must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue separate from the merits"; and (3) "be effectively unreviewable on appeal from a final judgment." *Gold*, 790 F.2d at 238, quoting *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (other citations omitted); *but see United States v. Culbertson*, 598 F.3d 40, 49-50 (2d Cir. 2010) (applying *Gold* / *Flanagan* factors; finding order of competency not to be immediately appealable).

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criminal defendant has the right to appeal his conviction after the trial court imposes a provisional sentence under section 4244").

At bar, Mr. Wenke pleaded guilty on April 18, 2022 to count one of the indictment. A 7, 39-107. He was sentenced on August 18, 2022. A 8. A judgment was entered the following day. A 8, 109-115. No appeal was filed from the initial judgment of conviction. Following extensive supervised release and competency-related litigation, a two-day evidentiary hearing was conducted. A 21-22. On April 23, 2025, the District Court imposed a "provisional sentence" pursuant to 18 U.S.C. § 4244 via a Decision and Order of Commitment. A 22, 435-445. Mr. Wenke has been in custody on the underlying supervised release violation since October 4, 2023. A 12. His maximum statutory penalty for this offense is two (2) years. 18 U.S.C. § 3583(e)(3). A timely notice of appeal was filed on May 1, 2025. A 22, 446.

In sum, should this Court not find the District Court's order of commitment to be "final" under 28 U.S.C. § 1291, this Court still enjoys jurisdiction pursuant to § 1292(a)(1).

Issues Presented

Whether there was legally sufficient evidence under 18 U.S.C. § 4244 to justify the District Court's determination that Mr. Wenke was

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.

Pertinent Procedural History and Statement of Facts

1. Allegations, guilty plea and the initial sentencing

On March 15, 2022, Mr. Wenke was accused in a two-count indictment with cyberstalking and making interstate threats during the period of September 22, 2020 through January 24, 2022. A 5, 25-26; 18 U.S.C. §§ 2261A(2)(a); (2)(b); 18 U.S.C. § 875(c). On April 18, 2022, he pleaded guilty to cyberstalking under count one. A 7. On August 18, 2022, Mr. Wenke was sentenced to eighteen (18) months in prison, to be followed by three (3) years of supervised release. A 8.

2. Supervised release violations and competency-related litigation

Mr. Wenke was first found to be in violation of his supervised release on June 23, 2023. A 10. This involved prohibited third-party email communications. *See* A 10; *U.S. v. Wenke*, WDNY file no. 1:22-cr-00035, dkts. 52 and 53. He was sentenced on that violation on

August 10, 2023, to time served and 34 more months of supervised release. A 11. A notice of appeal was timely filed, A 12, but the appeal was withdrawn on November 2, 2023. A 13.

Mr. Wenke admitted committing charge #5 of the second amended supervised release petition on November 7, 2023, having been in custody on this matter since October 4, 2023. A 12, 14. This event mostly involved social media postings, deemed as further prohibited third party contact.

On February 14, 2024, the District Court ordered appellant to undergo a presentence examination. A 130-132. Accordingly, Doctor Corey M. Leidenfrost examined Mr. Wenke and issued reports on April 1, 2024 and January 13, 2025, opining that appellant suffers from a "schizoaffective disorder, bipolar type," and, among other things, possesses symptoms significantly influencing a high risk for

future and imminent violence."[3] *See* Sealed Documents ("SD")[4] 36-57, 84-90, 240-241. On August 6, 2024, the District Court granted the defense motion for a psychiatric examination pursuant to § 4241. A 136-138. On November 12, 2024, Bureau of Prisons ("BOP") Doctors Kaitlin Nelson and Robin Watkins issued a report finding Mr. Wenke to be competent, while suffering from an "other specified personality disorder, with mixed personality features." SD 59-583; A 278-280, 315-316.

On April 23, 2025, the District Court, following a two-day evidentiary hearing[5] and briefing by the parties, A 22, issued a Decision and Order of Commitment, finding by a preponderance of the evidence that Mr. Wenke suffers from "a mental disease or defect

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[3] Dr. Liedenfrost's initial opinion, following an examination of the appellant in March of 2024, was that Mr. Wenke suffered from an unspecified bipolar I disorder, with psychotic features. A 173; *see also* A 160-161.

