

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.	*	November 21, 2023
	*	10:05 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:	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.

5

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

7

8

9

10 (Proceedings commenced at 10:05 a.m.)

11

12

13

14 **THE CLERK:** All rise.

15

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

18

THE COURT: Please be seated.

19

20 **THE CLERK:** Court calls United States versus Luke
21 Marshall Wenke, Case Number 22-CR-35.

21

22 We're here for a sentencing on violation of supervised
23 release.

23

Counsel, please state your appearances for the record.

24

25 **MR. DiGIACOMO:** Michael DiGiacomo for the United
States.

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

2 **THE COURT:** Okay. Good morning, Counsel.

3 Good morning, Mr. Wenke.

4 **THE DEFENDANT:** Good morning, Judge.

5 **THE COURT:** We are here today for sentencing on
6 Mr. Wenke's previous plea of guilty for violating a condition of
7 his supervised release.

8 And when we were all here the last time, we had
9 Mr. Zenger working on some things, and so I feel like we should
10 start with him for an update.

11 And if anyone else has anything they want to talk
12 about before we get started, now is the time.

13 Mr. Zenger, what's the status of things?

14 **THE PROBATION OFFICER:** Your Honor, while we were
15 working to schedule a date for the defendant to participate in a
16 psychiatric evaluation with Horizon Health Services, Horizon
17 indicated just yesterday that they have a strong recommendation
18 that the -- the defendant is in need of a different type of
19 evaluation to appropriately address his needs and any risk to
20 the community.

21 And so we are currently working on determining the
22 best path to achieve that goal.

23 **THE COURT:** And Horizon has been his mental health
24 treatment provider until now?

25 **THE PROBATION OFFICER:** It has been, Your Honor.

1 **THE COURT:** All right.

2 All right. Is there anything from the Government
3 before we get started?

4 **MR. DiGIACOMO:** Judge, again, we were hoping that we
5 would have something in place.

6 I mean, Mr. Passafiume advocated -- you know, when we
7 were last here, that, you know, Mr. Wenke should have that
8 evaluation that he didn't have prior to being, you know, placed
9 into Marshal custody.

10 And I know that was something, you know, that Frank
11 was -- Mr. Passafiume was advocating for. And this Court, you
12 know, had raised concerns about whether or not Mr. Wenke is just
13 a letter writer or does he really pose a danger to the
14 community?

15 And I think that the goal was to see, once that
16 evaluation was completed, sentencing. We could be in a better
17 position to fashion a sentence that was appropriate for this
18 type of violation, but now we're back to square one.

19 And so, really, it boils down to -- I know, having
20 spoke with Mr. Zenger in the presence of Mr. Passafiume,
21 Probation is recommending that this evaluation be done via the
22 Marshal service where Mr. Wenke would have to go and get a BOP
23 evaluation.

24 Obviously, Mr. Passafiume's opposed to that, but I
25 think where we all agree, Judge, is that, you know -- is there

1 has to be some type of evaluation so that all the parties,
2 including the Court, fully understands and has those concerns
3 addressed.

4 And it really boils down to where do we do it. And
5 it's my understanding, from speaking with Mr. Zenger -- and he
6 can correct me if -- or Mr. Passafiume can, if I'm misstating
7 anything, but it's my understanding there's potentially one new
8 local provider that might be able to do this evaluation, but we
9 don't know.

10 So there's a couple of avenues of which we can do
11 this. I mean, we can obviously proceed to sentence today, and
12 then, obviously, I know there would be an -- you know, the
13 Government and, I know, Probation would be advocating for
14 Mr. Wenke to obviously have the various terms and conditions put
15 back in place for any remaining term of supervised release.

16 Or the second alternative is -- is that we
17 determine -- you know, do we adjourn the sentencing for a short
18 period of time to determine whether or not there is an
19 alternative local assessment that can be done?

