

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.	*	July 30, 2024
	*	3:07 p.m.
	*	
LUKE MARSHALL WENKE,	*	STATUS CONFERENCE
	*	
Defendant.	*	
	*	
* * * * *	*	

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

APPEARANCES:

For the Government:	MICHAEL DiGIACOMO, UNITED STATES ATTORNEY, By MICHAEL DiGIACOMO, ESQ., Assistant United States Attorney, Federal Centre, 138 Delaware Avenue, Buffalo, New York 14202, Appearing for the United States.
---------------------	--

For the Defendant:	FEDERAL PUBLIC DEFENDER'S OFFICE By FRANK PASSAFIUME, ESQ., FONDA KUBIAK, 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 3:07 p.m.)

11

12 **THE CLERK:** All rise.

13

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

16

**THE COURT:** Please be seated.

17

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

20

Counsel, please state your appearances for the record.

21

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

23

24 **MR. PASSAFIUME:** Frank Passafiume and Fonda Kubiak to  
25 Mr. Wenke.

25

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

1 Good afternoon, Mr. Wenke.

2 **THE DEFENDANT:** Good afternoon.

3 **MS. KUBIAK:** Good afternoon, Your Honor.

4 **THE COURT:** We are here based on the motion  
5 Mr. Passafiume filed. And just to, kind of, set the table a  
6 little bit, there's currently a hearing set for October, under  
7 4244. This motion is under 4241.

8 And I read the proposed order -- the original one and  
9 the one that just came in. And so I'm at a little bit of a  
10 disadvantage, having tried to skim it on my way out here,  
11 basically.

12 But why don't you tell me, Mr. Passafiume, where you  
13 are and what's next?

14 And why you're seeking this relief, as opposed to the  
15 relief that's currently on the calendar?

16 **MR. PASSAFIUME:** Judge, I put that in my papers.  
17 It -- you know, I think we're ethically obligated to raise this.

18 It's based on consultations with our expert, our  
19 investigation, and our observations, so we filed this motion for  
20 this competency examination under 4241.

21 The original order that I had, kind of, left out half  
22 of the relief. This modified order, that I just sent to the  
23 Court -- basically, it states that, you know, if Your Honor  
24 grants the motion, Mr. Wenke would go to the Bureau of Prisons  
25 to be evaluated for competency.

1           There's a 30-to-45-day period for that. If he's found  
2 to be **competent**, he would return back to the District and we  
3 would, kind of, be -- maybe, in the same boat that we are now,  
4 but with the **Bureau of Prisons'** report.

5           If he's found to be not **competent**, he would -- that's  
6 the second part of the motion -- the proposed order. He would  
7 then stay with the **Bureau of Prisons** for up to four months for  
8 restoration proceedings.

9           And then at the end of that period, if he is restored,  
10 you know, he would come back here.

11           And at the end of that period, where -- then the  
12 **dangerousness evaluation** that Your Honor, I think, was concerned  
13 about under 4246 would occur.

14           So that's -- that's the -- you know, there's no --  
15 this wasn't the plan, obviously.

16           This has come up now after many months and it's, kind  
17 of, deteriorated to this point, Judge. So, again, this wasn't  
18 the plan all along.

19           We're, kind of, going as what our investigation leads  
20 and what our expert is saying. So that's why it was raised now  
21 as opposed to, you know, two months prior.

22           **THE COURT:** All right.

23           Mr. DiGiacomo, what are your thoughts?

24           **MR. DIGIACOMO:** Well, Judge, obviously, the defendants  
25 filed their motion. I mean, as I have expressed to counsel, as

1 Mr. Zenger and I, we share the same concern -- is, obviously,  
2 this step appears -- based on defense counsel's current motion,  
3 would appear to, the way I understand it, would pause what we  
4 currently have before the Court.

5 And we have to get through step one before we get to  
6 what was the current track for the hearing that was scheduled  
7 for -- I believe, the Court said it was October.

8 So with that being said, Judge, I mean, obviously, I  
9 don't have anything to say that defense motion -- the current  
10 motion that they filed on the 25, is baseless.

