

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	*	Docket Number:
	*	1:22-CR-00035-JLS-HKS-1
	*	
	*	Buffalo, New York
v.	*	December 14, 2023
	*	2:03 p.m.
	*	
LUKE MARSHALL WENKE,	*	STATUS CONFERENCE
	*	
Defendant.	*	
	*	
* * * * *	*	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	MICHAEL DiGIACOMO, UNITED STATES ATTORNEY, By MICHAEL DiGIACOMO, ESQ., Assistant United States Attorney, Federal Centre, 138 Delaware Avenue, Buffalo, New York 14202, Appearing for the United States.
For the Defendant:	FEDERAL PUBLIC DEFENDER'S OFFICE By FRANK PASSAFIUME, ESQ., Assistant Federal Public Defender, 300 Pearl Street, Suite 200, Buffalo, New York 14202.
The Courtroom Deputy:	KIRSTIE L. HENRY

1 The Court Reporter: BONNIE S. WEBER, RPR,
2 Notary Public,
3 Robert H. Jackson Courthouse,
4 2 Niagara Square,
5 Buffalo, New York 14202,
6 Bonnie_Weber@nywd.uscourts.gov.

7 Proceedings recorded by mechanical stenography,
8 transcript produced by computer.

9
10
11 (Proceedings commenced at 2:03 p.m.)

12
13 **THE CLERK:** All rise.

14 The United States District Court for the Western
15 District of New York is now in session, The Honorable John
16 Sinatra presiding.

17 **THE COURT:** Please be seated.

18 **THE CLERK:** In United States versus Luke Marshall
19 Wenke, Case Number 22-CR-35. We're here for a status
20 conference.

21 Counsel, please state your appearances.

22 **MR. DiGIACOMO:** Michael DiGiacomo for the United
23 States.

24 **MR. PASSAFIUME:** And Frank Passafiume for Mr. Wenke.

25 **THE COURT:** Good afternoon, Counsel.

1 Good afternoon, Mr. Wenke.

2 **THE DEFENDANT:** Good afternoon.

3 **MR. DiGIACOMO:** Good afternoon, Your Honor.

4 **MR. PASSAFIUME:** Good afternoon.

5 **THE COURT:** All right. Let's go across the room and
6 see if we have updates from any of you.

7 Mr. DiGiacomo --

8 **MR. DiGIACOMO:** Judge, I just received the latest
9 update from Mr. Zenger this afternoon at 12:50, and I believe
10 there was others.

11 That's the latest update I have and it also contained
12 some posts of Mr. Wenke's. So all I have is what the Court has
13 and what Mr. Passafiume has with respect to an update.

14 **THE COURT:** Okay. Any further updates on the -- this
15 Dr. Gupta plan? Is that who it was?

16 **MR. DiGIACOMO:** That's through -- that's -- to my
17 understanding, through Endeavor. That's not through -- that's
18 not through the lawyers.

19 **THE COURT:** That's not the one that the lawyers were
20 working on.

21 How about the one that the lawyers were working on?

22 **MR. PASSAFIUME:** Judge, there's no you update on that.

23 **THE COURT:** Okay.

24 **MR. PASSAFIUME:** We're hoping to -- the availability
25 of psychiatrists has been difficult, to say the least.

1 We're hoping that this alternate, Dr. Coggins, is
2 available to do something after the holidays -- sometime in
3 January.

4 **THE COURT:** All right. And, Mr. Zenger, anything
5 related to treatment plan updates first?

6 Before we get into the posts and that other sort of
7 thing that we need to talk about -- the posts and letter topic.

8 **PROBATION OFFICER ZENGER:** Yes, Your Honor. To
9 summarize the information I provided to the parties prior to
10 Court today, the referral to AOT, the Erie County wraparound
11 mental health program, has been made.

12 I have an e-mail out to the coordinator of that
13 program to just ask as far as the timeline. I've not heard back
14 yet.

15 I did also confirm with Endeavor that they are still
16 planning to work with Mr. Wenke, but that would depend upon his
17 admission to AOT. Which, at this point, we don't know if he
18 does qualify for the program.

19 The individuals in the program that came out to assess
20 Mr. Wenke relating to the behavioral threat assessment are also
21 planning to present his case to the Erie County Threat
22 Assessment Team, which could be another program, which I know
23 very little about.

24 I was just informed of this right before coming into
25 Court today in any event.

1 In the even the AOT does not qualify for Mr. Wenke,
2 that could be another wraparound-type service for him, although,
3 right now, we don't have any dates or specific information as to
4 any of those programs.

5 And, yes, Dr. Gupta is the doctor, the psychiatrist
6 through Endeavor, but he's not available until potentially early
7 January.

8 Mr. Wenke did go to Erie County Medical Center on his
9 release last week, and he was seen for some kind of initial
10 evaluation, although that is not a full psych evaluation.

11 And we were told that it takes up to 30 days for that
12 written report to be generated. And in the meantime, he was
13 released, so we know that. And then he met with a social worker
14 following that interaction.

15 **THE COURT:** Okay. And then, as far as I can tell,
16 we've got two sets of things related to Mr. Wenke's activity on
17 social media over the last few days.

18 One being something that came to us dated
19 November 8th, a letter from Katie [REDACTED] that contains posts,
20 that my chambers forwarded to the lawyers.

21 Do you have that, Mr. Passafiume?

22 **MR. PASSAFIUME:** I've reviewed that, Judge, yes.

23 **THE COURT:** And, Mr. DiGiacomo, do you have that?

24 **MR. DIGIACOMO:** I reviewed it, Your Honor, yes.

25 **THE COURT:** And that came directly, I believe, to my

1 chambers, so by U.S. mail, I believe.

2 Mr. Zenger, you've seen that as well?

3 **PROBATION OFFICER ZENGER:** I have, Your Honor.

4 **THE COURT:** All right. And then, separately is your
5 e-mail from a little while ago, Mr. Zenger, to my chambers and
6 to the lawyers.

7 And have the lawyers seen that as well? Which is an
8 update with -- it's at 12:50 p.m. today?

9 **MR. DiGIACOMO:** Yes, Your Honor.

10 **MR. PASSAFIUME:** Yes, Judge.

11 **THE COURT:** All right. Should both of these sets of
12 things be docketed, Mr. DiGiacomo?

13 **MR. DiGIACOMO:** I think it would make sense. Since
14 the Court is referencing them, you know, I think it should be
15 made part of the record.

16 **THE COURT:** Does anyone dispute that?

17 **MR. PASSAFIUME:** I guess not. The -- you know, the
18 first document has confidential, sensitive information, so I
19 think I'd need to --

20 **THE COURT:** For example, what? It's been a couple
21 days since I read it. Remind me what --

22 **MR. PASSAFIUME:** There's location. It's a letter, so
23 the heading has an address. Things like that.

24 **THE COURT:** Okay. Miss [REDACTED]'s address, for
25 example?

1 **MR. PASSAFIUME:** Yes.

2 **THE COURT:** By the way, particularly concerned about
3 people reaching out to her.

4 Aren't we concerned about that?

5 **MR. DiGIACOMO:** We've always been concerned about
6 people reaching out to Katie [REDACTED], Judge.

7 **THE COURT:** Some people that Mr. Wenke was
8 incarcerated with?

