UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LUKE WENKE,

Defendant.

22-CR-35-JLS

SENTENCING MEMORANDUM FOR LUKE WENKE

With trial on the horizon, the parties in this case agreed to a Rule 11(c)(1)(C) plea, with a sentence of imprisonment of 18 months, to be followed by three years of supervised release. This result, which includes Mr. Wenke's first criminal conviction – a felony – as well as a substantial term of incarceration and a prolonged period of federal supervision, was supported by the Government, and acceptable to the Victim, as an adequate pretrial resolution in this case. The defense submits the following memorandum in support of this agreed-upon sentence, and urges the Court to accept the Rule 11(c)(1)(C) plea and sentence Mr. Wenke to 18 months, followed by the statutory maximum of three years of supervised release.

Nature and Circumstances of the Offense

Mr. Wenke is the first to admit that he got carried away. What began as legitimate inquiries for information about a legal matter, and included periods of polite – even friendly – discourse, eventually spiraled out of control and culminated

in threats against the Victim in this case. While Mr. Wenke had no intention of carrying out these threats in any way, he appreciates the severity of his conduct and fully grasps why they were taken so seriously. Indeed, in his post-arrest statement to law enforcement, he acknowledged as much, telling FBI agents that he understood why the Victim was legitimately concerned after he sent the threatening email that led to his arrest.

Mr. Wenke's words and communications were troubling and he must answer for these statements. With a felony conviction and a substantial period of pretrial detention, he has already paid a significant price for his offense. Nevertheless, without minimizing the seriousness of what transpired between Mr. Wenke and the Victim, several limitations to the offense conduct should be noted. First, this was ultimately a crime of words. Mr. Wenke never physically harmed the Victim or anyone in his family. Relatedly, during the period that Mr. Wenke and the Victim were communicating, the only time that Mr. Wenke was present in the same city as the Victim was on July 29, 2021; he did not purchase the parts of a firearm (bought separately, on separate days, disassembled) until several months later, in September and November of 2021. Nor did Mr. Wenke visit any financial harm on the Victim: as noted in the PSR, "the victim has not identified any financial losses for services related to the commission of the instant offense." PSR ¶ 40. All of these factors must be taken into account by the Court at sentencing, to consider the full context of Mr. Wenke's offense: while there are certainly concerning aspects of Mr.

Wenke's offense, the mitigating circumstances set forth above suggest that the agreed-upon 18 month sentence is appropriate in this case.

In the Presentence Report, Probation recommends the application of a two-level enhancement under §2A6.2(b)(1)(E) of the Guidelines, based on "a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim." PSR ¶ 67 (citing U.S.S.G. §2A6.2(b)(1)(E). The defense has filed a separate objection to this enhancement, maintaining its position that the pattern enhancement does not apply. As noted in the Government's statement with respect to sentencing factors (Dkt. 28), the Government agrees that this enhancement does not apply to Mr. Wenke's conduct. Regardless, even if the Court does decide to apply the enhancement and adopt the PSR's Guidelines range of 24-30 months, the 18-month sentence agreed upon by the parties remains the appropriate sentence in this case. Indeed, if Probation's interpretation of §2A6.2(b)(1)(E) is correct, it is difficult to fathom a conviction for cyberstalking which would not result in the application of this enhancement: 18 U.S.C. § 2261(A)(2) specifically requires that the defendant "engage[d] in a course of conduct[.]" Any distinction between "engag[ing] in a course of conduct" and engaging in a "pattern of activity" for purposes of §2A6.2(b)(1)(E) would require a considerable degree of semantic gymnastics. Accordingly, as this enhancement would apply to not just the most-serious instances of cyberstalking, but rather to seemingly each and every violation of this statute, the enhancement does nothing to separate out the more serious offenders from the less so. Put differently, there is no additional level of harm that

the 2-level enhancement punishes that is not already taken into account by the offense itself. For this reason, and in light of the other mitigating circumstances present in this case, even if the Court concludes that Mr. Wenke's Guidelines range is properly calculated at 24-30 months, the agreed-upon sentence of 18 months is nevertheless sufficient to satisfy the objectives of sentencing under 18 U.S.C. § 3553(a). Moreover, this minor variance is particularly appropriate in this case, given the individual characteristics of Mr. Wenke, as set forth below.

History and Characteristics of Mr. Wenke

Mr. Wenke is 30 years old and has lived his entire life in Cattauraugus County. In her letter to the Court, Mr. Wenke's mother describes her son as "extremely intelligent, funny, [and] hard-working[.]" Exhibit A at 1. He has maintained a close bond with his mother, their relationship shaped by the fact that she is legally blind: diagnosed with macular degeneration at a young age, she has long been dependent on her son to drive her to and from medical appointments as well as daily errands and social functions. Id. at 1. More recently when Mr. Wenke lived in Olean, he would stop in to see his mother in Salamanca every day. Id. at 1. His mother describes this as a "tremendous gesture especially from a young man of his age to think of his mother before himself." Id. at 1. As the person who knows him best, his mother describes how, during her frequent phone calls with Mr. Wenke at Niagara County Jail since his arrest, she has "noticed a considerable difference in him" as "he has been thinking heavily about how he needs to change

things." Id. at 1. Critically, as noted at the end of her letter, Mr. Wenke has the continuing support of his family and friends, an essential resource for first-time offenders in avoiding recidivism. See, e.g., The Vera Institute, The Family and Recidivism (2012), available at https://www.prisonpolicy.org/scans/vera/the-family-and-recidivism.pdf (last visited July 20, 2022).

