

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 5, 2023
	*	9:04 a.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:	TRINI E. ROSS, UNITED STATES ATTORNEY, By MICHAEL DiGIACAMO, 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 R. 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
8 Proceedings recorded by mechanical stenography,
9 transcript produced by computer.

10
11 (Proceedings commenced at 9:04 a.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
18 **THE COURT:** Please be seated.

19 **THE CLERK:** In United States versus Luke Marshall
20 Wenke, Case Number 22-CR-35. This is the date set for a status
21 conference.

22 Counsel, please state your appearances.

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

25 **MR. PASSAFIUME:** Frank Passafiume for Mr. Wenke,
Judge.

THE COURT: Good morning, Counsel. Good morning,
Mr. Wenke and Mr. Zenger.

We're scheduled for a sentencing or a status today,

1 but let's get ourselves kind of all on the same page and up to
2 speed.

3 There was an e-mail from Mr. Passafiume regarding some
4 people that the lawyers have been in touch with. That e-mail
5 was from Tuesday, the 28th. Ultimately, assuming that you've
6 settled on meeting with Dr. Antonius in a couple of days.

7 Is that the current status of things?

8 **MR. DiGIACOMO:** No.

9 **MR. PASSAFIUME:** It was until late yesterday
10 afternoon -- I don't want to speak, but Dr. Antonius reached out
11 to both Mr. DiGiacomo and I and said he was no longer available
12 until January or February.

13 He did give us a list of alternatives, four other, I
14 believe, professors or faculty members at UB that may be
15 appropriate here.

16 There is one name in particular, a Dr. Coggins,
17 C-O-G-G-I-N-S, whose CV seemed appropriate for this.

18 And I spoke with -- I reached out to Mr. DiGiacomo
19 late yesterday afternoon, when we got the Dr. Antonius message.

20 I just spoke to him now before Court and I believe she
21 is the first person that we're going to try to make contact with
22 to set this up, so it happens sooner rather than later.

23 But all these experts, not just on this case, Judge,
24 in general, the backlog is a lot. In January and February, the
25 dates that we are getting a lot from people, those are the other

1 names on the list from the status update, none of them were
2 available sooner, rather than later. So it -- that's it.

3 Another kind of a last minute thing, every time we
4 come in, there is always a curve ball at the very end and we
5 couldn't avoid this one, Dr. Antonius let us know late yesterday
6 that he would be unavailable until January.

7 **THE COURT:** Okay. On that front, on the second front,
8 late last week Mr. Zenger alerted me to something that Endeavor
9 was willing to do -- there was something that was within their
10 wheelhouse that we were unaware of.

11 Can you explain what that process is, was or the
12 potential process might be?

13 **PROBATION OFFICER:** Yes, Your Honor. So Endeavor
14 partners with the Buffalo Police Department to -- for a
15 cooperative group, essentially, that addresses community risk.

16 And they reached out to me after we made first contact
17 with them regarding this case, explaining that their program
18 manager, along with a detective from the Buffalo Police
19 Department could go to the facility to meet with Mr. Wenke.

20 Their program manager would meet with Mr. Wenke to
21 assess his mental health, in general, which is much like the
22 initial mental health evaluation that Horizon did, but this
23 would be with Endeavor.

24 So that would not be to the level of expertise
25 forensically that the parties are discussing with Dr. Antonius,

1 but then in addition to that, the detective with the Buffalo
2 Police Department would do a criminogenic assessment as well.

3 So that would assist in predicting any kind of future
4 criminal behavior and determine any criminal risk to the
5 community.

6 **THE COURT:** So the Endeavor person would be looking at
7 Mr. Wenke, for planning purposes, for mental health going
8 forward?

9 **PROBATION OFFICER:** Mental health going forward and
10 also any type of intervention that he may need to enhance the
11 safety of the community.

12 **THE COURT:** The police detective, this is a program
13 that they have in place already?

14 **PROBATION OFFICER:** It is.

15 **THE COURT:** And he or she would be looking at
16 Mr. Wenke for to -- at least the way I see things, to give me
17 some kind of rule on risk to the community if he were to be
18 released?

19 **PROBATION OFFICER:** That is also what I understand,
20 Your Honor.

21 Mr. Passafiume did pose some questions to me
22 yesterday, but which I have since relayed to the parties at
23 Endeavor.

24 I just have not heard back yet explicitly from them
25 with a further explanation for him.

1 **THE COURT:** Okay. Just to close the loop on that,
2 that is essentially roughly what Mr. Zenger told me late last
3 week.

4 And I said, it sounds like a great idea. See if we
5 can do it right away, which I think could have been as early as
6 yesterday.

7 Mr. Passafiume, I think, was within his rights to
8 press pause on that until he could maybe attend.

9 I think that's maybe what your thought process is,
10 Mr. Passafiume?

11 **MR. PASSAFIUME:** Sure. I've never heard of this
12 assessment before and I did pose a lot of questions to
13 probation.

14 But to expedite it, all my questions would be resolved
15 if I just were there and put a stop to something that I don't
16 think is appropriate.

17 It's law enforcement speaking to my client, Judge.
18 You know, I would be the worst defense attorney in the history,
19 if I allowed that to happen.

20 So as long as I'm there, I don't need those questions
21 answered. The goal is to get Mr. Wenke out of custody and into
22 treatment and with his dad.

23 So I could be there tomorrow, if they want to come do
24 it again tomorrow and sit through the assessment.

25 **THE COURT:** Well, if they are available today, we can

1 do it today, even, right?

2 The idea is -- here is what I said to my law clerk
3 late last week, which is, the sooner we can do that, the sooner
4 I can get some comfort level, the sooner I can consider
5 releasing Mr. Wenke pending sentencing.

6 So if everything works well, and these people that
7 visit Mr. Wenke say everything looks good, give me no cause for
8 concern, then I can release him pending sentencing.

9 And then I can hold off on sentencing until you,
10 Mr. Passafiume and Mr. DiGiacomo, can get Mr. Wenke evaluated by
11 this alternative person that's out in the works there. I can't
12 remember her name.

13 That seems to be my -- if everything works well, that
14 would be where I would like to go on this.

15 So Mr. Zenger, Mr. Passafiume, are we still working to
16 see if we can get this -- will they allow Mr. Passafiume to sit
17 in with him. I don't see why that's a problem.

18 **PROBATION OFFICER:** Yes, Your Honor. I can
19 essentially connect Mr. Passafiume with these parties and be
20 included myself and make sure that they are all able to schedule
21 together as soon as possible.

22 **THE COURT:** I don't see why we can't do that right
23 away and then report back to me. And if everything is good,
24 then we can come back here soon, by the end of the week.

25 **MR. PASSAFIUME:** That works.

1 **THE COURT:** Is that a good game plan for now? So we
2 will just pause on the sentencing, see if we can -- see if this
3 works.

4 If it doesn't work, then we will regroup and we can
5 come back with plan B.

6 Anything, Mr. DiGiacomo?

7 **MR. DiGIACOMO:** Judge, just two things. I am not
8 saying I want to go, but would the Court have any objection or
9 I'll ask, Frank, obviously, if I could be there just to see what
10 questions they are asking or we could discuss it.

11 I mean, I am not going to ask any questions.

12 **THE COURT:** Mr. DiGiacomo is no more scary than a
13 police detective, is he?

14 **MR. PASSAFIUME:** No. I think that's fair. I think
15 we're both kind of in the dark with what the assessment is
16 about.