20 With the full understanding that when we come back, we
21 still may be where we are today.

22 That's the way the Government sees it, but, obviously,
23 that's just my take.

24 **THE COURT:** Mr. Zenger, what's Mr. DiGiacomo referring
25 to, in terms of this alternate option?

1 **THE PROBATION OFFICER:** Yes, Judge.

2 So, when speaking with Horizon yesterday, the
3 administrator at Horizon did identify one other community-based
4 program, Endeavor, in Buffalo, that may potentially be able to
5 potentially do the appropriate assessment for Mr. Wenke.

6 Although, that same administrator did indicate -- and
7 this was also indicated by our internal treatment specialist --
8 that the evaluation that would be done by the BOP would be far
9 superior in addressing any kind of safety needs, along with that
10 recommendation.

11 **THE COURT:** Okay. All right, Mr. Passafiume. What
12 are your thoughts?

13 And, also, does Mr. Wenke have private insurance? Can
14 he go find a psychiatrist on his own? Is his family willing to
15 pay for a private psychiatrist on his own?

16 What are our options besides -- if any -- besides what
17 you're hearing already here today?

18 **MR. PASSAFIUME:** That's -- I haven't explored that
19 yet, as far as privately retaining a doctor for -- a
20 psychiatrist for treatment.

21 You know, I obviously agree with what everybody just
22 said, and Mr. DiGiacomo's, kind of, option A/option B plan.

23 I guess I don't understand -- this is all new. I just
24 found this out, all before Court, so I'm a little unprepared
25 here.

1 I guess I don't understand why Horizon opted out of
2 working with Mr. Wenke. That's besides the point.

3 But I also don't understand why the BOP is -- is a
4 consideration when there are -- I don't know what assessment the
5 BOP can do that can't be done locally.

6 I know Dr. Rutter evaluated Mr. Wenke on the original
7 case. Dr. Rutter is very well respected in the community.

8 There are also other psychiatrists that -- that work
9 with both the Government and our office, that could do an
10 evaluation as well, that can be then relayed to Endeavor or
11 Horizon or whoever the local treatment provider agency would be.

12 So that's -- I guess that's the first portion, is --
13 the BOP road. I -- I didn't like it, you know, when we appeared
14 last. I think there's a lot of issues.

15 I don't know why it can't be done locally -- and I
16 think it can be done locally.

17 As far as contacting Endeavor, yeah. We would be all
18 for it. And Mr. DiGiacomo suggested that we all be present with
19 this -- you know, with this call with Endeavor, to maybe be
20 there to answer any questions or provide any more insight, so
21 they can make a better determination of whether they can provide
22 services for -- for Mr. Wenke.

23 You know, it's a long-winded way of me -- of saying I
24 don't think we should go forward with sentencing today. I know
25 we're back at square one.

1 Just other opportunity to -- to get back on track with
2 this plan that we're all on the same page with a couple weeks
3 ago, that we thought was going to be in the benefit of -- of
4 everybody, including Mr. Wenke.

5 So I didn't give you any answers, Judge. I'm sorry.
6 I just -- I don't think he should go to the BOP. I think there
7 are local doctors.

8 He's already been evaluated once; he can be evaluated
9 again. And -- and, as far as treatment is concerned, if
10 Endeavor won't -- won't do it, we'll explore the private -- the
11 private options then.

12 **THE COURT:** One other thing, Mr. Zenger, that I'm not
13 aware of, I guess, is: Is Horizon not interested, even, in
14 doing the medical health counseling that they have been doing
15 until now?

16 **THE PROBATION OFFICER:** Your Honor, they did not
17 explicitly say that they would not work with Mr. Wenke, but the
18 impression that I got was that they were strongly recommending
19 that they were not the appropriate service.

20 At least for the initial evaluation that we're
21 discussing here, that pertains -- not necessarily to the
22 medication management. That they can do.

23 The issue here is the need for an assessment that
24 addresses any kind of risk to the community. And that is the
25 assessment that they cannot do, that Endeavor might potentially

1 be able to do, but that the BOP sounds like it can do.