9 **MR. DiGIACOMO:** Well, that happened while he was
10 incarcerated, Judge, yes. I mean, I read the content of the
11 letter that, in fact, individuals reached out to her, but that's
12 all I know.

13 **THE COURT:** Well, let's address one thing at a time.
14 So we will docket this.

15 And, Ms. Henry, let's make sure that all the
16 addresses -- all addresses on this filing are redacted, all
17 right?

18 And we'll redact the addresses and get this docketed.
19 Also, Mr. Zenger's e-mail will be docketed as well.

20 I don't know. I don't know where to start. This is a
21 mess, Mr. Wenke. So when you left here, you haven't done some
22 of the things that I thought you'd be doing, which is to take
23 all of this seriously.

24 Instead, all that you're doing is talking about how
25 you've been mistreated by ECMC and by the Court. And talking

1 about murder a few different times.

2 Somebody else is doing that? Not you?

3 **THE DEFENDANT:** I don't recall talking about murder.

4 I recall talking about other people who have murdered.

5 I did not say anything about murdering at all.

6 There's other people associated with the entire situation, which

7 I, unfortunately, found myself aligned with, who murdered.

8 That's -- that's what I recall talking about.

9 And in the terms of ECMC, it was because a social -- I
10 did not know until I left that she is a social worker. And she
11 diagnosed me with something completely differently than
12 Dr. Rutter did.

13 And she just kind of sat there and judged the drama
14 that brought me to her. And I said I am aware that this is a
15 very intense situation. I'm trying to recover from it.

16 And I was very calm when I talked to her. They led me
17 to a lot of different doctors at ECMC, and then they led me to
18 her. And we waited a few hours. That was fine. It took about
19 until 9 o'clock.

20 But it was because she's a social worker, judged the
21 drama that led me to her, and then she diagnosed me with
22 something completely different than Dr. Rutter did.

23 So I questioned her ability to diagnose, but I was
24 very honest, and I told her the entire story, so that's what I
25 have to say about that.

1 **THE COURT:** All right. Just stand by for a moment,
2 please.

3 There are in some of these posts -- there actually is
4 a third thing -- and it's just not on my desk right now, so
5 we're going to get that.

6 But there were also some posts, Mr. Zenger, that you
7 forwarded to my chambers. Facebook posts late last week.

8 **PROBATION OFFICER ZENGER:** Yes.

9 **THE COURT:** Or a couple days ago. I don't remember.

10 **PROBATION OFFICER ZENGER:** Yes, Your Honor. There
11 were a number of posts. And one thing I wanted to also add were
12 posts that were concerning the defendant mentioning his rights
13 to refuse to take medication.

14 **THE COURT:** That's another -- that the kind of topic
15 that I'm eventually going to get to so we don't leave any stone
16 unturned here.

17 But has anyone else seen the posts that you sent to me
18 a couple days ago? The Facebook posts. Have counsel seen
19 those?

20 **PROBATION OFFICER ZENGER:** I believe --

21 **THE COURT:** I feel like I read them a couple of days
22 ago.

23 **PROBATION OFFICER ZENGER:** Yes.

24 **THE COURT:** Counsel has seen them?

25 **PROBATION OFFICER ZENGER:** I believe they have,

1 Your Honor. If we could ask the parties --

2 Did you receive --

3 **MR. PASSAFIUME:** Do you remember getting them?

4 **MR. DiGIACOMO:** I did get a **post** last week, Judge. I
5 was trying to -- I believe. I mean -- do you know the date?

6 **THE COURT:** So I think it was December 11th is what
7 I'm looking at.

8 Is that about right, Mr. Zenger? So I've got an
9 **e-mail** from -- actually, it was an **e-mail** from -- between you,
10 Mr. Taberski and Mr. Zenger that was forwarded along, and I
11 wanted to make sure that the lawyers have seen these posts as
12 well.

13 So -- and also --

14 **PROBATION OFFICER ZENGER:** I'm not sure the defense
15 has received that **e-mail**, Your Honor. I'm not sure if the
16 defense had received those **posts**, Your Honor.

17 **MR. DiGIACOMO:** Judge, if I may, I just want to make
18 sure -- there's an **e-mail** that I have that Mr. Passafiume's
19 copied on.

20 It's dated December 11, 2023. The timestamp is about
21 1 o'clock. And below that are some **e-mails** that came in or that
22 Mr. Taberski had sent to Mr. Zenger on that **e-mail** also from
23 December 11th. And that time on that **e-mail** is 9:26 in the
24 morning. It's all one.

25 **THE COURT:** That's what I'm looking at, yeah.

1 Do you have that?

2 **MR. PASSAFIUME:** Yes, Judge. I've reviewed that.

3 **THE COURT:** And so we should be docketing that as
4 well. So there's three sets of things that are going to be
5 docketed, okay?

6 Ms. Henry, just make sure that, if there are any
7 e-mail addresses of individuals like Zenger, Taberski,
8 et cetera, the e-mail addresses need to be redacted on all of
9 these, if there are any.

10 Miss [REDACTED]'s home address and e-mails all need to
11 be redacted. That's in a few different places, so we've got to
12 get all that redaction squared away before we docket these
13 things.

14 So in a couple places -- and I'm talking about all
15 three of these sources now; the two that came from Zenger and
16 one from Miss [REDACTED] -- Mr. Wenke seems to be trying to talk
17 to me or talk about me.

18 And, to me, that doesn't cause much concern, but I
19 want to ask all of you whether anybody thinks that that fact
20 creates a recusal situation that we need to talk about.

21 Mr. DiGiacomo?

22 **MR. DiGIACOMO:** Judge, I don't see it. I mean, unless
23 the Court feels there's some conflict that's going to impact
24 them.

25 But I don't -- based on the content, you know, I don't

1 see a need, because I don't think there's enough there to set
2 forth an actual conflict or even a potential conflict.

3 But, obviously, the Court is reviewing these and has
4 to make a determination based upon, you know, how they feel
5 having look at the these.

6 But you just referenced that you didn't see it as a
7 big concern, so I don't see it as a concern.

8 **THE COURT:** It doesn't create a concern for me,
9 either.

10 Mr. Passafiume, for you?

11 **MR. PASSAFIUME:** No, Judge.

12 **THE COURT:** I don't think -- I don't think it's
13 crossed any lines in terms of recusal. I've got to be mindful
14 of the recusal line and the recusal boundary. And if I set it
15 too conservatively, then people can game it.

16 But at the other -- the other hand, if I can't fairly
17 judge the case, then I've got to recuse, too. So there's a
18 balance. And I don't think we're there. And I just wanted to
19 ask all of you if you thought that we were.

20 So let's talk about these and the concerns that it
21 gives me and maybe hear from all of you.

22 Let me start with Probation. So we're looking at
23 three different sorts of inputs.

24 What do you make of it, Mr. Zenger? What are we
25 dealing with here? And what is Probation's recommendation based

1 on all of these new inputs?

2 And I'll go right to left, to you, Mr. Passafiume,
3 next.

4 **PROBATION OFFICER ZENGER:** Yes, Your Honor. So the
5 probation department is leaving no stone unturned, as far as
6 making every attempt we can to bring an evaluation assessment
7 treatment to the defendant, but at this point that resource is
8 not readily available.

9 Despite whatever things are being put into motion,
10 Mr. Wenke is still out in the community without that assistance.

11 In addition to that, the -- the online posting is very
12 concerning. Between the fixation on murder and his repeated
13 mentionings of his apparent unwillingness to -- or right to
14 refuse medication prescribed.