17 **THE COURT:** I don't see a problem with that.
18 Mr. Passafiume, do you, as a passive observer?

19 I guess the idea being, I guess is even better because
20 then everyone can come back to me and report to me that there is
21 no crisis if Mr. Wenke were to be walking the streets in a
22 couple of days or something like that.

23 **MR. PASSAFIUME:** Absolutely.

24 **THE COURT:** Isn't that really what we are after at
25 this point, I think?

1 Because then, if there is no urgency -- excuse me, no
2 concern about public safety, then he can be released pending
3 sentencing and we can deal with the rest of the case as it
4 comes.

5 **MR. PASSAFIUME:** Absolutely.

6 **MR. DiGIACOMO:** Sounds good.

7 **THE COURT:** Let's see if we can do that and -- he's in
8 Niagara County; is that right?

9 **PROBATION OFFICER:** I believe he is in Chautauqua.

10 **THE COURT:** Chautauqua. Harder to entice people to
11 drive down there on short notice, but see what we can do.

12 Is there any way it can happen today, when he's here
13 in the building or is that asking too much?

14 **PROBATION OFFICER:** I'm happy to reach out
15 immediately. I just don't know if those professional are
16 available that readily.

17 **THE COURT:** When is the transport going back?
18 Whenever --

19 **US MARSHAL:** Probably in the next couple hours.

20 **THE COURT:** So we don't really have a lot of time.
21 See what we can do. If it works, we're lucky it works. If it
22 doesn't work, then the next available day, right?

23 **PROBATION OFFICER:** Yes, Your Honor.

24 **THE COURT:** Okay. Anything else, anybody?

25 **MR. DiGIACOMO:** Judge, for scheduling purposes, would

1 you like Mr. Passafiume and I reach out to the Court once this
2 meeting occurs?

3 **THE COURT:** Any one of you, the lawyers or Mr. Zenger
4 can reach out and let me know we're ready to have another status
5 conference and we have time slots throughout the week that we
6 can get you back in.

7 **MR. DIGIACOMO:** Thank you.

8 **MR. PASSAFIUME:** Thank you.

9 **THE COURT:** Keep working. Thanks, guys. All right.

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11 (Proceedings concluded at 9:13 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.
6
7
8
9

10 s/ Bonnie S. Weber
11 Signature

January 17, 2024
Date

12 **BONNIE S. WEBER, RPR**

13 Official Court Reporter
14 United States District Court
15 Western District of New York
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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 7, 2023
	*	2:01 p.m.
	*	
LUKE MARSHALL WENKE,	*	STATUS CONFERENCE
	*	
Defendant.	*	
	*	
* * * * *	*	

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7 Proceedings recorded by mechanical stenography,
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9 (Proceedings commenced at 2:01 p.m.)

10
11 **THE CLERK:** All rise.

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

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

16 **THE CLERK:** The Court calls United States versus
17 Luke Marshall Wenke. Case Number 22-CR-35. We're here for a
18 status conference.

19 Counsel, please state your appearances.

20 **MR. DiGIACOMO:** Good afternoon, Your Honor.
21 Michael DiGiacomo for the United States.

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

23 **THE COURT:** Good afternoon, Counsel. Good afternoon,
24 Mr. Wenke.

25 **MR. PASSAFIUME:** Good afternoon.

1 **THE COURT:** We're here today for a status conference.
2 We are post plea of guilty, pending sentencing and working on
3 the what's next process here.

4 At the status conference a couple days ago, we
5 embarked on a process whereby Mr. Wenke would undergo some
6 preliminary mental and criminal risk assessment overseen by
7 Endeavor with Mr. Wenke -- with Mr. Zenger.

8 **PROBATION OFFICER:** That's correct.

9 **THE COURT:** Mr. Wenke, Mr. Passafiume, and I believe
10 that that has happened.

11 Also, that was on Tuesday, right?

12 And the purpose from my mind was to see if there were
13 facts out there that would allow me to get comfortable with a
14 presentence release of Mr. Wenke.

15 Which I -- to make a finding on whether there would be
16 a danger or not to the community, if he were released pending
17 sentencing.

18 And that would then give Mr. Passafiume time with
19 Mr. DiGiacomo, I guess, to engage with the psychologist that
20 they have been talking to, to have that psychological evaluation
21 happen.

22 I suppose that would be a driver towards sentencing,
23 maybe presenting mitigating factors, et cetera, relative to
24 sentencing.

25 So that's the kind of where we are now, from my

1 perspective. And does anyone have any factual updates for me?

2 Mr. DiGiacomo?

3 **MR. DiGIACOMO:** Judge, no. I just have the report,
4 which I'm sure the Court has.

5 But if you recall on the last -- we were here was a
6 day or two ago, I had asked if I could attend this assessment
7 and the Court said that I could.

8 But when I went over and the folks from Endeavor were
9 there, they suggested less is better, so I didn't physically sit
10 and participate in whatever questions were asked.

11 I was okay with that. I felt, based upon those
12 individuals who do this on a regular basis, if they felt less
13 was more, then I agreed to step away.

14 **THE COURT:** Okay. Any factual updates,
15 Mr. Passafiume?

16 **MR. PASSAFIUME:** No. I just have some comments on the
17 behavioral assessment.

18 **THE COURT:** All right. Let's get back to that then,
19 because I do want to talk about that a little bit, too.

20 Mr. Zenger, any factual updates?

21 **PROBATION OFFICER:** Just a brief update, Your Honor.
22 I've been in contact with Endeavor since the assessment to
23 inquire about the ongoing timeline for future treatment and
24 psychiatry for Mr. Wenke.

25 And it sounds like the clinician that attended the

1 assessment the other day has since made contact with the whole
2 team and they are working on assessing what their next move is,
3 but they haven't given me a timeline yet.

4 **THE COURT:** So it's entirely up in the air as to when
5 they would be able to have Mr. Wenke meet with a psychiatrist?

6 **PROBATION OFFICER:** That is true, Your Honor.
7 Although they have ran it up their chain and it sounds like
8 there is quite a few parties involved, and we should expect an
9 answer pretty soon.

10 **THE COURT:** Okay. I have -- we'll talk about it as
11 long or as short as you want to talk about it. I don't think
12 this assessment document needs to be in the record. Do any of
13 you think it does?

14 We can certainly get it filed if it needs to be there,
15 but I would say for the record, some of the conclusions that are
16 in here are ultimately the kinds of the same sorts of things
17 that I worried about in the beginning of this process, was is
18 this -- are we looking at signs and then the next step is going
19 to be some kind of acting out of Mr. Wenke's part?

20 That's kind of the driver of why we are spending all
21 this time on this issue.

22 So really, in some ways, it is confirming and it isn't
23 really adding much to what I know about the facts and the risks,
24 the factors of Mr. Wenke, generally.

25 So I kind of -- everything that I have read in here

1 are things that I kind of know already, with the exception of
2 the identification of the person in Ohio that, in theory, could
3 or did supply weapons or parts of weapons to Mr. Wenke.

4 Maybe he was the one that supplied them in the past
5 before -- I don't know. Or could supply them in the future, one
6 of the other, but that's really all that's new factually to me.

7 In looking at this assessment, the conclusions are
8 what they are. That there is some concern about whether he is
9 on the cusp of actually acting out and maybe doing something
10 violent towards somebody else or other people, so that's the sum
11 and substance of this.