11 I think they have some concerns, which I don't have  
12 privy to, for them to raise it.

13 The only concern Mr. Zenger and I both have is that,  
14 whatever the Court decides on defense counsel's current motion,  
15 we at some point down the line still need to address the report  
16 of Dr. Leidenfrost, which was something this Court wanted, with  
17 respect to dangerousness, should Mr. Wenke be released.

18 **THE COURT:** All right. There's still the problem,  
19 Mr. Passafiume -- and this is just a structural problem -- that  
20 the proposed order doesn't really track the statute as tightly  
21 as the statute is written.

22 So it's creative. I understand where you're coming  
23 from, but I feel like we need to go through this, kind of, as a  
24 team or some other way, to make sure that the order that I sign  
25 is the one that's tracking the statute as closely as I can track

1 it.

2 **MR. PASSAFIUME:** Sure.

3 **THE COURT:** For example, the order that was proposed  
4 and is in front of me -- I assume Mr. DiGiacomo has the most  
5 recent draft, proposed order? Yes?

6 **MR. PASSAFIUME:** Yes. I did e-mail it to him.

7 **THE COURT:** It doesn't contemplate for a hearing, but  
8 the statute does.

9 So it's, kind of, like, BOP has the decision  
10 authority, but that's not how the statute is written.

11 **MR. PASSAFIUME:** Well, the order would come after a  
12 hypothetical hearing, Judge. This is --

13 **THE COURT:** Well, I probably need to have the hearing  
14 sort of --

15 **MR. PASSAFIUME:** You know --

16 **MS. KUBIAK:** I can --

17 **THE COURT:** Look, this is my first rodeo on 4241; so  
18 if one of you has done this before, why don't you go ahead and  
19 talk about it.

20 **MS. KUBIAK:** I can weigh in, Your Honor.  
21 Traditionally, when we have had these issues arise, the Court's  
22 already been aware of certain issues that have occurred  
23 throughout the course of the case.

24 We file a motion -- as I understand it, the Government  
25 is not opposing it -- and based upon the prior history, as well

1 as our motion, that substantiates for what the statute  
2 contemplates as a hearing.

3 We don't necessarily go forward in an unopposed  
4 motion, with an actual evidentiary hearing relative to the  
5 competency.

6 **THE COURT:** Right.

7 **MS. KUBIAK:** In my experience, those have arisen when  
8 there's a dispute relative to the parties' positions.

9 And so the fact that we have our motion -- the  
10 Government does not appear to be opposing that -- I think that  
11 allows the Court to determine by a preponderance that 4241 is  
12 appropriate.

13 And then the provisions for the 30-day assessment  
14 would be triggered.

15 **THE COURT:** Can you waive -- we were looking for some  
16 case law on that basis that was, kind of, making me think that  
17 way, under the first proposed order more than the second one.

18 But is -- is this hearing something that can be  
19 waived?

20 **MR. PASSAFIUME:** It's just -- it's in the second, the  
21 modified order, Judge, at the very bottom.

22 It is -- the preponderance of the evidence, it's a  
23 standard. And I think Your Honor could find that based on the  
24 record and, particularly, my motion, and then Your Honor's  
25 amended order from February that, kind of, summarized this

1 entire case and cites all the dockets.

2 So the finding after a hearing, by a preponderance  
3 would just be that evidence. All that stuff that's already in  
4 the record, that everybody knows already.

5 **MR. DIGIACOMO:** Judge -- and I know it's been  
6 referenced, that the Government doesn't oppose Mr. Passafiume's  
7 motion.

8 Again, I don't oppose because I don't have anything to  
9 oppose it with. I don't have -- I mean, obviously, all I have  
10 is the same as what the Court has, is -- is the current motion.

11 So to say that I don't oppose it is true, but I don't  
12 have anything -- I don't have any reports from their doctor to  
13 say -- or anything of that nature to substantiate it.

14 So, I guess, to say it's unopposed is a true  
15 statement, but based upon the fact that I have no basis before  
16 me to oppose it.

17 **THE COURT:** Right. Who has their books out? 4241(a).

18 So, certainly, there's a motion. You can make it;  
19 anyone can make it or I can do it on my own motion, 4241(a).

20 And there certainly is reasonable cause to believe --  
21 right?

22 **MS. KUBIAK:** Yes.