15 Reservations, grievances with evaluations he has had
16 done and treatment he has had done in the past, this culmination
17 of all those things are troubling.

18 And in addition to that, one thing that I had not
19 mentioned in the e-mail update to the parties and the Court
20 leading up to court today was there is another law enforcement
21 agency that is continuing to monitor the defendant.

22 And it's been revealed that since his release just
23 this last Friday, though the defendant did not initiate that
24 contact, he has had contact with the individual in Ohio that --
25 that did assist him in obtaining the firearms --

1 **THE DEFENDANT:** I did not.

2 **PROBATION OFFICER ZENGER:** -- as part of the incident
3 offense.

4 **THE COURT:** All right.

5 **PROBATION OFFICER ZENGER:** So due to all those
6 reasons, Your Honor, because -- the issues we're having with the
7 treatment providers.

8 Also, the defendant's unwillingness to engage
9 long-term with those providers; postings online; the concerns
10 with the victims; the connections he has had with the -- with
11 the past contacts in dealing with the firearms, it is our
12 position that he go back into custody at this time.

13 **THE COURT:** All right. So, Mr. Passafiume, I'll ask
14 you to respond to that.

15 But I also want to ask you to respond -- you're pretty
16 good, I think, at taking multipart questions. So, if you need
17 me to repeat it, I'll repeat it, but generally respond, okay?

18 Also, I want you to respond to some of these things
19 that were in the Zenger e-mail from this afternoon, which are
20 posts that look like they're coming from your client, one that's
21 at the top the second page that says:

22 Sylvia Browne said by the end of the century, the veil
23 thins and we can all see spirits. What this means is that, when
24 you murder someone, they can just testify against you in court
25 on their own.

1 The murdered become their own witness. Thanks to what
2 happened to me, selenite crystals have become quite a phenomenon
3 among Federal officials. And that will help establish deceased
4 victim negotiations.

5 And then he's writing about printing 3D human bodies
6 to replace anyone who's murdered against their own will.

7 And on the next page, it looks like there's a comment
8 from Politico -- an article from Politico about: New Hampshire
9 man charged with threatening to kill Vivek Ramaswamy.

10 And it looks like the comment is in response to that,
11 where Mr. Wenke is writing that: Karmic energy is real. He --
12 the question I've got is who's "he" in the next sentence?

13 He is going to be shown by the God sensation that
14 there is an afterlife.

15 Who? Who's going to be shown?

16 Nobody who actually believes in an after -- I'm asking
17 who. Nobody who actually believes in an afterlife believes in
18 murder, because you're going to have to answer to your murder
19 victims one day as equal spirits.

20 And a couple other comments elsewhere about murder and
21 refusing to take medications. Which is, by the way, the
22 opposite of what Mr. Wenke told me when we were here last about
23 his willingness to engage and take medication.

24 So, Mr. Passafiume, what am I supposed to make of all
25 of this?

1 **MR. PASSAFIUME:** This is somebody that needs mental
2 health treatment; that has wanted mental health treatment; that
3 has engaged in mental health treatment.

4 When given that opportunity, that, for some reason
5 now, any agency is -- that can give him that treatment that
6 they're hired to do, is not doing that.

7 That -- that's -- it's incredible, Judge. I don't
8 know -- I don't know what -- what to say. He wants treatment.

9 He was going before he was arrested on this violation.
10 He had the psychiatrist appointment scheduled the very next day,
11 you know.

12 And now that -- that psychiatrist appointment is
13 impossible to get. Nobody wants to do it. If he were arrested
14 a week later, he would have had that appointment and maybe he'd
15 be on medication right now.

16 So that's my, I guess, general response, you know. He
17 hasn't received the treatment that he needs -- that we all think
18 he needs and we all believe he needs. That he wants -- through
19 no fault of his own, he's trying to do it.

20 And the postings and the -- the tweets or the social
21 media -- they're all symptoms of this. And, you know, those
22 postings, I guess, specifically, Judge, I have a tough time
23 reading them because, to me, it's gibberish. It's incoherent.
24 These things don't make sense to me.

25 And they talk about seven different things in two

1 sentences. I don't know. None of these are any -- like,
2 actual, overt the threats. They're all just commentary.

3 Nobody's really reading them, but the people in the
4 Courtroom now. And he hasn't reached out to anybody personally.
5 Like, he hasn't violated any order of protections in this week.

6 So I get the volume of posts is concerning. I get
7 the -- you know, that's what led us here today. Or partially.
8 But that wasn't going to stop, unless there was treatment. And
9 there is not treatment.

10 So incarceration just kind of punts this down the
11 road, you know, and -- because we're going to be in the same
12 boat.

13 Unless you're going to, you know, cut ties with him --
14 you know, sentence him, and then no supervision, and then just
15 kind of be done with it -- I don't know -- you know, I don't
16 know if that's a road that you want to go down, Judge, but --
17 that's it.

18 He needs treatment. He's asked for it. He wants it.
19 You've ordered it. He hasn't been getting it. And I don't know
20 what to do.

21 These posts to me, Judge -- I don't see any -- any,
22 like, real threat. I know that there's a term of art, real
23 threat.

24 I -- it's -- they're hard to read out loud because
25 it's -- they're all non sequiturs to me. I don't know what

1 selenite crystals are.

2 I don't know what any of that stuff is. And that's
3 what these posts are. And they're one after another. They're
4 commentaries and that's it.

5 They're not directives to anybody. They're not
6 pointed to anybody specifically. There -- there's no real
7 threat in any of these posts.

8 And if we all thought that was going to end with
9 without any treatment, you know, that's -- shame on us. Of
10 course that was going to happen.

11 That's been -- that's been the -- you know, the reason
12 why we're here. That's been the problem.

13 And even if you wanted to take away the social media
14 and the electronics and all the Internet and all that stuff, you
15 can't, because Endeavor said they're not going to treat him in
16 person. They're only going to do it online.

17 So in every which way, everybody's boxing him in, and
18 they're boxing him in to go back to jail, and then nothing
19 gets -- nothing gets solved. I think the week -- he looks a lot
20 better. He looks healthier -- Mr. Wenke.

21 One of the posts was a video of the family and a child
22 dancing. There are some good moments. There's been periods of
23 real rehabilitation or reintegration at least on the family part
24 of it. And his dad's been with him every step of the way.

25 You know, maybe heightened conditions and -- and

1 directives for social media -- I don't know. There's got to be
2 something between, you know, jail and what we have now, Judge.

3 **THE COURT:** But he just -- you know, he just told me
4 that he doesn't remember saying anything about murder, and I
5 think he's mentioned it four different times, Mr. Passafiume.

6 So there's a disassociation between what he's doing
7 and what he's remembering now?

8 **MR. PASSAFIUME:** Judge, honest -- kind of. If you
9 are -- if these are manic texts or messages that are just being
10 written in that spot, you're not going remember exactly what you
11 wrote because you have so many.

12 And what he refers to are -- they're commentaries.
13 They're not any threats of murder or anything like that. He --
14 he understood your question to be that, you know, has he
15 threatened to murder anybody?

16 Has he indicated somebody was going to get murdered?
17 And that's not it. These are all commentaries, I think, on
18 the -- on the posts, Judge.