12 Mr. Passafiume, you wanted to make some comments?

13 **MR. PASSAFIUME:** Yes, Judge. And the -- so this was
14 after gathering some more information on what this assessment
15 was, this was part of the red flag laws that were recently
16 enacted in response to the mass shootings, governed by
17 Article 63 of the New York State law, and it kind of includes
18 the New York State mental health law.

19 And the purpose of these -- and it's the ERPO,
20 E-R-P-O, Extreme Risk Protection Order. And the purpose -- so
21 let me backup.

22 I guess anybody could apply for this ERPO. It could
23 be law enforcement, a school or whatnot. And the purpose is, A,
24 to make a determination of whether someone is a danger to
25 himself or others, as defined by the New York State mental

1 health law.

2 The second part is to put restrictions in place to
3 prevent that person from possessing firearms, whether it's
4 firearms that were already in possession or ones that were going
5 to be purchased in the future, to take guns away from these
6 people.

7 The mental health counselor that was there from
8 Endeavor was there for the first part, and that is whether
9 Mr. Wenke is a danger to himself or others.

10 And she found that he's not. Because if she found
11 that he was, the mental health law that's referenced in this
12 ERPO requires a 15-day hospitalization, when -- where the
13 individual is monitored, medicated to see if he can be released
14 after the 15 days, and it's constantly kind of under review and
15 renewed.

16 So whether he is -- Mr. Wenke is a danger or not is
17 not necessarily in what the detective said in his assessment.

18 I think it's what was not said by the Endeavor
19 representative, that he is not -- he does not meet the criteria
20 of this mental health law.

21 And the second part, I guess, and, you know, I could
22 talk about that all day long, the first part, because I think
23 it's crucial.

24 The purpose of not, you know, restricting Mr. Wenke
25 from buying guns, that kind of stuff's already in place, right?

1 He has got the prior felony, so he can't buy guns
2 anyways. He hasn't purchased or attempted to purchase a firearm
3 that the -- the stuff that was found on the original, the -- I
4 have some -- my -- I think what Mr. Wenke explained is different
5 than what's in this report.

6 For example, you are talking about this person in
7 Ohio. He did not get the parts from that person in Ohio.

8 He got the part legally in New York, which he could
9 not get now because of the red flag law. And this person in
10 Ohio was giving him instructions on how to assemble it.

11 So whatever was found in his house was nonoperable.
12 Who knows if it was assembled or not, and that was years ago.
13 And he's since been released twice now knowing that, and there
14 has been no attempt to procure a gun, to get a rifle, any of
15 that stuff.

16 So, you know, the red flags are all there in place,
17 because of his Federal conviction. I think he's got that.

18 And honestly we would agree to all that stuff, right?
19 We don't oppose any of the red flags -- any of those
20 restrictions.

21 Now, talking about this kind of assessment itself --
22 this specific one for Mr. Wenke, this is not the standard form
23 used by New York State.

24 This is -- this assessment is created by this -- I'm
25 assuming, solely by this detective. The standard form is

1 online, it's right here.

2 It does not have all these boxes, all the things like
3 that. It is -- these categories are made by this detective.
4 It's not based on any science, empirical data. It's based his
5 opinion.

6 It is -- again, I don't want to downplay it, right?
7 He's the detective. He's the expert. But, again, it's not
8 based on anything else.

9 And even if you take that assessment on its face, I
10 think the determination that Mr. Wenke is about to breach or
11 whatever the terminology is, is based on kind of errors and
12 omissions in the report.

13 And the mitigators, I want to start there. He listed
14 only one mitigator quote. And, again, who knows what a
15 mitigator is according to this defective.

16 And that one mitigator is Mr. Wenke living with his
17 dad, but I think there are more.

18 The fact that he was open and honest and contrite
19 during this interview. Something I was really hesitant to do.
20 And in hindsight, I don't know if it was the right decision or
21 not.

22 I know it was the only way that -- the only chance
23 that Mr. Wenke had to get out based on kind of the circumstances
24 here.

25 But another mitigator is the compliance with

1 treatment. The fact that he hasn't been able to be evaluated by
2 a doctor that could prescribe medication, through no fault of
3 his own.

4 That Endeavor is willing to work with him and to treat
5 him, unlike Horizon. That there has been no threats or violence
6 or physical force, anything like that.

7 There has been no -- there is no conviction or pending
8 charge involving the use of a weapon. There is no fact or
9 allegation in any of his history that Mr. Wenke brandished or
10 displayed a rifle, shotgun, firearm.

11 There is no evidence of substance abuse. There is no
12 evidence of any recent acquisition of a firearm, rifle or
13 shotgun.

14 And I mention those mitigators specifically, because
15 these are the factors that the New York State law directs the
16 person that the law enforcement agent to -- and the Court to
17 consider when imposing this order, this ERPO order. And these
18 factors I think are in favor of Mr. Wenke.

19 The access to weapons part of this report -- you know,
20 it's listed as extreme is what the detective calls it.

21 And part of that, he notes that the lack of criminal
22 record and current ownership of weapons reflects a higher score.
23 That's just wrong, right?

24 He has a criminal record. He has a felony conviction,
25 and he does not have current access to weapons.

1 So those -- I don't know why those factors weigh
2 against that. I know he doesn't have a State record and maybe
3 that's what the detective was thinking of.

4 But he has a Federal conviction. He can't get a
5 firearm. He can't go anyplace to get it. He can't get a part
6 to a firearm.

7 And, again, and I already kind of touched on the Ohio
8 part of it. That is the only -- I don't want to minimize only.
9 That is the one fact that involves weapons and firearms.

10 And, again, that happened years ago. It's nothing --
11 there is no recency about that. And I know the timeline for a
12 detective to come in and do this 30-minute assessment and kind
13 of make this determination, it's hard for me to catch up on the
14 case as Mr. Wenke's attorney of -- kind of everything that has
15 happened since. So it does get kind of convoluted and
16 conflated.

17 The bottom line is he does not have access to weapons.
18 I don't think his access to weapons is extreme. There are no
19 guns in the house.

20 He's not a hunter. His dad, who's not a gun guy, he's
21 not going to buy him guns. He's not in a state where you can
22 easily purchase guns.

23 So all the red flags and all the background that are,
24 you know -- this is about mass shootings, right?

25 That is what we are worried about. All those things

1 are not present for Mr. Wenke.

2 The escalation of behavior, which is listed as high in
3 the report -- again, I disagree. I think it's been
4 deescalation.

5 The parts of the gun and all that -- that fact, that
6 was all in the beginning of the case. Now years have passed and
7 the -- Mr. Wenke's conduct has deescalated in the sense that
8 there were physical interactions with people. You know, that he
9 shouldn't have had interactions with, right?

10 Then that transitioned to online communication, which
11 transitioned to letter writing. And then to those people
12 specifically, which then transitioned to letter writing -- not
13 those people specifically, to the Court and to myself about kind
14 of nonsensical things.

15 And unless there are letters that I don't know about,
16 I haven't received anything from him in weeks.

17 I think it has gotten better. And I think Your Honor
18 even acknowledged that at one of the last appearances. It's
19 deescalated in my opinion.

20 And, again, I don't fault the detective for kind of
21 conflating when all this stuff happened, but it's gotten better.
22 And, again, he was compliant with treatment when he was out.

23 And the last thing, Judge, is pathway to violence,
24 which is the last part, which again, sums up this behavioral
25 assessment.

