

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *
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 v. *
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 LUKE MARSHALL WENKE, *
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 Defendant. *
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Docket Number:
1:22-CR-00035-JLS-HKS-1
Buffalo, New York
April 16, 2024
10:03 a.m.
STATUS CONFERENCE

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.

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10 (Proceedings commenced at 10:03 a.m.)

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

21 Counsel, please state your appearances.

22 **MR. DiGIACOMO:** Good morning, Your Honor. Michael
23 DiGiacomo for the United States.

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

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

1 Mr. Wenke.

2 **MR. PASSAFIUME:** Good morning.

3 **THE COURT:** All right. We've got Dr. Leidenfrost's
4 forensic psychological evaluation, dated April 1, 2024. And
5 that's been docketed under seal. That's Docket 122.

6 And then, I set this status conference to ask you,
7 among other questions -- I'm willing to hear everything that
8 you're interested in talking about, but one of the things on my
9 own mind is whether I should, on my own motion, order a hearing
10 under 4244(a) and 4247(d), to determine if Mr. Wenke suffers
11 from a mental disease or defect and should be provisionally
12 sentenced to a suitable treatment facility in lieu of
13 incarceration under the statute.

14 First and foremost, Mr. Passafiume, I assume that you
15 and your client have received this forensic psychological
16 evaluation.

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

18 **THE COURT:** All right. Let me start with
19 Mr. DiGiacomo.

20 What are our next steps, from your perspective?

21 **MR. DIGIACOMO:** Judge, I think the Court has pointed
22 it out, that the next question is, based on the contents of this
23 report, does the Court, on its own, order a hearing? Or does
24 defense counsel ask for a hearing on it?

25 I mean, I've seen the contents of the report. I

1 don't -- I don't see a need for the Government to have a
2 hearing.

3 We're not going to request one, based upon what's in
4 here. We've had our concerns from the onset.

5 So I think the question is, is the hearing the next
6 step? Or if the parties waive a hearing and the Court doesn't
7 want to have a hearing, is the Court willing to adopt what's in
8 this report?

9 **THE COURT:** Well, I guess the other alternative is to
10 proceed straight to sentencing.

11 Is that not what the Government's advocating? Are you
12 advocating going down this path and the statute 4247,
13 ultimately?

14 **MR. DiGIACOMO:** Well, Judge, the question boils down
15 to, Judge, based on the contents of this report, you know, is it
16 going to be -- if the Court adopts it and then we proceed to
17 sentencing, are they going to -- is the sentence going to be to
18 send Mr. Wenke, as its required in 4244(d) -- are they going to
19 send Mr. Wenke to a suitable treatment facility up to the
20 maximum term authorized by law, so that he can get treatment for
21 this?

22 If that's what the Court is inclined to do, then we
23 would have no objection, I guess, to moving to sentencing.

24 **THE COURT:** Right. And my view is that 4244 -- is
25 that, if at this hearing -- I suppose the defendant can waive

1 it, but, if at this hearing I find by a preponderance of the
2 evidence that the defendant is suffering from a mental disease
3 or defect and that he should, in lieu of being sentenced to
4 imprisonment, be committed instead to a suitable facility, then
5 I would impose a provisional sentence that then basically
6 directs him to the facility in BOP custody.

7 Mr. Passafiume, would you like to talk about your
8 perspective at this point?

9 **MR. PASSAFIUME:** I guess that is accurate. I think
10 there's more than one avenue, as Your Honor said.

11 It can be going to a BOP facility, which is a suitable
12 facility under 4244 or can it can be to proceed directly with
13 sentencing.

14 I have a lot of issues with the report, Judge. It
15 was, frankly, unexpected. And there's some wild stuff in there,
16 Judge, that -- I don't think anybody in this Court could foresee
17 what was in there.

18 If we go directly to sentencing, I think that could be
19 a viable route, if this report does not follow Mr. Wenke to the
20 BOP; it's not included in anything that goes to the BOP.

21 Because I hope the Court can -- I think I need to
22 either contest this or have our own evaluation done, which then
23 would -- would kind of bring us into the ballpark of that
24 hearing under 4244.

25 So if Your Honor would consider proceeding forward

1 with sentencing, not including this evaluation, necessarily, in
2 what goes to the BOP or part of the record -- I know it's
3 already docketed under seal.

4 I don't know if that's even possible at this point --
5 I think we can proceed forward with sentencing.

6 I still have to investigate that a little bit further.
7 But, if that's not even a consideration, I do think we have to
8 go down the hearing route under that provision, that statute
9 that Your Honor -- so was it 4244 or 4442?