19 **THE COURT:** Taking away his ability to write these
20 things isn't the solution either, Mr. Passafiume. In fact,
21 it's -- these kind of views into his mind are helpful.

22 **MR. PASSAFIUME:** Sure.

23 **THE COURT:** Not -- to me, maybe not to him. But
24 helpful to me. So shutting them down doesn't serve any purpose,
25 I don't think, because then we have fewer glimpses into his

1 mind.

2 **MR. PASSAFIUME:** That's a great point, Judge. You
3 know, now we're back to the Minority Report movie, right?

4 I don't -- he needs treatment. And he's not getting
5 it. He's not going to get it in jail. He's not getting it now.
6 I don't know why he's not getting it. It's through no fault of
7 his own.

8 And we do this dance --

9 **THE COURT:** But it becomes who's going to bear the
10 burden of him not getting treatment?

11 Right now, just him. When it's somebody else, then
12 it's on me.

13 What about this Ohio thing? What do we know more
14 about, this contact with the person in Ohio that he's not
15 supposed to have contact with, Mr. Zenger?

16 **PROBATION OFFICER ZENGER:** Yes, Your Honor. So the
17 background is that this individual in Ohio met Mr. Wenke on
18 online.

19 They had met on some kind of personality-type
20 assessment thread and had shared some similar background, as far
21 as time spent in Olean.

22 I don't know what caused this individual to follow
23 back up with Mr. Wenke, but I have been told that there has been
24 contact between the two since Mr. Wenke's release this past
25 Friday.

1 I don't have much information beyond that except for
2 that this person is cooperating and assisting in a separate --

3 **THE COURT:** But it's your understanding that it
4 originated from the person in Ohio, not from Mr. Wenke?

5 **PROBATION OFFICER ZENGER:** That is my understanding,
6 yes.

7 **THE COURT:** So back to my specific question,
8 Mr. Passafiume, to that page three of that e-mail, where we're
9 talking about: Karmic energy is real. He is going to be shown
10 by the God sensation that there is an afterlife.

11 Who is "he"?

12 **MR. PASSAFIUME:** He is the person accused, right? In
13 that article, of making the threats to kill the candidate.

14 **THE COURT:** What about his multiple refusals? At
15 least three, maybe more than that. He says he's got a right to
16 refuse medication.

17 So different from what he told us the last time we
18 were together, that he was going to take all this seriously,
19 isn't it?

20 **MR. PASSAFIUME:** Yeah. I talked to him before Court
21 about that. So my conversations with him are very similar to
22 what he represented in Court.

23 And he -- he has never -- he's never refused
24 medication that's been offered. Nothing has ever been offered
25 to him. He indicates he would take it.

1 These -- he indicates that he says this stuff online
2 and in these posts. Basically: You know, I'm going to refuse
3 until I get a real doctor to -- to evaluate me.

4 There's no -- you know -- on their face, they say what
5 they say. And there's no excuse for that. It is contrary to
6 what he indicated to the Court.

7 But he hasn't had the chance to refuse. And I think
8 giving him the chance to refuse is -- is paramount.

9 And then there's really no excuse if he were to refuse
10 medication or not take medication that was prescribed by -- you
11 know, by a licensed psychiatrist.

12 You know, there's no excuse for those posts. It is
13 contrary to what he indicated to you.

14 He -- he indicates they're -- they were kind of rants
15 on a specific basis. And he's always indicated to me and to
16 anybody in my office that he would take medication, if -- if
17 offered.

18 And, in fact, his father has been on board with that
19 the entire time. And, I think, would ensure and make sure that
20 he would be taking the medication, if offered, or report to the
21 Court if he's not doing it.

22 **THE COURT:** Mr. Passafiume -- and then another thread
23 that runs through the posts is his ranting against the system.

24 Ranting against this; ranting against the Court;
25 ranting against me. I guess; ranting against the ankle

1 bracelet, which he thinks is listening to his conversations.

2 And that's, again, different from the contrite person,
3 who speaks -- when he speaks to me -- that everything's going to
4 be okay and nothing to worry about here. And then he goes
5 online and spews all kinds of crazy stuff.

6 **MR. PASSAFIUME:** That's the mental illness, Judge.

7 **THE COURT:** I get it. But what am I supposed to do
8 with that?

9 I get it. That's why I said that the statutory
10 process starts itself. I don't even need to make -- I mean,
11 it's like, obviously, the statutory process starts itself. It's
12 so easy.

13 **MR. PASSAFIUME:** You know, going down the BOP road, I
14 kind of disagree with -- before we get to that point and I argue
15 against that, I still don't understand why, if you're
16 ordering -- if Your Honor is ordering a psychiatric evaluation
17 and treatment, how Horizon and Endeavor refuse to do it. I
18 don't fundamentally understand that.

19 When -- when a Federal district judge is ordering
20 treatment multiple times, that they find ways around it and this
21 AOT and all these different assessments and teams and -- you
22 know, this psychiatrist is not the right one; we need somebody
23 else, and we're waiting on this.

24 He was in treatment with Horizon until his arrest.
25 There was no imminent danger that -- that Horizon was scared of,

1 that they reported or anything like that. He was in treatment.
2 He was compliant.

3 Those counselors didn't say he was a danger to
4 somebody. They didn't call up and say: Get this guy off the
5 streets. We -- you know, something's going to happen.

6 They were treating him. He had the psychiatrist
7 appointment scheduled, ready to go, and he was arrested on
8 the -- you know, the day before.

9 So I don't know why we could not just go back to that
10 and with an order from Your Honor saying: Do what you were
11 doing. And if Horizon doesn't want to do it, I guess, and
12 Endeavor's better equipped, then, Endeavor, do it.

13 And it gives everybody, you know, peace of mind and
14 coverage, and a glimpse -- a better glimpse into Mr. Wenke's
15 mind.

16 That's -- that's what I -- I don't understand.
17 Because there is no -- there's nothing here I could say that's
18 going to, you know, make anybody feel better.

19 **THE COURT:** Mr. Zenger, do you want to respond to
20 the -- the specific comments about psychiatric treatment? And
21 where are we? And why hasn't it happened? And are we any
22 closer than we have been?

23 **PROBATION OFFICER ZENGER:** Yes, Your Honor. So it's
24 not necessarily an unwillingness to work with the defendant.
25 **Psychiatric evaluations** take a couple of months, just with the

1 lead time to schedule these appointments.

2 And that is why, upon the defendant's last release,
3 when he was in intensive out-patient services with Horizon, it
4 wasn't until he was a couple months into his supervision that
5 that appointment was going to take place.

6 It was scheduled off the bat. It just takes that long
7 for them to take place. He was taken into custody. Some more
8 background information came to light and was given to Horizon.

9 And at that time, they just felt that they weren't
10 equipped to deal with his needs. That it would be irresponsible
11 for them, alone, to go forward and continue working with the
12 defendant, without the appropriate wraparound services that they
13 felt that he needed, which is when we transitioned to Endeavor,
14 set up the behavioral threat assessment.

15 That was conducted. The outcome of that assessment is
16 what generated the recommendation of Endeavor, who is willing to
17 have a psychiatric assessment done with the defendant.

18 And that is going to take place, what they told me, in
19 early January. So we do have a time frame for that.

20 Their willingness, though, is dependent upon, again,
21 the wraparound services. They need more support, based upon the
22 background of the defendant, for this AOT program and/or the
23 Erie County threat program to be in partnership with them, to
24 ensure that they have the adequate services to supplement their
25 own services, so that he can be in the community, safe.