1 And, again, if you Google this -- I didn't know what a
2 pathway to violence was. And it's a law enforcement training
3 thing to assess danger and every agency has a different version
4 of this.

5 For the reasons I talked about here, all the
6 indicators that talk about high risk and extreme, I think those
7 are based on misinformation.

8 And I completely understand the need that we all need
9 to be overly cautious about this, right?

10 Like -- you know, I'm not a gun guy. This assessment
11 is used to take guns away from people.

12 And, honestly, if I'm a law enforcement guy, I would
13 tend to err on the side of, you know, the extreme part, let's
14 take the guns away from people.

15 But the point of the assessment is not to lock
16 somebody up. It's not a dangerousness evaluation. The mental
17 health professional does that. And she found him not to be a
18 danger to himself or others.

19 If she did, she would recommend that he go to be
20 hospitalized for 15 days, which is what we should be doing here,
21 because -- and I'm going to kind of summarize it here --

22 **THE COURT:** What do you mean by what should we be
23 doing?

24 **MR. PASSAFIUME:** I don't know. I guess this is what
25 we're trying to do here. I shouldn't say what we're doing.

1 What we're trying to do here, but unfortunately, Your Honor, you
2 are handcuffed.

3 You can't order hospitalization, right? I understand
4 that. And I think there is jail, I think is making the
5 situation worse.

6 This all starts with, quote, **grievances**, that
7 Mr. Wenke has. And the longer he's detained, when we're coming
8 into Court to try to get him treatment in fear of future conduct
9 that may or may not occur -- you know, like Minority Report, the
10 movie, that's what I'm thinking of with this stuff, you know, I
11 think that causes more grievances.

12 And I think -- and I'm saying this and I have no
13 solution, you know, so I apologize. This is just kind of me
14 complaining, but it's making the situation worse.

15 So the point of this kind of -- I don't think this
16 assessment should be -- should form the basis of your decision
17 to detain or keep Mr. Wenke out of custody.

18 Especially with the mitigators that I, kind of,
19 outlined, which mirror the factors that courts consider when
20 imposing this -- this ERPO -- this order.

21 **THE COURT:** I can safely say that it doesn't, because
22 the fact -- there is no facts in here. These are all the same
23 facts that I've been dealing with from the beginning, except
24 that he knows somebody in Ohio who coached him on putting some
25 parts together maybe for this AR-15 or things probably he could

1 have learned on the Internet just as easily.

2 So I think I can safely say that I know this stuff
3 already that's in this document. It's just not assembled that
4 way -- quite the same way in my mind, but these are all based on
5 the file in this case, so I guess I know all that.

6 Unless he said something new -- Mr. Wenke said
7 something new at that interview a couple days ago about violent
8 ideations -- I'm not hearing anybody telling me that he did.

9 **MR. PASSAFIUME:** No, he didn't.

10 **THE COURT:** Mr. Zenger, is that accurate, that the
11 person who was doing the first part, the is he a danger to
12 himself or others? Should he been hospitalized?

13 Did that person reach that conclusion as
14 Mr. Passafiume has recounted to us?

15 **PROBATION OFFICER:** That is accurate, Your Honor.

16 **THE COURT:** Okay. Not that I don't trust you, but
17 since I have someone to verify I might as well, right?

18 **MR. PASSAFIUME:** Sure, sure. I get it.

19 **THE COURT:** All right. See, the problem is, I
20 guess -- and then I said this before, too, it would be based on
21 the facts that I know then, is that the history will -- it
22 writes itself one way and/or it writes itself the other way.

23 One way is there's never any problem and the other way
24 is something really bad happens and then you look back in
25 history and say, what was everybody doing?

1 Nobody was paying attention. Look at all the flashing
2 signs, right?

3 And it's the same with this document, whether it's
4 this document or whether it's the presentence report and all of
5 the violation documents, it'll either be -- it will be here's
6 the history and then outcome A, or here's the same history and
7 outcome B, and nobody has got the crystal ball, right?

8 That's the problem. That's why nobody has got a
9 solution.

10 **MR. PASSAFIUME:** Can I say something?

11 **THE COURT:** But he has got a solution.

12 **MR. PASSAFIUME:** No, no. I don't have a solution.

13 **THE COURT:** Go ahead.

14 **MR. PASSAFIUME:** What I was going to say is, you know,
15 we don't have a crystal ball, but you have a little bit of a
16 hint, right?

17 Because he's been -- he's been released twice and his
18 conduct, I think, has deescalated. And I think it's gotten
19 better.

20 And there has been no attempt to procure a weapon. He
21 didn't blow off counselling. He was compliant. He complained
22 about it, because it was such a long drive, but he was
23 compliant.

24 So, Your Honor has had -- you had this information way
25 back when. He's now been -- two opportunities to be out.

1 He hasn't violated or been deemed a danger by any of
2 the mental health professionals that have taught -- that have
3 spoken to him, right?

4 If he was going to Horizon and anybody there thought
5 he was a danger to himself or others, he would have been
6 violated or he would be recommended to go into a hospital then.

7 He was violated because of letter writing and
8 violating the Order of Protection.

9 So although we don't know what's going to happen in
10 the future, right, that's obvious, you do have a little bit of
11 indication.

12 And I think that indication is more towards that
13 nothing is going to happen, because nothing has happened in
14 those two periods to the extent that requires detention or
15 anything like that to avoid harm to others.

16 **THE COURT:** Right. Right. And it was, I think,
17 yesterday that I met for a couple minutes with Mr. Zenger and my
18 law clerk and I said the same thing about Minority Report movie,
19 that we're talking about here. I don't know.

20 Mr. DiGiacomo, doesn't Mr. Passafiume make a good
21 argument? Certainly a passionate argument.

22 Doesn't he make a good argument for presentence
23 release?

24 **MR. DiGIACOMO:** Judge, I have to say that, again, I
25 was not part of this meeting yesterday. I have not seen any

1 report and I'm not saying I have no reason to disbelieve
2 Mr. Passafiume or Mr. Zenger with respect to the mental health
3 aspect evaluation.

4 I have not seen anything. All I can do is rely on
5 this behavioral threat assessment. That's all I have before me.

6 And I cannot -- you, obviously, Judge, have had
7 familiarity with this case from the onset. As you pointed out,
8 a lot of the things in here were things you were already aware
9 of.

10 But from my vantage point as I sit here, I can't see
11 how this report can be completely ignored. Do I believe
12 Mr. Wenke needs to get on the right track? I do.

13 But at the same token, Judge, there has to be -- just
14 have him released on past prior conduct that he didn't escalate
15 anything, I think would be a little perhaps -- I don't want to
16 say the word dangerous, that would be a bad choice of words, I
17 want to say it perhaps would be a little risky.

18 And I say that based upon when Mr. Passafiume says
19 that the longer Mr. Wenke sits in custody, the more the
20 grievances become an issue.

21 Now, again, I don't think -- if there is some type of
22 way to fashion that Mr. Wenke -- that the Court and the
23 Government feels puts enough people, so that I have to be
24 mindful of the individuals.

25 I pointed it out before -- maybe I did, maybe I

1 didn't. I was recently contacted by one of the individuals who
2 has the -- who Mr. Wenke is not supposed to contact.

3 And, in fact, had, in fact, contacted, as alleged in
4 the violation petition, and that individual indicated to me that
5 they are fearful.