[4] All three expert reports, previously filed under seal in the District Court, are incorporated by reference for purposes of this appeal and are submitted herein under seal.

[5] The hearing was conducted over two days: February 18th and April 10th of 2025.

for which he is in need of custody for care or treatment in a suitable facility." A 444. This order was deemed, pursuant to 18 U.S.C. § 4244, a "provisional sentence of imprisonment to the maximum term authorized by law for the violation of supervised release to which [Mr.] Wenke admitted." A 444.

On May 1, 2025, Mr. Wenke timely filed a notice of appeal. A 446. On May 16, 2025, the District Court denied his motion for a stay of the instant judgment pending this appeal. *U.S. v. Wenke*, WDNY file no. 1:22-cr-00035, dkt. 205. On June 16, 2025, this Court also denied Mr. Wenke's motion for a stay of the judgment. *See U.S. v. Wenke*, 2d Cir. file no. 25-1165, dkt. 16. Appellant secured an expedited transcript schedule and obtained, on July 25, 2025, an expedited appeal schedule with this Court.

Summary of Argument

The evidence relied upon to justify the District Court's determination that Mr. Wenke was suffering from a mental disease or defect was contradictory and based on erroneous information. However, even if a mental disease or defect had been established, the need for hospitalization was not.

Argument

I. There was legally insufficient evidence to support the district court's finding that Mr. Wenke was 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.

A. Standards of review

Provisional sentencing under 18 U.S.C. § 4244(d) requires a preponderance of the evidence showing the defendant presently suffers from a mental disease or defect for which he is in need of custody for care or treatment in a suitable facility. Such evidence may, and often does, include expert medical opinions and the court's own observations during the proceedings. *See*, *e.g.*, *United States v. Hemsi*, 901 F.2d 293, 295-296 (2d Cir. 1990) (addressing competency); *United States v. Nichols*, 56 F.3d 403, 411 (2d Cir. 1995) (same); *United States v. Morrison*, 153 F.3d 34, 46 (2d Cir. 1998) (same).

The district court's determination in this regard is a factual finding reviewed for clear error, *United States v. Prescott*, 920 F.2d 139, 146 (2d Cir. 1990); *Gold*, 790 F.2d at 239-240 (same standard for competency), which occurs where the record as a whole leaves us with a definite and firm conviction that a mistake has been committed.

United States v. Esteras, 102 F.4th 98, 104 (2d Cir. 2024). "Where there are two permissible views of the evidence as to competency, the court's choice between them cannot be deemed clearly erroneous." *United States v. Villegas*, 899 F.2d 545 (2d Cir.), *cert. denied*, 498 U.S. 991 (1990); *see also Nichols*, 56 F.3d at 411.

B. Legally insufficient evidence

i. Mental disease or defect not established

As Mr. Wenke argued previously, the opinion of Dr. Leidenfrost that appellant suffered from a "[s]chizoaffective disorder, bipolar type," and, among other things, possessed symptoms significantly influencing a high risk for "future and imminent violence," SD 62, 64-65, was based on erroneous and insufficient information. Doctor Liedenfrost conducted only one in-person meeting with Mr. Wenke and failed to consult at all with appellant's counsel and family. A 193-194, 201, 212-213, 340-347. Such commonsense outreach would potentially provide helpful insight in arriving at a proper diagnosis. A 193. A determination of this importance requires such efforts.

Dr. Leidenfrost's opinion was also based on the erroneous conclusion that Mr. Wenke suffered from delusions. *See*, A 344-346 (counsel addressing eight examples of wrongly found delusions). Dr. Watkins defined a delusion as "a fixed belief that remains steadfast even in the face of contrary evidence." A 286; s*ee also* A 295 (also discussing 17-factor Cunningham Model for classifying individuals as delusional).[6] All three doctors agreed that a "schizoaffective disorder, bipolar type" diagnosis is dependent upon there being psychotic symptoms, such as delusions. A 158, 175-178, 331-333. Indeed, the purported existence of delusions was "critical" to Dr. Liedenfrost's diagnosis. A 211; *see also* A 158-159.