1 In addition, yes, he was in compliance with treatment
2 before, but what's concerning is that time and time again we
3 would see online him poking fun, making fun of the treatment and
4 not taking it seriously.

5 Yes, it was a long drive. I recognize that. But that
6 was not solely the context of what he was presenting online at
7 that time.

8 And then, since he's been released this time, he's
9 done much of the same with his assessment with ECMC and his
10 apparent fixation on his right not to take medications.

11 **THE COURT:** And has he been able to start the
12 psychological part of the treatment? You know, with a counselor
13 or whatever at Endeavor since he's been out?

14 **PROBATION OFFICER ZENGER:** He has not, Your Honor,
15 because they are not willing to begin services with him until
16 AOT has begun their services in combination with them.

17 **THE COURT:** So it sounds like sometimes, to some
18 extent, Mr. Passafiume's right, when he worries about one step
19 forward and two steps back. It seems that's exactly what's
20 happening here.

21 **PROBATION OFFICER ZENGER:** That could be the case,
22 Your Honor.

23 The defendant has a lot of unique needs. And as more
24 of those needs are coming to light, it has an impact on what
25 type of programming is necessary. And that programming takes

1 time to fall into place.

2 **THE COURT:** So all of this and everything that we've
3 been talking about the past couple of weeks is all about getting
4 Mr. Wenke some treatment.

5 But the bigger backdrop is the -- and I had to make
6 and I did make the findings the last time we were here -- is the
7 concern for whether there is a danger to the community or not.

8 And that's the biggest backdrop. That's where I am
9 and have to work on and think about. Getting him some treatment
10 is a corollary to that, but that's not the end, itself, right?

11 Mr. DiGiacomo, I haven't had -- I haven't given you a
12 chance to talk.

13 So what's the Government's position?

14 **MR. DiGIACOMO:** Judge, the Government's position -- I
15 mean, the Court may recall we were opposed to Mr. Wenke's
16 release, last time, until everything was up and running with
17 Endeavor.

18 I know the Court wanted him to -- because we couldn't
19 get the psychiatrist evaluation, the Court took the next best
20 approach and had him self-report to ECMC, but it doesn't appear
21 that we have a report.

22 We're not going to see one for 30 days. And I don't
23 even know if it confirmed that Mr. Wenke even saw a psychiatrist
24 there.

25 So where we are, Judge, today is basically where we

1 were before. Except now, with Mr. Wenke being released into the
2 custody of his father and on home detention -- I mean, now he
3 has access back to the computers.

4 Which I understand and I can respect the Court's
5 position that, you know, it gives an insight as to -- whoever
6 finally does this evaluation, as to what Mr. Wenke's thinking.

7 I know there's been conversation about, you know --
8 brought up with what do we do? Do we take away the computer?

9 But as you pointed out, that gives whoever the
10 clinicians are that are going to eventually treat Mr. Wenke an
11 insight as to who he is.

12 But then there's also been the argument that Endeavor
13 requires him to have access to a computer for their -- when they
14 get into the counseling aspect of it.

15 But I believe that, when it gets into the counseling
16 aspect of it, that could be a very limited. He would do a Zoom
17 conference that specific day and time or whenever that
18 evaluation is.

19 So, Judge -- and I know it's been said by -- you
20 questioned it and it's been said by Probation, I think, really,
21 there's two -- there's two things here.

22 The references to the murder that the Court has
23 pointed out and, more importantly, Judge, the multiple
24 references.

25 And it says -- I know Mr. Passafiume has acknowledged

1 that, you know, some of these -- some of these posts of
2 Mr. Wenke's, you know -- they're just kind of rambling.

3 But the ones where he's saying he will refuse to take
4 medication, we have, quote: We have legal rights to refuse
5 medication. In capitalization.

6 I mean, that speaks for itself. That's not gibberish.
7 And so now, really, until we get things going, is it in the
8 public safety to have Mr. Wenke out still, in the custody of his
9 father? Probation doesn't think so.

10 **THE COURT:** And I assume the Government doesn't think
11 so.

12 **MR. DiGIACOMO:** Well, Judge, we were opposed to his
13 release before, so, yes. We have our concerns.

14 And it's not just -- Judge, for the record -- it's
15 clear it's not just what's been happening since.

16 I mean, we had our reservations after that evaluation,
17 although, as Mr. Passafiume pointed out and the Court pointed
18 out, some of it was dated from the underlying offense -- I mean,
19 the threat assessment.

20 **THE COURT:** What is Probation's recommendation,
21 specifically, in terms of if he's remanded as you're
22 recommending, Mr. Zenger? Then what? And vis-à-vis treatment.

23 **PROBATION OFFICER TABERSKI:** May I, Your Honor?

24 **THE COURT:** Mr. Taberski --

25 **PROBATION OFFICER TABERSKI:** Your Honor, our position

1 would be that the defendant is committed to the BOP process that
2 we previously discussed or that he be remanded up until the date
3 that we have scheduled for a psychiatric evaluation in the
4 community and he be remanded up until that exact date.

5 **THE COURT:** And does that even assuage your concerns?
6 In other words, this isn't -- an M.D. psychiatrist doesn't have
7 a magic wand either, right?

8 **PROBATION OFFICER TABERSKI:** That's true, Your Honor.
9 And, especially, if the defendant is unwilling to take
10 medication, having a psychiatric evaluation done and medications
11 recommended doesn't go very far.

12 **THE COURT:** Can any of this interaction and treatment,
13 et cetera, with Endeavor, begin while he's in a local county
14 jail?

15 **PROBATION OFFICER TABERSKI:** I can ask that question
16 specifically. I do think that Endeavor has more of a capability
17 to do that than Horizon, but it would not be through a probation
18 contract.

19 **THE COURT:** Because I feel like you have told me that
20 they won't do that while somebody's in custody, right?

21 **PROBATION OFFICER TABERSKI:** And my supervisor just
22 indicated to me that, no. They do not have the ability to do
23 that.

24 **THE COURT:** See what I mean? So we're going two steps
25 forward, one step about back again -- or whatever the dance is.

1 I forgot the rhythm, but seems like we're in a dance.

2 **PROBATION OFFICER TABERSKI:** Yes, Your Honor.

3 **THE COURT:** And somehow, I've got to call the cadence.

4 All right. Mr. Passafiume --

5 **MR. PASSAFIUME:** Kind of going back to the dance that
6 we're doing -- so, you know, Endeavor says that they're not
7 going to treat until AOT -- he qualifies for this AOT. I don't
8 think he's even going to qualify for that.

9 In talking with the New York State mental hygiene
10 services lawyer, who gave me the documents that I forward the --
11 to the Court -- and it's in the brochure that Officer Zenger
12 provided -- the criteria for eligibility requires, you know, all
13 of these -- you know, there's, like, five or six different
14 requirements.

15 But one of it is history of lack of compliance with
16 treatment for mental illness, which has either led to -- to
17 either two hospitalizations in the last three years or one or
18 more acts of serious violent behavior towards others or threats
19 within the last 48 months.

20 That's just one of all the criteria he needs. He's
21 not going to qualify for the intensive out-of-pocket program
22 because he is not -- he's not going to meet the -- the
23 threshold, which is high.