6 I can't turn a blind eye to that. And I don't think
7 the Court should either. So we keep talking, but as you point
8 out, nobody really has solutions.

9 I think the solution has to be if the Court is
10 inclined to release him, based upon the conduct, until he can
11 get some mental health assistance, there has -- it can't be
12 just, hey, you're out the door. Live with your father and let's
13 hope everything goes okay.

14 This is not going to work, at least from the
15 Government's eyes. Again, focusing on this report. I can't --
16 I don't have anything but this report in front of me.

17 And with that, Judge, I have significant concerns as
18 to what's outlined here. And so for that, while I agree
19 Mr. Passafiume has made some compelling arguments for the Court
20 to consider, I think I've made some compelling arguments to the
21 contrary.

22 Now, whose arguments are going to carry water or does
23 the Court fashion something different, but I don't see how the
24 Court can -- although done in 30 minutes and not the proper form
25 and -- I just don't see how the Court cannot take some of the

1 things, if not all the things -- I would say all the things,
2 because Mr. Wenke in this report has some stability in his life
3 in his father.

4 His father has been here all the time. So, I mean, I
5 just don't see how the Court can discount exactly what's
6 outlined in this report when fashioning how to proceed forward.

7 **THE COURT:** I don't think -- I don't think -- I'm
8 sorry if I suggested that or it sounded like I suggested that,
9 but I've not discounted anything.

10 I'm saying that all of this stuff has been in my mind
11 all along, so that's why we're still working on this, because
12 all of these facts have been swirling around in my mind, it just
13 hasn't been written up quite this way.

14 Writing it up this quite way makes it look worse, I
15 suppose. I grant everybody that. But they are still all the
16 same facts.

17 **MR. PASSAFIUME:** It's written up like that for a
18 reason, Judge.

19 **THE COURT:** I know. I know. And if I were writing it
20 up, I would err on the side of caution too, wouldn't you?

21 **MR. PASSAFIUME:** Yeah. I already said that. But
22 we've already done that, right? And it's worked. It's worked.

23 He hasn't been able to buy a gun, he hasn't been able
24 to do any of that stuff.

25 **THE COURT:** So part of the frustration I have got is,

1 Mr. Zenger, why can't we get an appointment for this guy?

2 **PROBATION OFFICER:** To be honest, Your Honor, I'm
3 pretty frustrated with that, too.

4 **THE COURT:** Why can't Endeavor say, okay, he is going
5 to be released on X day and we'll see him that day? Why can't
6 they do that?

7 **PROBATION OFFICER:** I agree. And the indication that
8 we got leaving the assessment from a clinician that was there
9 was that he was appropriate for services.

10 And when I followed up with the program manager after
11 speaking with Your Honor yesterday. It sounds like, again, she
12 is running it up the chain.

13 They are going to get together and talk about it, but
14 they have not given me an answer yet. And I simply just asked
15 for a timeline, not a specific date, just a timeline on when
16 they can -- when we could expect that he could be seen by a
17 psychiatrist and get on medication.

18 Again, I believe they are going to get back to me
19 shortly, but they have not been able to do so yet.

20 **THE COURT:** Certainly, I believe the situation would
21 be that they would see him on the nonpsychiatric side right
22 away.

23 **PROBATION OFFICER:** That's correct, Your Honor.

24 **THE COURT:** Someone in the building there would see
25 him right away, just not somebody who is going to give him a

1 psychiatric evaluation, correct?

2 **PROBATION OFFICER:** That is correct. And actually,
3 contractually, they have to see him within a certain period of
4 time based on our contract with them.

5 **THE COURT:** All right. I still -- look, is this
6 evaluation that you're working on, by the way, in the background
7 with your psychologist -- this is to the lawyers -- is that a
8 substitute in your mind for the statutory process?

9 I've got in 18 United States Code 4244, it's out
10 there. It's always out there for me. I could easily start that
11 process, but -- but it's an onerous process and somewhat once
12 you start it, you lose control of it to some extent.

13 **MR. PASSAFIUME:** Yeah. It is -- it is -- I don't want
14 to do it that way, Judge.

15 So I know the statute says 30 days or 45 days. It
16 takes nine months to start that, because the travel time between
17 now and the facility is excluded during that 30 to 45 day time.

18 We have litigated this plenty of times. And that's
19 happened twice to two of my clients, and each time it's been a
20 six to eight month process.

21 When we've been in contact with these experts, I
22 mirror the language in that statute. And Mr. DiGiacomo can
23 attest to this.

24 And I ask that we need an answer to that question.
25 And I use the exact language that's in the statute that you

1 referenced, Judge, when speaking with these experts to -- when
2 they do the evaluation.

3 So, yes. To me, it's not going down the BOP road.
4 It's to do something local because, again, we have good doctors
5 in the area. UB is great and that's who -- I think that's
6 appropriate.

7 **THE COURT:** I mean, I still -- look, I can initiate
8 that process at any time short of sentencing also. That remains
9 available to me until the day I pronounce the sentence.

10 And, again, like I said, it's easily -- I think the
11 process easily can be triggered under the statute. I think, in
12 my mind, I can easily say, okay, let's go, we're doing that.

13 But I hear you, and I would like to try to fashion
14 something that works short of that, but I'm not closing the book
15 on whether it's necessary later.

16 In other words, if the day comes where it's -- some
17 more crazy letters start coming from Mr. Wenke, then I may have
18 no choice.

19 **MR. PASSAFIUME:** Understood.

20 **THE COURT:** Like it or not, lengthy or not.

21 **MR. DiGIACOMO:** Judge, I agree if you -- what
22 Mr. Passafiume said. I seem to recall that that was a concern,
23 the length of time. The Court had talked about the 4244
24 provision and sending Mr. Wenke via the Bureau of Prisons to
25 have this assessment.

1 And that was done -- the hope is that -- is that we
2 would be able to find someone locally who could do that.

3 We believe Dr. Antonious can do it, but as we alluded
4 to the last time, he was unavailable. And then we went down
5 this road on Tuesday and here we are with this report.

6 So we think maybe Dr. Antonious can do it. And so
7 that I think is the plan, to talk to him. We're going to get it
8 back on the books to talk to him.

9 But, you know, in the meantime, not to throw a wrench
10 into it, but I look at this way, Judge. I'm kind of looking
11 down the road a little bit here.

12 We get to the point this Court eventually is going to
13 sentence Mr. Wenke to whatever it is, whether you had talked
14 about in the past a period of time served, whatever it may be.

15 Or perhaps releasing him until the sentence to see how
16 he does, I guess, what I would ask is when that point in time
17 comes, if the Court is inclined to say, hey, we're going to
18 release Mr. Wenke, so at least he can start the outpatient
19 services with Endeavor -- and I'm not suggesting that's what's
20 going to happen or not, but we still don't have that mental
21 health evaluation, perhaps there is a necessity of medicine of
22 some sort.

23 So what I'm saying is the bottom line is what safety
24 protocols would the Court be inclined to put in place if, in
25 fact, they released Mr. Wenke pending sentencing, so that he can

1 at least start getting some of the treatment and that apparently
2 he needs.

3 That Endeavor feels he needs or that he was getting
4 from Horizons, that no longer wants to provide these services to
5 him.

6 What are we going to do or what type of conditions is
7 the Court going to impose?

8 Is the Court going to impose -- if that's the case, is
9 the Court going to consider imposing a home incarceration,
10 something to that effect, where Mr. Wenke is only allowed to
11 leave his father's home to attend medical proceedings?