2 **THE COURT:** And Mr. Passafiume's telling us that
3 perhaps there's something short of sending him into BOP custody
4 for that.

5 Can that be explored, Mr. Passafiume? What exactly
6 are you thinking, if that can be done locally?

7 **MR. PASSAFIUME:** Again, Mr. Wenke has been
8 evaluated -- Dr. Rutter. There are other doctors that -- that
9 can do an evaluation I know.

10 **THE COURT:** Is Dr. Rutter a psychiatrist?

11 **MR. PASSAFIUME:** I don't know his credentials. I
12 think he's a just a psychologist.

13 I don't want to say "just." I don't know his
14 credentials specifically, but -- but we've worked the -- on
15 other cases where the insanity defense was raised, we've done
16 out-of-custody evaluations.

17 The Government has provided -- always seem to find a
18 doctor. The -- one's out of Rochester -- I don't know his name.

19 But -- but there's a joint kind of evaluation. I know
20 we also use Dr. Cervantes, which is used by both the Government
21 and the defense, Dr. Antonius.

22 These are all names of people that are respected in
23 the community, that can make that -- that evaluation that
24 Horizon, frankly, just doesn't want to do. Maybe they don't
25 want to take on that -- that responsibility.

1 **THE COURT:** So I don't think we necessarily need
2 someone who can dispense medicine to give us a risk assessment.

3 So there's two different things, correct?

4 **MR. DiGIACOMO:** That's correct, Judge. And, while I
5 agree with Mr. Passafiume, the offices have used different
6 experts.

7 I will say that, again, Dr. Rutter -- I actually had
8 him on the stand for two hours on a cross-examination. He tends
9 to focus primarily on child exploitation cases and whether or
10 not the person has a risk to reoffend.

11 I have not -- in all candor, I have not looked at his
12 assessment of Mr. Wenke, so I'm not saying it's an improper
13 assessment. And I think Mr. Passafiume's correct. He might be
14 a psychologist.

15 But so what -- the specific nature of the assessment
16 of Mr. Wenke's danger, I don't know if the evaluators we've
17 used, whether it be Rochester or Buffalo -- I mean, my dealings
18 with Dr. Cervantes is she tends to -- I've used her as to
19 whether or not the person is competent to stand trial. I don't
20 think that's the issue here we need to address.

21 So while I'm not saying it can't be done and I'm not
22 saying I won't work with Mr. Passafiume and Probation, I just
23 want the Court to be aware we might need a little time to find
24 the right psychiatrist to do the assessment that would be
25 beneficial to everybody.

1 **THE PROBATION OFFICER:** If I could add, Your Honor,
2 Dr. Rutter's report did come up during the conversation with
3 Horizon yesterday.

4 And although it is very informative, they specified
5 that that is also not the type of assessment that they're
6 suggesting we take.

7 **MR. PASSAFIUME:** I guess I don't -- is this assessment
8 that has a -- does it have a name?

9 Like, I don't know what assessment they want. Like,
10 all these doctors -- there's not going to be a doctor that
11 specializes in risk assessment for defendants who are sending
12 letters from -- you know, from jail.

13 I don't -- I don't understand what -- maybe the Rutter
14 report is not comprehensive enough for -- for Horizon, but I
15 don't understand why -- why there aren't local doctors that -- I
16 mean, there are -- between Rochester and Buffalo that can
17 perform this assessment, this evaluation.

18 **THE COURT:** Give me just a minute. Just by way of a
19 benchmark -- and, again, I'm not prepared to go there today,
20 again, because I'd like to use it as a last resort.

21 But the statutory provision that I mentioned before,
22 which is 4244, envisions a psychological or a psychiatric
23 evaluation in custody of the Bureau of Prisons.

24 But one of the things that can be looked at in the
25 report there, right in the statute, is -- this is in 4247(c) --

1 can be that they can give a report on whether the person is
2 suffering from a mental disease or defect, as a result of which
3 his release would create a substantial risk of bodily injury to
4 another person or serious damage to property on another.