10 I keep --

11 **THE COURT:** 4244. And then, the hearing is 4247.

12 **MR. PASSAFIUME:** That's right, Judge. So in
13 anticipation of going down that route, I did reach out to -- I
14 have colleagues in North Carolina in Butner that deal with the
15 civil commitment proceedings.

16 They recommended a doctor out of -- he works in Johns
17 Hopkins -- out of Harvard, Dr. Fabian Saleh.

18 He does a lot of these hearings across the country in
19 Federal courts all over and is very familiar with the
20 dangerousness assessment.

21 But also -- and, I think, more importantly, he's
22 familiar with the BOP and the treatment options and the
23 option -- those options compared to the options in the
24 community, which was part of Your Honor's original order
25 ordering this psychiatric examination.

1 I spoke to him. He's able to do a report and conduct
2 his own evaluation and get something to us by the end of June.

3 I've submitted, you know, a request for funding for
4 approval for that. That's pending. I haven't received word on
5 that. But I have started that process in case we do go down
6 that 4244 road.

7 I hope that all makes sense, Judge. There are two
8 options, I think.

9 **MR. DiGIACOMO:** Judge, if I can maybe clarify my
10 point --

11 **THE COURT:** Go ahead.

12 **MR. DiGIACOMO:** I know the Court -- we're
13 contemplating the hearing under 4244(c), which is compassed by
14 4247(d).

15 And I know the Court had asked can we proceed -- or
16 asked what the Government's position was on proceeding to
17 sentencing.

18 And I understand and respect what counsel is
19 indicating, but if the position of the Court is -- is that this
20 report not be given any consideration, we would be completely
21 opposed to that.

22 Because what we have before the record now is two --
23 you have this report that's under seal from Dr. Leidenfrost that
24 raises significant concerns regarding Mr. Wenke; and you also
25 have -- I believe it was -- the Endeavor report that came out a

1 short time ago, which ultimately led to this as well.

2 So we'd be opposed to just the Court casting this
3 report from Dr. Leidenfrost aside and just proceeding with
4 sentencing.

5 It's our position, Judge, we have to either have the
6 hearing based upon what Mr. Passafiume's indicated -- that
7 he's -- there's some -- he has some major concerns with what's
8 contained in this report.

9 So I our position is, Judge, if we're going to go to
10 sentencing, it's got to be -- we can't do that at this point.

11 It has to be under 4244(d), that, until Mr. Wenke
12 is -- is -- I guess, Dr. Leidenfrost's conclusion, you know --
13 he can become stabler, as the statute indicates, then he can be
14 sentenced.

15 We just don't want this report cast aside and then
16 just move forward and sentence him within the guideline range or
17 whatever the Court's inclined to do for the violation.

18 **THE COURT:** How about from Probation? Mr. Taberski?
19 Mr. Zenger? What are your thoughts?

20 **PROBATION OFFICER ZENGER:** Your Honor, I'm happy to
21 provide our recommendation, as far as moving forward, but I'm
22 not sure if we're at that point yet.

23 If this is just in relation up to the hearing, I
24 believe it is up to the Court, based on the information within
25 the report we received, itself.

1 **THE COURT:** That's all we're doing right now is next
2 steps, whether to have the hearing or not.

3 I don't see how there's any way to avoid it,
4 Mr. Passafiume. The report is the report.

5 I can't ignore it and I'm not going to ignore it; but
6 I certainly can take it into context.

7 If you've got somebody else who comes in and tells me
8 differently, then we've got competing views, so I think we've
9 got to set the hearing date.

10 Mr. DiGiacomo needs to decide how this report gets in
11 front of me under the statute. Or is it already in front of me
12 under the statute?

13 I don't know the answer to that question. Maybe it
14 is; maybe it isn't.

15 But under sub (b), it says: Prior to the date of the
16 hearing, the Court may order a psychiatric or psychological
17 examination and that the report be filed with the Court.

18 Has that happened already? Perhaps it has; perhaps it
19 hasn't.

20 **MR. DiGIACOMO:** I believe it has, Judge. Because it
21 was Court ordered. It was sent to the Court directly, and then
22 it was provided to the parties.

23 So it's my understanding this report is already before
24 the Court, although it's under seal.

25 **THE COURT:** Right. And then the question next is,

1 does this Leidenfrost come and get cross-examined?

2 **MR. DiGIACOMO:** Judge, I think, at that point, if
3 Mr. Passafiume wants to have -- as he's indicated, he's now
4 going to retain his own expert.