12 I just don't think the Court, until we have a full
13 understanding as to this danger and threat assessment, I don't
14 believe that -- again, based upon this report and your
15 familiarity with this case and the history, that I just don't
16 know if it's in anybody's best interest just to the let
17 Mr. Wenke reside with his father to come and go as he pleases.

18 **THE COURT:** So I have got two tracks, and I've been
19 doing some of the same thinking, Mr. DiGiacomo, is what -- when
20 that day comes, I don't know when it is.

21 It could be close in time, it could be far in time,
22 but there has got to be a plan in place for how do we,
23 nevertheless, mitigate whatever the risk is to other people in
24 the community.

25 Whatever the risk is it's not zero, and so we've got

1 to mitigate it, right? It may not be a hundred, but it's not
2 zero either.

3 So I've got to be mindful of that too, and I've been
4 working on what conditions might be someday.

5 Whether they are conditions of release, presentence
6 release or conditions that come along with the sentencing, so we
7 can talk about that.

8 Some of those conditions we can talk about now, but
9 tell me a little bit about this idea that he's going to live
10 with his father.

11 His father, who else? Is there anybody else in that
12 house that needs to be concerned or that I need to be concerned
13 about?

14 **MR. PASSAFIUME:** His father is present in the
15 courtroom. You could ask him yourself. I know a little bit. I
16 know it's not just his dad.

17 He has got a family, other people there. But he's in
18 the courtroom now. I don't want to answer wrong, if you want to
19 ask him any questions.

20 **THE COURT:** Mr. Wenke, Sr., who else lives in that
21 house?

22 **MR. WENKE, SR.:** Right now, it's my wife and Luke's
23 brother, who is nine; sister who is seven, and sister who is
24 three.

25 My mother-in-law is also here from Morocco. And she

1 will be here for several more months.

2 **THE COURT:** These are people that you live in your
3 house with that you love and care for, I assume?

4 **MR. WENKE, SR.:** Correct.

5 **THE COURT:** Do you have any concern for their safety
6 if Luke Wenke were to move into your house with you?

7 **MR. WENKE, SR.:** No.

8 **THE COURT:** None at all?

9 **MR. WENKE, SR.:** No.

10 **THE COURT:** Do you have any concern for public safety
11 if I were to release him into your custody?

12 **MR. WENKE, SR.:** No. No. I do not have any concern
13 for anybody's safety. I've always believed Luke talks through
14 the pen or the Internet.

15 You know, if you ever are around him personally, he's
16 a completely different person. There is the psychological
17 issue, right?

18 Like, why do you have to voice this opinion and why do
19 you have to put all this on paper or in -- on texts constantly?

20 Because when you are in front of people, you are the
21 sweetest person in the world. You know, when you have that
22 aura, that feeling of a person?

23 Now, there is a lot of times where you, you know --
24 you know, he's -- he will argue with things, but that's just an
25 opinion.

1 But, you know, I know even what he's been doing in the
2 prisons, he's been in what, Niagara County, Chautauqua and
3 Cattaraugus.

4 I know in Niagara, wasn't he helping people get GEDs?
5 You know, things like that. I mean, so he always wants to help.
6 And I think that is another thing that he thinks, too.

7 Like, when's writing these letters, some of the things
8 I think he is trying to do is help people. I just -- it's not
9 the right way to do it, but this is how he thinks.

10 But no, I'm not -- I guess long story short, I'm not
11 afraid of anybody physically getting hurt.

12 You know, I'm sure there is going to be trials and
13 tribulations to, you know, to, you know, live together, but I
14 don't see any issues physical danger.

15 I've never seen Luke, you know, raise his hand to
16 anybody, you know. He's a third degree black belt, but he's
17 never had any force on anybody.

18 **THE COURT:** There is that, I suppose, hand-to-hand
19 physical concern, right? There is the concern of using
20 firearms, which is what Mr. Passafiume spoke to, but he's a
21 prolific letter writer.

22 He likes to put things in the mail and mail things,
23 right?

24 **MR. WENKE, SR.:** I know, it's crazy. Yeah.

25 **THE COURT:** Do I need to be concerned about him

1 mailing something to someone that he shouldn't, other than a
2 piece of paper with ink on it?

3 **MR. WENKE, SR.:** I want him to stop. I don't know.

4 How do you -- I mean, I would like to -- I mean, I ask him -- I
5 tell him to stop. How do you stop? That's it. Stop.

6 **THE COURT:** Yeah. What happens when you tell him that
7 and he doesn't listen to you? Does that create a problem --

8 **MR. WENKE, SR.:** It frustrates me.

9 **THE COURT:** No. I mean in the future. What happens
10 when you tell him to stop and he doesn't stop?

11 **MR. WENKE, SR.:** Okay. So you mean going forward.
12 Let's say you release him, for example, you know, there is
13 consequences. I believe that.

14 You know, if you were to release him with the
15 consequence of if you write one more letter, it's going through
16 the Bureau of Prisons.

17 Whatever that is, you got nine months. Just don't do
18 it. It's really that simple to me.

19 But I don't -- there is -- what is that, and this is
20 the psychological part, what is it that doesn't stop Luke from
21 doing that?

22 Where doesn't he not hear that? And that's the
23 problem that I'm having with it. Because I don't see him
24 physically hurting anybody, but he continues to write letters.

25 And everybody has seen the text messages he writes,

1 they are books.

2 **THE COURT:** Does it make sense for him to see the
3 Endeavor mental health counselors and the Endeavor mental health
4 psychiatrist both?

5 Do you think it makes sense for him to see both of
6 those people?

7 **MR. WENKE, SR.:** Well, yeah. So the psychiatrist is
8 going to help to potentially get his chemicals in his brain
9 ready to receive counselling, correct?

10 That's the idea. Now, he was going -- now, yes. He
11 was complaining about it, because it was hundred miles each way.
12 You know, he has to be receptive to that.

13 You know, you said it here. He has to understand how
14 to interact with society so that he's not an anarchist or, you
15 know, against everything that exists.

16 Everything is in place for a reason and then there is
17 a lot of opportunity. So you don't have to buck every system
18 there is. How does -- how does he receive that?

19 You know, knowing him personally, like, as you know,
20 I've had my own issues health-wise, which causes anger. And I
21 know that I became angry and I had to go to counselling when I
22 was his age.

23 And it took a while, but the counselor finally figured
24 out what it was and it snapped.

25 And everything -- once you have that breakthrough, all

1 of a sudden -- like, you know, you used your paths, all of a
2 sudden you understand that that's the way you're supposed to go.

3 When that happens is -- is up to the professionalism
4 and the skill level of counselor.

5 You know, I had a Venezuelan woman who just basically
6 let me figure it out. And then she goes, what is that doing for
7 you?

8 And it, like, shocked me. I was like, wait a minute.
9 She's right. And all of a sudden I went that direction instead
10 of being so angry about things.

11 That would probably happen with Luke as well, but he
12 has to be ready for that.

13 **THE COURT:** Thank you, Mr. Wenke.

14 Mr. Luke Wenke, do you hear what your dad just said?

15 **THE DEFENDANT:** Yes, I'm listening.

16 **THE COURT:** Does that make an impression on you?

17 **THE DEFENDANT:** Yes. I am listening and it is
18 emotional to hear him talk, so --

19 **THE COURT:** Do you see how much effort is being
20 expended here in the effort of trying --

21 **THE DEFENDANT:** I am fully aware. I am capable of not
22 sending letters at all. And I know that.