5 So I don't know why -- there's nothing magical about
6 somebody in BOP who can look at that question. Why can't some
7 other provider locally look at that question?

8 Same question. If I order it, I can order it here
9 short of the statute, can't I? Can't I tell somebody to look at
10 that question?

11 **MR. PASSAFIUME:** Yes. Yes, absolutely.

12 **THE COURT:** Well, where is this provider? That's the
13 problem. We're kind of banging our head against the wall here.

14 I'm concerned. I went back to the PSR yesterday and
15 read the PSR from the criminal case, and it's concerning.

16 I guess the good thing I can say is that the
17 trajectory has been -- from where he was in the criminal conduct
18 in the PSR, to where he is now, in terms of the letter
19 writing -- there's no more threats, at least, right?

20 No more crimes, at least, in the letters. So that's
21 progress.

22 But -- but what if he goes backwards? What if he gets
23 worse? And that's on me, right?

24 So that's the -- kind of the bind that I'm in,
25 Mr. Passafiume. I'm trying to work with you and your client and

1 with the Government and Mr. Zenger, but now what?

2 So we're sitting here -- I mean, I can do it a lot of
3 different ways, but we need a provider; and we need a provider
4 quickly, right? Because I -- I don't want to prolong this thing
5 either.

6 **MR. PASSAFIUME:** I don't -- I don't know, Judge. I
7 wasn't anticipating Horizon saying we're not going to do
8 something that they said they would do, that they were doing.

9 Like, I, frankly, don't understand why they can't.
10 Maybe -- I don't know.

11 But there is -- I think, if you give Mr. DiGiacomo and
12 I a week or two, we can get on the same page and find, I think,
13 a doctor that we would both be okay with, I guess.

14 Like, I don't --

15 **THE COURT:** How does that doctor get funded? Does
16 that bill go to Mr. Zenger?

17 **MR. PASSAFIUME:** No.

18 **THE COURT:** Nobody knows?

19 **MR. PASSAFIUME:** So it would be likely our office.
20 And I don't want to volunteer -- I don't want to -- I'm not
21 writing the checks here, but in the past, when there have been
22 two experts competing, the Government -- again, this is --
23 again, this is for more if an adversarial proceeding, where
24 there was the -- insanity was an issue, the Government paid for
25 its own expert and we paid for our own expert.

1 In this venture, maybe we could split the costs. I --
2 I don't know, but -- but --

3 **MR. DiGIACOMO:** I'm not writing checks either, so I
4 can't agree to that at this point, but I'm not saying that we
5 couldn't try to work towards that.

6 **THE COURT:** All right. Well, because what I would
7 like to do is be comfortable that a time served sentence is
8 appropriate, and then I can massage some conditions going
9 forward that make sense to everybody, you know.

10 And I've got some thoughts on what the conditions
11 might be about letter writing, et cetera, and trying to draw a
12 line between the letter writing that is a problem and letter
13 writing that's not a problem.

14 You know, again, everybody's entitled to write
15 letters. You write a letter to the editor and it goes in the
16 garbage, that's where it goes, right?

17 Or you write a letter -- whatever, a letter that --
18 you don't like a product that you bought, and, okay, it
19 goes -- whatever.

20 But there's also a line. And one of the conditions
21 someday that will be imposed is a condition that he spend time
22 with you, Mr. Passafiume, to learn the distinction between his
23 First Amendment rights and the criminal law.

24 **MR. PASSAFIUME:** Okay.

25 **THE COURT:** There's a distinction, right? You fight

1 about it all the time, but there is a line.

2 Sometimes there's a line that's pretty clear. And I
3 think we can make some progress on those fronts. And we can
4 make some progress on making sure that the recipients of prior
5 letters are adequately thought about and protected.