24 We don't -- we don't see these cases here, but a
25 threshold is high for somebody to be deemed a danger where they

1 cannot be in the community.

2 And, you know, to lock him up for saying something
3 that's correct, he can't be forced to take medications -- I
4 understand in the context that sounds awful -- give him a chance
5 to -- to commit the violation before detaining him on that
6 violation. He goes back to jail now, we are in the same exact
7 boat.

8 And, you know, before the BOP, kind of, path, there's
9 going to be a lot -- I think, you know, I'm going to want a
10 hearing. There's going to be some legal issues, I think, with
11 that part of it.

12 But I still -- I don't get why this cannot happen
13 here, locally, in Buffalo. That -- what Officer Zenger
14 said and, kind of, one of the options to keep Mr. Zenger --
15 Mr. Wenke in custody until the psychiatric evaluation.

16 That was the plan, but then they refused to do it. So
17 we're going to be in the same exact boat.

18 **THE COURT:** That was my next question, Mr. Zenger --
19 was what about that?

20 In other words, he's at whatever county jail, and then
21 what? Will they actually get the appointment scheduled?

22 That was part of the trouble we had the last time is
23 they wouldn't get us on the calendar.

24 **PROBATION OFFICER ZENGER:** That's correct, Your Honor.
25 And there is the possibility that -- the very real possibility

1 that AOT -- that he does not qualify for AOT.

2 And then, hopefully, that other supplemental program
3 that was proposed in the e-mail I sent today -- I know very
4 little about it.

5 I just learned about it about an hour before Court.
6 But the threat assessment team wraparound program, that could
7 then assist Endeavor, would then come into play. But who knows
8 what's going to come out of that, too.

9 So the concern here is that he does not qualify for
10 AOT, in which case Endeavor has basically said that their
11 willingness to work with him is dependant upon that being
12 accepted.

13 **THE COURT:** So where does that leave us? Again, he
14 still has no access to a psychiatrist.

15 **MR. PASSAFIUME:** Can I just -- he wouldn't qualify for
16 AOT because he's not dangerous enough.

17 So that makes no sense that they're not going to treat
18 him, because he doesn't qualify for a more intensive program. I
19 fundamentally don't understand that, Judge.

20 **THE COURT:** Maybe you should have a meeting with
21 them -- with Mr. Zenger and Mr. DiGiacomo -- and make the
22 argument to them.

23 **PROBATION OFFICER ZENGER:** These are the same
24 individuals that had to digest the threat assessment that was
25 done, too, which does raise concern about the defendant's

1 history, behavior and concerns for the future as well.

2 **THE COURT:** My whole view of ameliorating -- of
3 mitigating the risk is getting him the treatment. And we're
4 moving farther and farther away from that.

5 He needs treatment because he needs treatment, but the
6 treatment is also a factor in my risk analysis, isn't it? And
7 we're getting farther and farther away from that.

8 Does anyone have a problem with me calling the next
9 case and taking a recess on this case? I've got Vassar now, and
10 your case, as well, Mr. Passafiume.

11 Would you be able to stick around, Mr. DiGiacomo and
12 probation folks?

13 Why don't I take a recess on Wenke and call Vassar so
14 that I can continue to think about Wenke while I'm up here and
15 maybe take a recess off the bench for a few minutes, all right?

16 **MR. PASSAFIUME:** Thank you, Judge.

17 **THE COURT:** All right. Let's do that. So we're in
18 recess on Wenke.

19

20 (Recess commenced at 2:47 p.m., until 3:10 p.m.)

21

22 **THE COURT:** Thanks for the recess. Please be seated.
23 Everybody back?

24 Mr. Taberski's in the hot seat now, for some reason,
25 so we'll see. Tell me, for you, Mr. Taberski or Mr. Zenger, is

1 Endeavor going to engage?

2 Do they need some kind of a trigger from the Erie
3 County **threat assessment** group to prompt Endeavor to engage?
4 How is that going to work?

5 In other words, is there another prerequisite that we
6 haven't even fleshed out?

7 **PROBATION OFFICER ZENGER:** Your Honor, it seems as
8 though Endeavor directly partners with AOT in that effort.

9 So what they've indicated is that their willingness to
10 work with Mr. Wenke is dependent upon AOT -- him qualifying for
11 AOT.

12 So I did -- there actually is a field on the referral,
13 itself, for the partnering agency. And I did provide Endeavor's
14 contact information.

15 The clinical director over there is the one that
16 recommended AOT in the first place. So that would -- that
17 connection has been made, Your Honor, so -- there's also e-mail
18 threads with the both of them on there.

19 **THE COURT:** And, Mr. Taberski, is there something that
20 you wanted to say?

21 **PROBATION OFFICER TABERSKI:** Yes, Your Honor, thank
22 you.

23 I just wanted to discuss how our office has come to
24 the recommendation that we have, for Mr. Wenke to be detained at
25 this point, because that's not something that we take lightly in

1 any case.

2 And I know that everyone in this room, with their
3 different roles in the system, are all concerned about two
4 things: public safety and Mr. Wenke's mental health, as it
5 relates to his threat to public safety, based on his own
6 conduct, which is why we're here.

7 Now, I wanted to discuss what defense counsel brought
8 up previously about Mr. Wenke's so-called compliance with the
9 mental health treatment that Your Honor ordered after his last
10 revocation proceeding.

11 And that was mental health treatment that defense
12 counsel adamantly suggested that he needed to turn everything
13 around. It was put in place.

14 And what Mr. Wenke did in response was what we refer
15 to in our field, in my office, as surface compliance. It's not
16 engagement. It's not buy-in.

17 He drove to the facility he was ordered to go to
18 several days per week. And what he did immediately after
19 virtually every session he went to was mock everything about it.

20 He wasn't engaged responsibly in it. He wasn't
21 showing progress, which is why we're back here today.

22 So as Your Honor suggested about having a window into
23 Mr. Wenke's psyche, with his very concerning Facebook and
24 Twitter posts, we have a window into his engagement in
25 treatment.

1 No matter what kind of treatment everyone in this room
2 tries to arrange for him, he doesn't take it seriously.

3 And that is why we're all very concerned about public
4 safety. There is only one guarantee for public safety and
5 further intimidation and harassment of all these victims that
6 are named in his judgment and the modification order and that is
7 for him to be detained.

8 Otherwise, none of us know what's going to happen when
9 he walks out of this courtroom. But what history shows us is
10 he'll be back on social media, mocking Your Honor, mocking the
11 prosecutor, mocking our office, and mocking mental health
12 treatment.

13 And he's also pending violation proceedings,
14 Your Honor, for harassing people. People are walking around in
15 fear for their safety. And there's only one course of action
16 that can prevent that today.

17 And we've discussed with the Government the option of
18 the 18 U.S. Code 4244. I'm not that familiar with that,
19 Your Honor, but I think there are two options for -- if you were
20 going to follow our recommendation, rather, is that -- you could
21 hold Mr. Wenke in detention pending violation proceedings and
22 sentencing on the violations.

23 We could research what mental health treatment is
24 available in the Bureau of Prisons and we could come back with
25 those recommendations. Or you could go along with this

1 18 U.S. Code 4244.

2 And I'd be happy to answer any other questions
3 Your Honor has about how our office arrived at this
4 recommendation.

5 **THE COURT:** What would you research? What treatment
6 is available short of the statutory provision we've been talking
7 about? Separate from that.