23 And I enjoyed my conversations with the Horizons
24 mental health analyst, as I sat there. We had group time and
25 they talked about mental health rights and I always talked in

1 every group session.

2 So my ability to speak with people face to face has
3 always been there.

4 It's just, you know, the emotions of these past two
5 years has been the biggest religious crisis to me that I have
6 ever had my whole life and that is what I had been struggling
7 with, with why did I find myself here.

8 What caught up to me my whole life. I've never had an
9 issue dealing with anybody face to face my whole life and like
10 he said even, it's actually a second degree black belt in Shotu
11 Kahn from Bruyer's Martial Arts in Olean. They've since closed.

12 I taught there before transferring over to AKT
13 Combatives, but I never got in a fistfight my whole life.

14 And even seeing prison from the inside at 29 to
15 31 years old, simple jail and prison culture rules, like, don't
16 talk about your case with other inmates.

17 I am able to talk about their cases right to them as a
18 way to discuss, you know, what -- some people in Cattaraugus
19 County Jail can't even come to terms with the fact that maybe
20 someone was a little bit too traumatized by whatever they did,
21 for example.

22 It is a known fact by everyone in this Court
23 personally that I am in the J-pod with Khaled Abughanem, and he
24 has shown me his Koran.

25 But I just want to say that I'm able to identify the

1 core of individual people's emotional concerns and needs, even
2 if I haven't met them face-to-face.

3 And even last year, as this started in Niagara County
4 Jail, I came to terms with karma, as opposed to the individual
5 people associated with this case.

6 So -- but the point is, yes. I can. I'm capable of
7 sitting and listening person to person.

8 Brain chemicals, completely aware of what's going on
9 the mental health analyst, as I did at Horizons. It was running
10 out of gas money that kind of wore me out.

11 George Floyd's fake \$20 bill kind of registers with me
12 now and maybe it's hard to catch up with stuff.

13 I feel ashamed at myself to ask adults for help with
14 bills, but this forced -- this situation has forced some
15 humiliation to do that, but that was the initial frustration.

16 And, you know, when you are sitting like this at this
17 age, when I was one of the State senator's top donors in 2021,
18 when I had been face-to-face with Carl Paladino in his office in
19 2019.

20 When republicans and democrats come to me for the
21 libertarian line on the ballot for years, and then when you are
22 sitting here with adults, I know I am fully capable of -- I see
23 everyone's professional needs and what drew them to this career
24 path in their lives.

25 When I sit and think -- when the letters have been

1 sent out from Cattaraugus County Jail, it is me thinking --
2 everyone at Cattaraugus County Jail has accused me of
3 over-thinking.

4 Well, too bad. And I say too bad. I'm thinking about
5 the people in that courtroom right now because this is not a
6 normal way to socialize with people.

7 And I see the good nature of why systems exist. It's
8 not just being an anarchist all the time.

9 I understand that there is a difference between public
10 safety and political points of view.

11 The point is, yes. I can speak with mental health
12 analysts and receive everything that they tell me.

13 Horizons, it was nice to see them. Sending letters, I
14 don't have to send letters.

15 **THE COURT:** Do you have a -- are you open to sitting
16 with the psychiatrist and the counselor there and listening to
17 and taking their advice?

18 **THE DEFENDANT:** I will take their advice. I will --

19 **THE COURT:** If they ask you to take medicine, will you
20 be open to taking the medicine?

21 **THE DEFENDANT:** I will listen to all of their
22 suggestions in regards to that.

23 **THE COURT:** Are you planning to hurt somebody?

24 **THE DEFENDANT:** There is no need to hurt anybody.
25 It's time to help people.

1 **THE COURT:** That's not what I asked you. Are you
2 planning to hurt anybody?

3 **THE DEFENDANT:** I'm not planning to hurt anybody.

4 **THE COURT:** So you gave me a long answer a couple of
5 minutes ago. It went on for a while. And it kind of sounds
6 like what your letters sound like, and that's okay.

7 Look, if you need to vent, that's fine. But you have
8 got to keep that into the appropriate channels, all right?

9 So like I said, if you want to write a long letter
10 like that and vent to your lawyer, go ahead. Write it. Send it
11 to him. He will be --

12 **THE DEFENDANT:** I don't have to do that.

13 **THE COURT:** Do you understand what I'm getting at?

14 **THE DEFENDANT:** Yes.

15 **THE COURT:** But there's also a line, and I'm
16 encouraging you to talk to him. You know, there are lines,
17 you've crossed it before.

18 That's what brought you to this case in the first
19 instance. You know, you can write things in letters that are
20 actually crimes, and you did that.

21 You can write things in letters that are close to
22 being crimes. Lots of ways to violate the law by writing just a
23 letter, okay? And then the rest of it is just letter writing.

24 The biggest -- the biggest challenge here is,
25 Mr. Zenger, is to getting Mr. Wenke over to Endeavor to get the

1 process started.

2 He's not getting any psychiatric treatment where he
3 is, so we're just treading water, at best, in the jail.

4 **PROBATION OFFICER:** Your Honor, the Court has my
5 commitment to pursue that relentlessly.

6 And I do believe that we should be having an answer
7 one way or the other from Endeavor, hopefully to the benefit of
8 Mr. Wenke.

9 I do have a concern, of course, that it could
10 ultimately, as an outcome of the assessment the other day,
11 potentially opt not to work with Mr. Wenke.

12 In which case that would be a concern, obviously. But
13 an answer one way or the other and, of course, a timeline, too,
14 would be --

15 **THE COURT:** Well, I mean, the first person that -- the
16 lady who met with him a couple of days ago, her assessment is
17 that he is not a harm to himself or anybody else.

18 Why should there be a problem treating him, then?

19 **PROBATION OFFICER:** I agree.

20 **THE COURT:** I'm a little reluctant until we have got a
21 path forward on that front. But I am willing, once we have got
22 that path forward.

23 So if we can get Endeavor to open their arms and
24 accept Mr. Wenke to treatment right away, then I'll release him
25 pending sentencing.

1 Now we have got to work on the conditions. So that's
2 the homework. And that's, Mr. DiGiacomo, some of the work that
3 I've been doing here, is writing some of my thoughts down in
4 terms of whether we need to have home detention. I don't know
5 the answer to that, versus a curfew.

6 But I believe he does need to have an ankle monitor
7 with GPS monitoring and exclusion zones, so that probation can
8 keep an eye on where he is and keep an eye on protecting --
9 keeping him away from the people that he's been writing letters
10 to.

11 So we can have an ankle bracelet with a GPS monitor
12 and exclusion zones. That's more government on top of you,
13 Mr. Wenke, so you are going to have to deal with it.

14 But the exclusion zones would keep you from -- well,
15 going to certain addresses, so they would set that up for you.
16 Whether there needs to be home detention or curfew, we can talk
17 about that.

18 And I would be interested in hearing the inputs of all
19 three of you on whether it should be a home detention or a
20 curfew.

21 But he needs to -- I think he needs to interact with
22 people other than people who are in the jail.

23 At some point --

24 **MR. DIGIACOMO:** Your Honor --

25 **THE COURT:** -- he's got to develop some social life.

1 **MR. DiGIACOMO:** I apologize for the interruption. I
2 don't think from the Government perspective, we disagree with
3 Mr. Wenke sitting there getting no treatment of which he says
4 he's open to. I don't think is benefiting anybody.