6 But I don't want Mr. Wenke sitting in the county jail
7 while we're continuously finding -- trying to find somebody,
8 because, you know, he is getting sentenced for a letter that he
9 admitted to the last time we were here and not more than that.

10 So I don't want to get carried away either, by letting
11 this linger.

12 **MR. PASSAFIUME:** One question that needs to -- that
13 Your Honor asked that needs to be answered is even
14 postevaluation, is Horizon still willing to do the treatment
15 that he was in before -- or more intense? Or is Endeavor
16 willing to do that?

17 I understand they're not willing to do an evaluation,
18 for whatever reason, but there's got to be the treatment on the
19 back end. And I think that -- that has to be answered at some
20 point.

21 **THE COURT:** Right. And so, Mr. Zenger, make sure that
22 they're still willing to oblige.

23 And would they be doing the medical part of it, too?
24 You said -- it sounded like you said they would; it's just the
25 assessment that they won't do.

1 **THE PROBATION OFFICER:** That is correct, Your Honor.

2 **THE COURT:** So they would provide him with a
3 psychologist and psychiatrist going forward?

4 **THE PROBATION OFFICER:** Yes. The only caveat to that
5 would be it might be dependent upon that evaluation and what the
6 recommendation is if they believe that their services are safe
7 and stable and appropriate for Mr. Wenke moving forward.

8 But I would imagine, if the outcome was positive, that
9 they would be willing to do those services that we've already
10 contracted with them for.

11 And also, Mr. Passafiume had asked is there a name for
12 this evaluation?

13 And, to admit, I don't know if it has a formal title.
14 But during that conversation I had with Horizon, the terminology
15 that kept coming up was essentially an evaluation and
16 recommendation that addresses the criminogenic needs of the
17 defendant and how they relate to the safety of the community.

18 **THE COURT:** All right. Did you write that down,
19 lawyers?

20 **THE PROBATION OFFICER:** And then, lastly, Your Honor,
21 we have already been in contact with Endeavor.

22 And this issue was personally handed off by the
23 administrator at Horizon to the CEO of Endeavor. So I -- I'm
24 very confident that this -- these answers will be obtained
25 quicker than what we experienced in the last couple weeks.

1 **THE COURT:** And also, you should write down, Counsel,
2 4247(c) (4) (C), which is the provision that I read to you
3 about -- really, that's what I want to hear.

4 I want to hear that he's not going to create a problem
5 for other members of society in terms of physical danger.

6 If I can hear that, then I can give him a time served
7 sentence and a set of conditions that are a little bit new.

8 I've been working on them with Mr. Zenger and with my
9 law clerk, but conditions that are going to try to get better --
10 do a better job at getting at the carrot-and-stick kind of way
11 to manage this issue.

12 I understand he's got an urge to write letters.
13 That's okay. But he's also got to know that there's a line.

14 And I think maybe we can tolerate, as a society, some
15 irritation, but we can't have him going across that line. About
16 right?

17 So if somebody gets a letter they don't want, so what?
18 That's my going-forward view on things. But he's got to be
19 mindful of the line.

20 The line is there's lots of criminal statutes out
21 there that he can violate by writing a letter.

22 I'm sentencing someone this afternoon who wrote a
23 letter that had some contents in it.

24 So I'm working -- I'm trying to work here, and work
25 hard, but I just need to get across that threshold of somebody

1 who knows psychological issues, maybe psychiatric issues, much
2 better than all of us, can tell us that Mr. Wenke should be
3 fine.

4 Nobody's going to give me a guarantee, but they can
5 certainly tell me the process; tell me what the interview looked
6 like, and tell me what they see. I.

7 Also want that person to look at the letters. How
8 could you evaluate Mr. Wenke without looking at what comes out
9 of his mind?

10 But we've got to have a process in place pretty
11 quickly because the tension here is that the clock is ticking on
12 his sentence.

13 Mr. Passafiume knows that well because his job is to
14 advocate for the shortest sentence possible.

15 But I think -- I think your charge also has to be
16 what's the best for your client. And part of that is getting
17 him the proper treatment.