23 **THE COURT:** I can certainly make that finding and I  
24 will. I am making it. To believe that the defendant may  
25 presently be suffering from a mental disease or defect rendering

1 him mentally incompetent, to the extent that he is unable to  
2 understand the nature and consequences of the proceedings  
3 against him or to assist properly in his defense.

4 That's a motion for a hearing. Prior to the date of  
5 the hearing -- this is in Section (b) -- then we do the  
6 examination, right?

7 And then, the hearing is under 4247(d), where the  
8 defendant has a right to testify.

9 So I feel -- I just feel like I'm more comfortable  
10 tracking the statute more tightly than this proposed order does  
11 it.

12 I understand -- I think I understand some of your  
13 advocacy, Mr. Passafiume, Ms. Kubiak -- and, certainly, the  
14 advocacy that tightens up the cycle on timing.

15 Go ahead --

16 **MR. PASSAFIUME:** What --

17 **THE COURT:** -- but what if we send it down there on a  
18 shorter cycle, and BOP says: Sorry, that isn't how it works.

19 **MR. PASSAFIUME:** Sure. And, I guess, that -- that's  
20 the concern.

21 So in the past, in my experience -- and it's such a  
22 waste -- my client would go down for the 30 days or 45 days,  
23 found to be not competent, then be brought back here, only to be  
24 then sent back to the BOP for the restoration proceeding.

25 We just -- the purpose of that order was to try to

1 combine it. Why would you have to come back here, to this  
2 District, and waste all that time and resource, when you can  
3 just stay there and go through the restoration there, if he's  
4 found not to be competent?

5 **THE COURT:** All right.

6 **MS. KUBIAK:** We could also do a video conference with  
7 the Bureau of Prisons, once their initial report is done. And  
8 that would avoid transport back to this District.

9 Because, in our experience, it could take up to eight  
10 months for that process to complete, in terms of being  
11 transported from the Marshals to the Bureau of Prisons and then  
12 return trip back.

13 So we could set it, potentially, 45 days out. Have a  
14 status where we have the Bureau of Prisons on the line.

15 We would know what their evaluation initially was  
16 relative to competency, and then we could determine at that  
17 moment where we wanted to go from there, without the necessity  
18 of him being transported back to this District.

19 **THE COURT:** All right. Is there any advantage to me  
20 granting the motion?

21 Which I can certainly grant, but then we could  
22 continue to work on what the proposed order looks like.

23 Mr. DiGiacomo, does this document work structurally,  
24 from your perspective?

25 **MR. DIGIACOMO:** Judge, I didn't have -- I mean, I got

1 it. I didn't have a chance to fully look at it.

2 **THE COURT:** That's what I'm concerned about, right?

3 And so neither have I.

4 So I feel like we'd benefit from a go-around of  
5 circulating the draft order and maybe working among yourselves  
6 to refine it. Loop in Mr. Wenke on that, too -- excuse me --  
7 Mr. Zenger.

8 I did that once before. I'm sorry, Mr. Zenger.

9 Loop in Mr. Zenger on the draft order as well.  
10 Because the motion is granted, but we just need to refine what  
11 the order is going to say, at this point.

12 **MR. PASSAFIUME:** Absolutely.

13 **MR. DIGIACOMO:** So, Judge --

14 **THE COURT:** So the motion under 4241(a) is granted.

15 Now, we need to have an order that captures what it  
16 ought to capture, based on the statutory structure.

17 **MR. DIGIACOMO:** So I just want to make sure so that  
18 we're -- it's going to help, I think, in drafting the order --  
19 working with counsel to draft the order.

20 So we're making this -- if I understand what the Court  
21 is saying, this is going to be a two-step process.

22 Since the Court's granting the 4241 **competency** issue,  
23 since the defendant hasn't been sentenced yet, we're going to go  
24 through the procedure of having him evaluated, which he's  
25 entitled to have the **psychological evaluation**, under 4241,

1 subsection (b).

2 Then depending on what that outcome is, we then  
3 determine if we're having a hearing.

4 And then, if -- depending on what happens at that  
5 hearing, then we proceed back under the track we were currently  
6 on.

7 **THE COURT:** What do you say to that?

8 **MR. PASSAFIUME:** That's essentially correct.