5 My only question would be is that let's take --
6 although Horizons said no. Let's assume Endeavor says yes for
7 the reasons you just indicated.

8 It's my understanding -- and correct me if I'm wrong,
9 that Mr. Passafiume and I would still reach out and have a
10 conversation with Dr. Antonious to meet with Mr. Wenke.

11 I just want to make sure that the Court is saying that
12 the Endeavor treatment plan is going to replace what this Court
13 has wanted the parties to examine --

14 **THE COURT:** No. It doesn't replace -- no, it doesn't.
15 If it's not Antonious, it was the other person that you
16 mentioned who was going to be a substitute.

17 Wasn't there another person?

18 **MR. PASSAFIUME:** Dr. Coggins.

19 **THE COURT:** Another doctor. Okay. So one of those
20 two people.

21 No. That process is still critical I think for
22 sentencing. It is a driver, I think. You would want it for
23 mitigating factors, Mr. Passafiume.

24 If it turns out that there are no mitigating factors
25 there, then that's a problem, I guess.

1 (Start of FTR recording transcription.)

2 **MR. PASSAFIUME:** Sure, sure. And honestly, if
3 Mr. Wenke is released, and he is working with Endeavor, the plan
4 is the only reason why I brought up Dr. Coggins as an option is
5 because Dr. Antonious is not available until February.

6 So if Mr. Wenke is released for treatment, I think we
7 can wait for Dr. Antonious to be ready in February to do the
8 assessment, because he's --

9 **THE COURT:** But both -- both tracks need to happen,
10 Mr. DiGiacomo.

11 **MR. DiGIACOMO:** Okay.

12 **THE COURT:** If both of these tracks don't happen, then
13 what am I left with, right? I might as well -- what's the
14 statute?

15 That's my only tool in the toolbox at that point is
16 the crudest of tools and that's all I've got.

17 So the other process is to get him into Endeavor right
18 away and then work it with the other Dr. Coggins or
19 Dr. Antonious, whoever is ready to talk to him.

20 Other conditions that I have -- maybe there needs to
21 be a condition that he doesn't communicate with Nathan Weaver in
22 Ohio without preapproval from probation. Things of that nature.

23 What can we do to mitigate the risk is -- whatever the
24 risk is, big or small. Whatever the risk is, we have to work to
25 mitigate it and we have to do that now or same -- we are going

1 to be back here in the same scenario, if I were to give him
2 what's the maximum possible sentence on his violation, two
3 years.

4 **MR. PASSAFIUME:** Correct.

5 **THE COURT:** Okay. So if he gets two years
6 imprisonment, we are going to be back here in exactly two years
7 having the exact same conversation, maybe worse.

8 Maybe worse, right? Because people with mental health
9 issues don't typically get better on their own while in custody.

10 My experience is they get worse, so we have to get him
11 into treatment that includes psychiatrists and work on these
12 conditions and I am open to suggestions.

13 We are not going to be able to accomplish this today,
14 but we can certainly reconvene soon.

15 **MR. PASSAFIUME:** I just -- I guess it -- I just don't
16 understand how these agencies can choose not to work with people
17 when they are ordered by a Federal District Judge, but --

18 **THE COURT:** Well, I mean, I can order it, but when are
19 they actually going to see him, right?

20 **MR. PASSAFIUME:** So -- yeah. That's right. I guess
21 my impression -- I guess she is not the director or the boss or
22 anything like that, but the counselor who did meet with
23 Mr. Wenke said he would be appropriate and they would work with
24 him for the psychological aspect.

25 Is that -- is that one hundred percent?

1 **PROBATION OFFICER:** She is the clinician within the
2 program?

3 **MR. PASSAFIUME:** Yes.

4 **PROBATION OFFICER:** The person that came to personally
5 evaluate Mr. Wenke?

6 **MR. PASSAFIUME:** Yes.

7 **PROBATION OFFICER:** The person I am in direct contact
8 with is the program manager overseeing that entire unit and she
9 has been in contact with the administration.

10 **MR. PASSAFIUME:** All right.

11 **THE COURT:** All right. Well, we can certainly
12 schedule us to reconvene again tomorrow, and see if we can hear
13 from them by then and get some kind of commitment out of them,
14 Mr. Zenger.

15 **PROBATION OFFICER:** I will mention the letters, with
16 what we discussed today. I can now contact them -- in fact,
17 whoever I need to and hope to get an answer out of them, so --

18 **THE COURT:** But I am reluctant to release Mr. Wenke
19 without that being established. It doesn't make any sense.

20 But I am willing to do it, if we have someplace to go
21 at Endeavor -- someone is willing to see him right away.

22 So that's where we are. I think we should reconvene
23 tomorrow and see where we are, if that is okay with everybody.

24 **MR. DiGIACOMO:** Judge, I will have to send a
25 substitute. I am unavailable tomorrow.

1 **MR. PASSAFIUME:** Okay.

2 **THE COURT:** Okay. In the meantime, we need some
3 proposed conditions from all three of you, what your suggested
4 conditions ought to be, so we can work on that today and
5 tomorrow.

6 **MR. PASSAFIUME:** Okay.

7 **THE COURT:** He is -- already has his existing
8 conditions that he will be on, but we can probably tweak them a
9 little bit to include the psychiatric evaluation and the public
10 safety concerns.

11 The other condition I am considering is -- I don't
12 know where I wrote it, but I know I am considering it, is that
13 he have -- that he not write anything to anyone and mail
14 anything to anyone except paper with ink on it.

15 In other words, no objects, no substances or that sort
16 of thing.

17 If you need to write a letter to somebody, letter to
18 the editor, letter to whomever, paper with pen or paper with
19 printer ink and that is it. No substances and no objects.

20 That is going to be a condition, too, so that if he
21 mails something, whatever it is, talcum powder, then that's a
22 violation.

23 Do you see what I am saying? Lots of ways to create
24 havoc, Mr. Wenke. And I hope you do none of them, but you've
25 got me in a position where I have to solve what might happen and

1 that is pretty hard to do.

2 So let's come back tomorrow and see if we can make any
3 progress.

4 Mr. Zenger, we are kind of running out of options at
5 this point, so it is all in Endeavor's court, I would say. I
6 have to get some sort of comfort level or otherwise, I won't
7 have it.

8 I have to make a finding by clear and convincing
9 evidence that there is no danger to any other person or the
10 community. I think I can get there, but I need Endeavor to play
11 ball with me.

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

13 **THE COURT:** So those are the conditions I am thinking
14 about. If anyone has any other conditions, we can talk about
15 them tomorrow.

16 So let's take a look at what our calendar looks like
17 tomorrow. We can do it at 9. We can do it at 3 or 1.

18 Ms. Henry, are those all open? 9, 1 and 3?

19 **THE CLERK:** Yes.

20 **THE COURT:** Mr. Passafiume --

21 **MR. PASSAFIUME:** I would like 1.

22 **THE COURT:** It gives you a little more time, I
23 suppose, to get Endeavor back to us, right?

24 Mr. Zenger, 1 o'clock.

25 **PROBATION OFFICER:** Yes, Judge.

25 (Proceedings concluded at 2:55 p.m.)

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
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8
9
10 s/ Bonnie S. Weber
Signature

January 26, 2024
Date

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

13 Official Court Reporter
14 United States District Court
Western District of New York
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