5 Although we were agreeable to this expert -- which is
6 fine. That's the right he has and Mr. Wenke has, then I think
7 you're going to end up having a hearing of which you're going to
8 have to hear testimony from Dr. Leidenfrost, based upon this
9 report, as well as whatever the report of Mr. Passafiume's
10 expert comes out.

11 And then that expert would be subject to
12 cross-examination as well. And then, at the end, as you know,
13 Judge, it's going to be up to the Court to determine -- as the
14 battle of the experts, as to which expert report the Court wants
15 to consider moving forward.

16 **THE COURT:** Do you see it any differently? In other
17 words, Mr. Passafiume, do you have an objection that
18 Leidenfrost, the report, is a report, at least? And you're
19 going to have your own report?

20 **MR. PASSAFIUME:** Yes.

21 **THE COURT:** Okay. So we'll have both of these experts
22 to testify. They can adopt the report and then be subject to
23 cross-examination, basically.

24 **MR. PASSAFIUME:** Sure. I guess there's -- I'm always
25 looking for an alternative route.

1 I don't think there's any -- there's a mental health
2 issue here, right? There's a mental disease. I don't think
3 that's disputed. I guess the extent of that might be in
4 question.

5 But I do see a route also -- and, obviously, the
6 biggest concern is the dangerousness assessment here, which, you
7 know, usually doesn't happen at this stage, right? And then we
8 don't have this.

9 I think there's a scenario where we don't have a
10 hearing, but maybe both reports go to the BOP. And -- because
11 you could always find, Your Honor, that there is a mental
12 disease or defect. I think it's there.

13 If there's some overlapping between Dr. Leidenfrost
14 and my expert's diagnosis -- if there's something overlapping,
15 you could find it there and then send both reports to the BOP
16 without having a hearing.

17 But, again, it might be easier just to have a hearing
18 and kind of flush it all out anyway.

19 **THE COURT:** Perhaps. Yeah. Let's set the hearing and
20 then, if something happens with what Dr. Saleh will tell you,
21 then you can always revisit things based upon what Dr. Saleh
22 finds.

23 We just don't know it -- Fabian Saleh? A man?

24 **MR. PASSAFIUME:** Yes.

25 **THE COURT:** We don't know what he's going to find.

1 **MR. PASSAFIUME:** Right. Exactly, exactly.

2 **THE COURT:** Okay. So, you know, largely, the public
3 danger safety concern is something that I wanted to have
4 answered to me in the event I was proceeding towards an ordinary
5 sentencing.

6 The regular part of -- the rest of the report,
7 however, is -- speaks to the statute, of whether he's in need of
8 medical treatment at a mental facility in BOP.

9 So it's kind of two different things. So to go down
10 this road under the statute 4244, the conclusions about
11 dangerousness are almost irrelevant.

12 **MR. PASSAFIUME:** Right. Right. Which --

13 **THE COURT:** They're there.

14 **MR. PASSAFIUME:** But they're there. That's the thing.
15 It's integrated.

16 So, you know, that's why I was hoping maybe there's a
17 way to do it without the dangerousness part, but --

18 **THE COURT:** I'll let you argue that to me later, but,
19 meanwhile, you've to get Dr. Saleh engaged and set up, right?

20 How long do you think that will take? End of June,
21 you said.

22 **MR. PASSAFIUME:** That's when he's -- assuming that
23 everything is -- the green light to retain him and everything's
24 approved -- again, that's, you know, above my pay grade -- and
25 he starts now, he said by the end of June.

1 If I could report back to the Court, like, in a week
2 on that status and the retaining him and that process? If
3 that's okay? And we can go from there.

4 **THE COURT:** Do you want to do that in writing? Report
5 to us in writing on the status? And then I can set the hearing
6 date at that point?

7 **MR. PASSAFIUME:** Yes. Send an e-mail to the --

8 **THE COURT:** You can make some suggestions on when. So
9 sometime in July, sometime in August. You know, it's the two of
10 you that need to prepare for the cross-examinations.

11 **MR. DiGIACOMO:** Judge, I would ask -- as we did with
12 this current report from Dr. Leidenfrost, I would just
13 respectfully ask if Mr. Passafiume can get me a copy of their
14 expert's CV?

15 And, in addition, be aware of what information we --
16 Probation -- we agreed to have Probation be the filtering source
17 as to what information was given to Dr. Leidenfrost.

18 And I'm assuming -- I don't know if we're going to do
19 the same thing or if Frank's going to -- I just want to know
20 what's being furnished to their expert when he's reaching
21 whatever conclusion he reaches.