9 **THE COURT:** Okay.

10 **MR. PASSAFIUME:** And it depends on what happens at  
11 that hearing, right?

12 **THE COURT:** Okay. All right. I'm willing to, you  
13 know, work with you a little bit, too.

14 There's certainly a little bit of play in the joints  
15 in the statute, but it has to be within reason, too, right?

16 **MR. PASSAFIUME:** Sure.

17 **THE COURT:** We can't just make it all up, because  
18 somebody's going to send it back from BOP and say: This doesn't  
19 compute.

20 And then you're going to be wasting everybody's time.  
21 So we've got to track the statute as much as we can so that it  
22 works.

23 **MR. PASSAFIUME:** Yes.

24 **THE COURT:** We don't want to create a process that  
25 doesn't work and then waste everybody's time.

1           And then, obviously, the other process that's set for  
2           October, we can just leave that sitting for now. And if it's  
3           necessary, we'll use it.

4           If it's necessary to adjourn it, we'll adjourn it. Or  
5           if we cancel it, we cancel it.

6           There's three different outcomes, but we can just  
7           leave it sitting there on the calendar for now, can't we?

8           **MR. PASSAFIUME:** Sure.

9           **THE COURT:** The October process? We'll just leave it  
10          there sitting there. We could use it, cancel it or postpone it,  
11          based on what this 4241 process reveals.

12          In terms of the mechanics, it's got to track the  
13          statute as much as it needs to track the statute to make it  
14          work.

15          So I know Mr. DiGiacomo, Mr. Passafiume, Ms. Kubiak --  
16          all very capable of making that easier for me, right?

17          **MR. DIGIACOMO:** Correct, Judge.

18          And the last thing, I just want to make sure that  
19          defense counsel -- they want the evaluation to occur at the BOP.

20          **THE COURT:** It has to. Yeah. Yeah.

21          **MR. DIGIACOMO:** Okay.

22          **THE COURT:** So, I mean, I could draft -- I could pick  
23          up the statute and write the order, too.

24          But it sounds like there's some hope that we can make  
25          something that works a little bit better, that isn't as

1 difficult or onerous.

2 So I'm willing to play ball a little bit, but I think  
3 you guys have to ease the burden on me on that one.

4 **MS. KUBIAK:** I think we're trying to capture, while  
5 he's there, if the event is an incompetency evaluation, that  
6 they also opine relative to restoration, so that we have that in  
7 front of us at that time.

8 So I think we can structure that within that order.

9 **THE COURT:** Just be mindful of -- my concern is that I  
10 don't want to sign something that's going to fail.

11 **MS. KUBIAK:** I Understand.

12 **THE COURT:** In other words, it's a structural problem  
13 that won't compute, and then he's down there, and nothing's been  
14 accomplished.

15 **MS. KUBIAK:** Right.

16 **MR. PASSAFIUME:** Understood, Judge.

17 **THE COURT:** So that's the concern. So, yes, we can  
18 get there. Why don't you work on that and maybe by the end of  
19 the week, you can have something to me.

20 Where are we today? Tuesday?

21 **MR. PASSAFIUME:** Yes.

22 **THE COURT:** So work amongst yourselves on the draft  
23 order and propose it to me. And that's it, as far as I'm  
24 concerned.

25 Mr. DiGiacomo, anything else from the Government?

1           **MR. DIGIACOMO:** No, Your Honor.

2           **THE COURT:** Mr. Zenger?

3           **THE PROBATION OFFICER:** I have nothing necessarily new  
4 to say, Your Honor.

5           I just want to reiterate for the record that our  
6 concern would be that competency is not the same as the threat  
7 to the community here.

8           So just making sure that that's accounted for as well,  
9 some way, shape, or form, along in this process. But it sounds  
10 like that's going to be lined up, too.

11           **THE COURT:** Right. I agree with that. We've got two  
12 different things at this point.

13           So this is the first, more pressing thing, that we've  
14 got to deal with now under 4241, right?

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

16           **THE COURT:** All right. Anything else from you?

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

18           **THE COURT:** Thank you, everybody.

19

20                           (Proceedings concluded at 3:22 p.m.)

21   \*   \*   \*

22

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 27, 2025  
Date

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