18 You agree?

19 **MR. PASSAFIUME:** Yes, Judge. Absolutely.

20 **THE COURT:** And I think he has to agree with that,
21 too.

22 Mr. Wenke?

23 **THE DEFENDANT:** Uh-huh?

24 **THE COURT:** You agree with that? You on board with
25 all this?

1 **THE DEFENDANT:** Yes. Yes, I do.

2 **THE COURT:** One of the questions I was planning to ask
3 you -- it's a little premature, but if we -- if we find the
4 right doctor who's ready to do this, are you willing to take
5 this seriously?

6 **THE DEFENDANT:** Yes. I am.

7 **THE COURT:** All right. So what should we do? Should
8 we have a status conference back here in a week or something
9 like that? Is that too soon?

10 **MR. DiGIACOMO:** Judge, with the holiday, I would --
11 again, I'm not trying to prolong this. I understand the
12 sensitivity.

13 But if we could -- I would suggest -- and
14 Mr. Passafiume can weigh in. I would say, due to the holiday,
15 two weeks.

16 But if we find someone in advance of that, we can make
17 application to the Court to see if they can get us in here
18 sooner. That's my suggestion.

19 (Discussion off the record.)

20 **MR. DiGIACOMO:** My suggestion: I said two weeks, but,
21 if you want it shorter, we'll come back shorter. What's your --
22 it's up to you.

23 **MR. PASSAFIUME:** Yeah, I agree with that, Judge. I
24 have doctors on -- on my mind now that I want to run by the
25 Government that -- that I think are great.

1 Dr. Benedict's another one, Judge, that I think I've
2 submitted reports for -- before Your Honor.

3 So I don't think it should be hard to find a qualified
4 doctor that -- that could do this evaluation pursuant and along
5 the lines of the statute.

6 I mean, not pursuant, but answering the questions of
7 the statute.

8 **THE COURT:** All right. So if we come back in two
9 weeks, maybe you can give me a status report in one week. And
10 that can be something that you just put on the letter and file
11 it --

12 **MR. PASSAFIUME:** Great.

13 **THE COURT:** -- and tell me what your progress is.

14 **MR. PASSAFIUME:** Great.

15 **THE COURT:** All right?

16 So Tuesday the 28th for a status report. It can be a
17 joint status report, if possible.

18 And then, the week after that, Ms. Henry, how's that
19 calendar looking?

20 **THE CLERK:** How about December 5th at 9 a.m.?

21 **MR. PASSAFIUME:** That works.

22 **THE COURT:** I guess we should call it sentencing, and
23 then we can go as far as we can at that time, right? If we're
24 ready to sentence, we'll sentence, right?

25 **MR. PASSAFIUME:** Yes.

1 December 5 at 9 a.m. We'll call it a sentencing and,
2 hopefully, we can get all the way through it if we're making
3 progress.

4 **MR. DiGIACOMO:** Sounds great, Judge. Thank you.

5 **THE COURT:** All right. But I just don't want to
6 prolong this needless -- and I know everyone's working --
7 needlessly.

8 From the process viewpoint, not from any individual
9 participant. I just -- I don't want it to linger, okay?

10 Every provider you call is going to be busy, right?
11 But we've got to work through that somehow.

12 Mr. Zenger, help these lawyers out and help them find
13 somebody, if you can.

14 **THE PROBATION OFFICER:** Absolutely, Judge.

15 **THE COURT:** All right. Anything else?

16 **MR. DiGIACOMO:** Nothing from the Government, Your
17 Honor. Thank you.

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

19 **THE COURT:** All right. Very good. See you
20 December 5.

21

22 (Proceedings concluded at 10:31 a.m.)

23

* * *

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

s/ Bonnie S. Weber
Signature

May 22, 2025
Date

BONNIE S. WEBER, RPR
Official Court Reporter
United States District Court
Western District of New York