22 **THE COURT:** My two cents is this: That you probably
23 should provide Dr. Saleh with everything that Dr. Leidenfrost
24 had. Otherwise, that's going to be a cross-examination point.

25 **MR. PASSAFIUME:** I think he's going to get more than

1 what Dr. Leidenfrost --

2 THE COURT: Or at least as much, right?

3 MR. PASSAFIUME: Yeah. At least much. And he might
4 do his own investigation, which is part of my issue with
5 Dr. Leidenfrost's examination.

6 THE COURT: All right. At least as much. So if it's
7 short of that, then that's going to be a problem for
8 cross-examination, I would say.

9 MR. PASSAFIUME: It definitely won't be shorter.

10 PROBATION OFFICER ZENGER: Your Honor, can I clarify?
11 Is that Probation's responsibility then?

12 THE COURT: I don't see why not. Why don't you keep
13 working that angle in terms of being a facilitator for
14 information, right? Whatever they need.

15 PROBATION OFFICER ZENGER: Okay. And then, we
16 disclose all this information that we gave to Dr. Leidenfrost --

17 THE COURT: -- to Dr. Saleh.

18 PROBATION OFFICER ZENGER: Okay.

19 THE COURT: Yes.

20 PROBATION OFFICER ZENGER: And the actual report that
21 was produced by Dr. Leidenfrost, does that go to Dr. Saleh?

22 THE COURT: I would say yes. Why wouldn't you want
23 the second doctor to see what the first doctor did, right?

24 MR. PASSAFIUME: Judge, I plan on giving Dr. Saleh
25 everything that we have in our file dating back from the

1 original offense to now.

2 That includes everything that Dr. Leidenfrost has, and
3 it might include even more documents that -- that our expert
4 then retains as part of his investigation to do a proper
5 evaluation.

6 And our expert, I'm assuming, will have the same
7 sources of assessment in his report.

8 And if there are documents that, you know, sometimes I
9 can't get without a Court order -- like Probation documents,
10 things like that -- I'll work with Probation. If I need to file
11 something with the Court, I would do that.

12 **THE COURT:** Okay. All right. So I am ordering a
13 hearing on my own motion, and it will be scheduled soon, once we
14 hear from you, Mr. Passafiume, about your scheduling issues with
15 your expert.

16 And if there needs to be anybody else subpoenaed, then
17 make that happen. Otherwise, we've just got these two
18 witnesses.

19 **MR. PASSAFIUME:** Okay.

20 **THE COURT:** Obviously, my view is that anything
21 relevant should be provided.

22 In other words, if there are new letters that arrive
23 to me from the defendant, I'm going to ask that they be supplied
24 to the new doctor, as well.

25 There's no reason to shield the new person from any

1 information. And if it's there, it's relevant, in my view.

2 I don't know the answers to these questions and they
3 are premature; but I want you to think about them. We'll have
4 this hearing and I will make a determination one way or the
5 other.

6 If I make a determination that the hospitalization is
7 required, the question that I have is must I revoke supervised
8 release first?

9 It's a technical question. I have no idea what the
10 answer to that question is, so work on that as homework.

11 Does supervised release technically need to be revoked
12 first? I don't know the answer to that. And that's if I'm
13 making that finding.

14 And then, we've also got to address the question --
15 another homework question -- that, I think, Mr. Passafiume's
16 alluding to; If the Leidenfrost report is in the record, I
17 assume that goes to BOP, then, in that scenario, as well, along
18 with the Dr. Saleh report.

19 So if somebody's asking that they don't go to BOP, we
20 have to address that as well. Those are the homework
21 assignments, in addition to working on the Saleh logistics,
22 Mr. Passafiume.

23 And then, at that point, I'll set a hearing. You
24 know, if you want to talk to Mr. DiGiacomo offline and make some
25 recommendations to me, that's perfectly fine, too.

1 **MR. PASSAFIUME:** Absolutely.

2 **THE COURT:** We'll fit it in. Probably takes a couple
3 of days, right?

4 **MR. PASSAFIUME:** Yes.

5 **THE COURT:** One day for each expert, maybe? Something
6 like that?

7 **MR. PASSAFIUME:** Sounds right.

8 **THE COURT:** All right. Anything else, Mr. DiGiacomo?

9 **MR. DiGIACOMO:** Nothing from the Government, Judge.

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

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

12 **THE COURT:** From Probation?

13 **PROBATION OFFICER ZENGER:** No, Your Honor. Thank you.

14 **THE COURT:** Okay. Take care, everybody.
15 Thank you.

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17 (Proceedings concluded at 10:22 a.m.)

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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.

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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
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