But Doctors Nelson and Watkins, whose conclusions were based on observing Mr. Wenke on a number of occasions over a 45-day period, directly contradicted Dr. Liedenfrost on this issue. *Contrast* A 164-170, 173-174, 178, 180-183, 190-191, 195-198, 202-

[6] *See* M. Cunningham, M.D., "Model of Analysis for Differentiating Delusional Disorder from the Radicalization of Extreme Beliefs: A 17-Factor Model," American Psychological Association site, accessible at: https://psycnet.apa.org/record/2018-45244-002 (site visited, July 12, 2025).

204, 207-209, with A 300-301, 313-314, 320-321, 331-333. During the latter observation period, Mr. Wenke remained in the general population of a correctional facility, raising no concerns to Dr. Nelson regarding the safety of others in custody. A 300-301, 313-314. Further, Mr. Wenke demonstrated an ability to follow rules, SD 67, despite not being on medication during this time. A 317.[7] Moreover, a schizoaffective disorder may be detected during individual interactions with the patient -- but wasn't discovered here by either Doctors Nelson or Watkins. A 331-333. In sum, Doctors Nelson and Watkins believed that Mr. Wenke's expressed beliefs were not "overtly" delusional. A 289-291, 312; SD 78.

Doctor Liedenfrost's testimony, on the other hand, was inherently contradictory. While part of his ultimate conclusion included the opinion that Mr. Wenke would likely refuse to voluntarily take medication, A 240-241, Liedenfrost also testified to *not* actually knowing if the defendant could be medicated voluntarily.

[7] Dr. Liedenfrost acknowledged that mental health treatment had not been necessary for Mr. Wenke during his time in the BOP system. A 230.

See, A 238.

Moreover, Dr. Liedenfrost's opinion about Mr. Wenke's potential for committing future violence is suspect. For instance, the doctor references an incident flagged on social media involving the appellant possessing a firearm in 2020. A 170-171. In addition to this purported event occurring *two years* before the 2022 offense at bar, there was no police report filed regarding this incident, nor was there any report of a gun being recovered. A 215-216. Indeed, the 33-year-old Mr. Wenke had no prior arrest record before the present matter. SD 67.

ii. No need for hospitalization

With regards to future care, neither Doctors Nelson nor Watkins could opine on a specific treatment plan, as Mr. Wenke suffers only from Other Specified Personality Disorder, with Mixed Personality Features -- containing features unlikely to significantly change in the near future. *See e.g.*, A 316, 318-319 (Dr. Nelson opining that therapy, including group therapy, was important and that treatment could take time; not necessarily requiring hospitalization); *see also*, SD 76; A 348. Even Dr. Liedenfrost acknowledged that Mr. Wenke

could be released to his father's custody, who could then bring him to the nearby Erie County Medical Center for treatment. A 245-246. All of this weighs against the court's ultimate ruling that Mr. Wenke presently needs hospitalization.

Dr. Liedenfrost also recognized that having Mr. Wenke in custody hundreds of miles away, with less access to his family, could worsen his condition. A 231-232, 239. It's also telling that -- unlike BOP Doctors Nelson and Watkins -- Dr. Liedenfrost: (1) was not familiar at all with the BOP system, (2) had never been to any of its facilities and (3) naturally had no knowledge of BOP's treatment plans. A 230-231.

In sum, even if Mr. Wenke's personality disorder qualified as a mental disease or defect, there was insufficient evidence before the District Court to warrant an order of hospitalization to provide appropriate treatment. A 347-348.

Conclusion

This Court should vacate the District Court's April 23, 2025 Decision and Order of Commitment (A 435-445), remand for sentencing relative to the supervised release violation admitted to on November 7, 2023, and grant such other and further relief as this Court deems just and proper.

Dated: July 22, 2025
Buffalo, New York

Respectfully submitted,

/s/ Timothy P. Murphy
Timothy P. Murphy
Federal Public Defender's Office
Western District of New York
300 Pearl Street, Suite 200
Buffalo, New York 14202
Telephone: (716) 551-3341

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UNITED STATES COURT OF APPEALS
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Dated: July 22, 2025
Buffalo, New York

Respectfully submitted,

/s/ Timothy P. Murphy
Timothy P. Murphy
Federal Public Defender's Office
Western District of New York
300 Pearl Street, Suite 200
Buffalo, New York 14202
Telephone: (716) 551-3341