8 **PROBATION OFFICER TABERSKI:** Right, Your Honor. In
9 other words, we could reach out to the Bureau of Prisons and
10 say: If Mr. Wenke is sentenced to a period of time, what mental
11 health treatment is available in the Bureau of Prisons? There
12 are different programs.

13 **THE COURT:** Right. But if he's -- okay. I get it.
14 Mr. DiGiacomo --

15 **MR. DiGIACOMO:** Judge, as we represent, Probation -- I
16 mean, we agree. We've had a public safety concern throughout,
17 but we're mindful that Mr. Wenke needs some assistance.

18 And what I've heard here today is that everybody in
19 this courtroom is trying to get Mr. Wenke treatment locally.

20 And so far, I don't believe through the fault of
21 anybody in this courtroom -- I mean, Probation's gone above and
22 beyond to get him treatment, we just don't have a treatment plan
23 in place.

24 And so that triggers the public safety exception that
25 we have to examine. I mean, what's the next -- as Probation's

1 stated, what's the next move?

2 **THE COURT:** I guess I come at it the other way around.
3 In other words, the public safety concern is there -- is there,
4 has always been there.

5 And can we mitigate or ameliorate it or address it,
6 deal with it, feel comfortable about it by getting him the
7 treatment.

8 So it's just inverting what you said, I think,
9 Mr. DiGiacomo. And that's where I'm coming from.

10 Mr. Passafiume --

11 **MR. PASSAFIUME:** Yeah. The easy way out is to lock
12 Mr. Wenke up and throw away the key. That's what I keep
13 hearing.

14 **THE COURT:** That's the hard way out, Mr. Passafiume.
15 I sleep with these consequences.

16 **MR. PASSAFIUME:** Okay. Thank you. I like that you
17 said that, Judge, because that's all I heard.

18 **THE COURT:** That's why we're struggling. That's why
19 we struggled the last time we were here and we struggled today.

20 And we can come back every single day, and then we can
21 watch him every single day, and he's out there thumbing his nose
22 at the system, and he's not taking it seriously. Not at all.

23 And everything he does is volitional. It's not like
24 he can't control what he's doing.

25 **MR. PASSAFIUME:** In the context of his mental illness,

1 Judge, I guess -- and we don't know the -- the -- kind of the
2 scope of that.

3 One thing that I kind of overlooked before, that AOT,
4 pending, you know, admission into that -- didn't Your Honor
5 order that?

6 Wasn't that the order that I prepared? That he
7 qualify and do it so they don't have to follow that order?

8 I fundamentally don't -- I keep saying the same thing.
9 I don't understand. Locking Mr. Wenke up is not the answer.

10 There are two agencies in Buffalo that could treat him
11 to evaluate him, and they're both refusing. And that's the
12 problem, not --

13 **THE COURT:** Detention pending sentencing or remand
14 pending sentencing is not the solution to the mental health
15 problem. I would agree with you.

16 But it's the only solution that I've got to the
17 problem of is there a safety concern.

18 And the finding that I've got to make, which I made
19 before, is now something that I can't make anymore, which is
20 that -- based on clear and convincing evidence, that there's no
21 threat to public safety or to anyone in the community or the
22 community generally.

23 And I can't make that finding anymore and I won't make
24 that finding anymore, so he's going to be remanded pending
25 sentencing.

1 **MR. PASSAFIUME:** I guess. What is -- I'm sorry.

2 **THE COURT:** Go ahead.

3 **MR. PASSAFIUME:** I'm sorry. Did I -- I'm talking too
4 much.

5 What is -- I understand that -- what does everybody
6 think he's going to do? That's -- I guess that's what I don't
7 understand.

8 Like, why -- what about a GPS monitor? What about
9 conditions?

10 Like, I don't know what -- we keep talking about
11 safety, you know, the public --

12 **THE COURT:** Well, we've tried all that. And so -- yet
13 at a time when we need him to be serious and to show that he's
14 serious about it and to show that he's taking all of this
15 seriously, he's -- he's not.

16 He's making fun of all of it, including the Court;
17 including Probation; including the monitor on his ankle;
18 including the people that he interacted with at ECMC.

19 Including the medication issue that I talked to him
20 about and made sure that he would take it seriously, he's
21 saying: No -- you know, maybe I won't -- maybe I won't take it,
22 because I don't have to.

23 So he is going to be remanded pending sentencing. We
24 can talk about a sentencing date.

25 Mr. Taberski, you should do that research and report

1 back to all of us. Hard stop.

2 Separate topic is in 4244(a), this is the standard --
3 and I said it answers itself -- I, at any time prior to the
4 sentencing, shall order such a hearing -- this is the hearing
5 that we're talking about, that Mr. Passafiume would be entitled
6 to -- if I'm of the opinion that there's reasonable cause to
7 believe that Mr. Wenke may presently be suffering from a mental
8 disease or defect for the treatment of which he is in need of
9 custody for care or treatment in a suitable facility.

10 That part -- triggering the hearing part -- is easy.
11 That's automatic. So I feel like we ought to be triggering that
12 process, and then you can have your hearing. And then he can go
13 out and get evaluated for the hearing.

14 But what else am I supposed to do? Certainly, it
15 wasn't my first preference. You saw what my first preference
16 was, and we bent over backwards to accomplish it. And he's not
17 taking it seriously.

18 So maybe I need you to get some input to me on whether
19 we should trigger the process or not. Because I understand the
20 process is a serious one and somewhat -- once the hearing's
21 concluded, if I make a finding a certain way -- somewhat out of
22 our hands after that, in terms of what BOP does with it.

23 So should I trigger the process now and set a hearing
24 date? Or should I get input from Mr. DiGiacomo and
25 Mr. Passafiume on whether and to what extent we should be

1 triggering 4244(a)?

2 **MR. DiGIACOMO:** Judge, with respect to -- I mean, at
3 the end of the day, whether we go -- whether we start the 4244
4 process or we kind of, what I'll say, back-court dribble for a
5 period of time, nevertheless, the Government and the defense
6 need to get Mr. Wenke evaluated.

7 In the statute, it says that he has to undergo a
8 psychiatric or psychological evaluation. I understand everybody
9 here is trying to do it from a different way.

10 Now -- so he's going to be remanded. Now the question
11 becomes is there someone local to do it or does he have to go
12 into the BOP facility.

13 And, quite candidly, as you asked Mr. Passafiume when
14 you opened the initial proceeding, where were we? We're talking
15 and finding those two -- since Dr. Antonius wasn't available, we
16 were trying either Evelyn Coggins or Corey Leidenfrost to do the
17 evaluation.

18 But, quite candidly, because of their schedules, we
19 haven't been able to talk to them to see -- I know Frank has put
20 in his e-mails what -- the exact quote from 4247, referencing,
21 you know, is he suffering from a mental disease or defect that
22 he would create a substantial risk or bodily injury to another
23 person.

24 We haven't been told by either one of them directly
25 that they are in a position to conduct that evaluation.

1 So -- the point is -- is that, whether we go forward
2 with the hearing, I think we have to determine can one of these
3 two individuals do the evaluation?

4 Or does the Government get their own and the defense
5 gets their own, and then we have a hearing on that aspect?

6 But, nevertheless, Judge, whether we go 4244 or
7 whether the Court wants to make a finding short of that,
8 Mr. Wenke has to be evaluated to see where we stand.

9 And that's the frustration the Court's had. That's
10 the frustration defense has had and, I think, a lot of people in
11 this room have had, is that it just haven't been able to put in
12 place at a time for the benefit of Mr. Wenke.

13 But we don't disagree, Judge, that -- the Court's
14 conclusion that, until that happens -- you know, as you point
15 out, he no longer meets the standard.

16 But the question is -- is how quickly can we do that?

17 **THE COURT:** Once the status pending sentencing is
18 decided, the second question is -- and 4247 talks about that
19 very psychiatric or psychological examination.

20 It doesn't have to be in BOP, right? It could be
21 something else that's local.

22 Maybe the evaluation that the lawyers are working on
23 can suffice and serve that purpose. I don't know.

24 But you certainly might want to talk to the
25 psychiatrist about whether their evaluation would be sufficient

1 or could be sufficient. Why not work towards that?

2 If you're engaging this person already and the
3 evaluation would be in lieu of what BOP can do, I would say why
4 not, if you can accomplish that? Then he can have the
5 evaluation done locally.

6 **MR. PASSAFIUME:** Absolutely. That was the goal. I
7 did all -- everything Mr. DiGiacomo said. That's why, when
8 we're approaching these doctors, we're mirroring the language of
9 the statute.

10 So Mr. Wenke is remanded. Is the Endeavor evaluation
11 from Dr. Gupta in January not going to happen, then?

12 **THE COURT:** I don't know. It sounds like that could
13 be in jeopardy, from what I heard from Mr. Zenger, but I
14 certainly would encourage that.

15 You can talk to it now, Mr. Zenger or Mr. Taberski, or
16 you can continue to talk about it with Mr. Passafiume offline.

17 Go ahead.

18 **PROBATION OFFICER ZENGER:** Yes, Your Honor. I can
19 recommend or try to set it up -- that that continues to happen.
20 But it won't be through Probation at that point.

21 We have no contract that can function when the
22 defendant is incarcerated. So if AOT and/or Endeavor can
23 function in that matter, I can try to get that ball rolling, but
24 that's as far as I can go.

25 **THE COURT:** And they're going to wonder who's paying

1 them for it, right?

2 **PROBATION OFFICER ZENGER:** Correct, Your Honor. AOT
3 is a government-funded program.

4 **THE COURT:** All right. Well, why don't we see if we
5 can keep the process going.

6 Certainly, I encourage you to encourage them to keep
7 the process going, but I understand how it could be in jeopardy
8 because nobody from this building is going to be paying for it.
9 But I understand that and -- kind of stuck with it.

10 Mr. Taberski, if you can find, maybe, BOP's treatment
11 mechanism about being sentenced and being treated, does it work
12 backwards to the county jails or no?

13 Can he get treatment through BOP now, in the county
14 jail?

15 **PROBATION OFFICER TABERSKI:** Judge, I know the answer
16 to that is no.

17 I mean, this would be if he was at BOP custody and you
18 were sentencing him with the recommendation that Your Honor
19 makes on the judgment and commitment order.

20 Similar to when Your Honor recommends that a person be
21 housed as close to home as possible, there have been times in
22 the past that judges have ordered or not ordered.

23 That's the distinction I'm trying to make. It's a
24 recommendation that a person participate in a program such as
25 RDAP. That is something that the Court recommends on a regular

1 basis.

2 But what we can find out for Your Honor is what types
3 of programs are available in the BOP; how long does one need to
4 be in custody to participate in such programs; and criteria such
5 as that.

6 **THE COURT:** All right. I think that's good input.

7 Look, I've got no agenda here. Right now, I can't see
8 the conclusion either, because there's five or six or I don't
9 know how many different permutations on where this thing
10 resolves.

11 But I think we've got to move it one step at a time.
12 So I have today to answer the question about my concerns about
13 public safety.

14 Next is what are we going to do about getting
15 Mr. Wenke evaluated? And I think that process has to continue
16 among the lawyers for now.

17 And I'm willing to wait and hear from you,
18 Mr. DiGiacomo and Mr. Passafiume, about whether that process is
19 working or whether I've got to force it, which is what I would
20 do through the statute.

21 **MR. DIGIACOMO:** This is just my suggestion, Judge.
22 Mr. Passafiume can -- if he disagrees, and the Court can,
23 obviously, can order whatever they want.

24 My position would be that we schedule a status
25 conference in perhaps two to three weeks, so that we can --

1 Mr. Passafiume and I can determine -- if we determine prior to
2 that that the two individuals that I referenced, Evelyn Coggins
3 or Corey Leidenfrost, are unavailable or don't have the
4 requirements or the training to conduct this evaluation, that we
5 would come back and tell the Court.

6 I think in two to three weeks, we report back and say
7 either, A, they think they can do it, and this is how long it
8 would take a generate a report, or, B, they can't do it and,
9 now, Judge, we have to look at the next provision in 4244 -- is
10 sending Mr. Wenke to the BOP, which we know is going to be a
11 lengthy process.

12 So that would -- that's my suggestion. That's my two
13 cents. The Court can give me two cents' change, but that's my
14 feeling.

15 And, obviously, Mr. Passafiume -- it's his client. We
16 can obviously agree, disagree, or --

17 **THE COURT:** That sounds -- Mr. Passafiume, does that
18 sound like a reasonable approach?

19 **MR. PASSAFIUME:** Yes.

20 **THE COURT:** All right. So keep working. Everyone's
21 got homework assignments.

22 And we will regroup right around the end of the year,
23 it sounds like, Ms. Henry.

24 **MR. DiGIACOMO:** Judge, can we have right after the 1st
25 of the year?

1 **THE COURT:** I think the 2nd is a Monday or a Tuesday
2 or something like that -- yeah.

3 What are we doing on January 2, Ms. Henry? We have
4 things -- we have a trial, don't we?

5 All right. We're in the middle of a trial then, but
6 we can certainly meet here at 9 that day, right?

7 **MR. DiGIACOMO:** Sure.

8 **THE COURT:** 9 o'clock, January 2? And -- that gives
9 us a half an hour before the jurors will be looking for
10 testimony.

11 So 9 a.m., January 2 will be our status conference to
12 see where we are. And, hopefully, have a path forward more
13 clear to us at this point -- at that point, by then.

14 All right. Keep working, folks.

15 Anything else, Mr. DiGiacomo?

16 **MR. DiGIACOMO:** Nothing from the Government.

17 **THE COURT:** Mr. Passafiume?

18 **MR. PASSAFIUME:** No, Judge.

19 **THE COURT:** Anything from Probation?

20 **PROBATION OFFICER TABERSKI:** No, Your Honor. Thank
21 you.

22 **THE COURT:** All right. Thanks, everybody.

23

24 (Proceedings concluded at 3:29 p.m.)

25

* * *

1
2 In accordance with 28, U.S.C., 753(b), I certify that these
3 original notes are a true and correct record of proceedings in
4 the United States District Court for the Western District of
5 New York before the Honorable John L. Sinatra, Jr.

6
7
8
9
10 s/ Bonnie S. Weber
Signature

May 27, 2025
Date

11
12 **BONNIE S. WEBER, RPR**

13 Official Court Reporter
14 United States District Court
15 Western District of New York
16
17
18
19
20
21
22
23
24
25