Prior to this offense, Mr. Wenke had no criminal record. Indeed, the "Other Criminal Conduct" referred to in the PSR relates to allegations as minor as walking around with a "No Parking" sign, making off-color jokes on social media, and sending unwanted text messages (which apparently ceased immediately upon the admonition of the local police department). PSR ¶¶ 59-61. Needless to say, threatening a lawyer in another state was remarkably out of character for Mr. Wenke. Mr. Wenke has been candid about the circumstances surrounding this behavior, acknowledging that the lockdowns related to the Covid-19 pandemic left him intensely isolated and may also have triggered his mental health: the PSR notes that Mr. Wenke "stated that he would like an opportunity to participate in mental health treatment for the purposes of addressing stress induced by the Covid-19 pandemic," specifically noting that benefit from counseling designed to help with "managing my environment." PSR ¶ 86. Indeed, given his youth, his lack of prior criminal history, and the nature of the communications in this case, all parties involved believe that mental health evaluation and counseling would be helpful in the future. Prior to entering the plea agreement, the Government, defense counsel,

and Mr. Wenke himself all expressed an interest in this being a part of Mr. Wenke's period of supervised release.

Notably, part of the Rule 11(c)(1)(C) agreement in this case is that the Court would sentence Mr. Wenke to the statutory maximum term of supervised release in this case: three years. Plea Agreement ¶ 10. Given the degree to which Mr. Wenke's offense conduct differs from how he has lived the remainder of his life, this lengthy period of supervision would be both appropriate and productive in helping to ensure that Mr. Wenke takes full advantage of the resources available to him upon his release.

Finally, the Court should consider not only Mr. Wenke's lack of criminal history, but also the related fact that he has never before been incarcerated for any period of time, much less an extended number of months as is in this case. Any suggestion that a higher sentence would be appropriate is undermined by this fact: for Mr. Wenke, the deterrent impact of an 18 month sentence is equivalent to that of a longer sentence: the point has been made and will not soon be forgotten. Moreover, the collateral consequences of Mr. Wenke's felony conviction will be both far-reaching and permanent, serving as a constant reminder to Mr. Wenke of the impact his decisions can have. See United States v. Stewart, 590 F.3d 93, 141 (2d Cir. 2009) ("It is difficult to see how a court can properly calibrate a 'just punishment' if it does not consider the collateral effects of a particular sentence.").

For the foregoing reasons, the defense requests that the Court accept the Rule 11(c)(1)(C) plea agreement of the parties, and sentence Mr. Wenke to a term of

imprisonment of 18 months, followed by three years of supervised release. The combined effect of jail and supervision is sufficient to satisfy the goals of sentencing.

DATED: Buffalo, New York, July 21, 2022

Respectfully submitted,

/s/ Alexander J. Anzalone
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United States v. Luke Marshall Wenke

22-CR-35-JLS-HKS

DEFENDANT'S EXHIBIT A

Dear Honorable John Sinatra,

My name is Janet McCaul. I am a 50-year-old music teacher and Luke Wenke's mother. Luke is extremely intelligent, funny, hard-working young man, and for merely a 30-year-old man, he has accomplished much more then some individuals twice his age.

Luke, is always on a journey to help others. Perfect example, would be on January 28, 2022, the day he was arrested, Luke had an appointment at the Olean police station, because the police had met with Luke on previous occasions due to problems he, along with some of his neighbors, were having with vandalism and stealing from fig raf in the neighborhood. Therefore, the police made an appointment to come down to the station, so they could help Luke organize a neighborhood watch… but obviously, that never happened.

Furthermore, Luke has organized many fundraisers on his own. Not only does Luke help coordinate fundraisers , in general, but he also provides the entertainment. Luke has written, directed and produced many, many plays and musicals for these fundraisers. As a matter of fact, just before he got arrested, he was in the midst of coordinating a fundraiser for the SPCA, where he volunteered.

Luke is extremely passionate about politics. Our family has always been involved in politics, due to my mothers influence. She introduced my children to politics at an early age. You Will find enclosed a picture with me, Luke and Sen. George Borello. Luke and I attended one of his fundraising events and that's where the picture came from. In addition, Luke and I have also had a few lunches with the Sen.. Luke used to be the chairman for the libertarian party of Cattaraugus County.Luke and I attended one of his fundraising events and that's where the picture came from. In addition, Luke and I have also had a few lunches with the Sen. Luke used to be the chairman for the Libertarian party of Cattaraugus County.

So now that I presented you with just a few, selfless acts my son has done, let me tell you about Luke, my loving son. Luke and I are very close, so close in fact, all he has to do is look at my face, and know what I'm thinking. When I was 10, I was diagnosed with macular degeneration so therefore I am classified legally blind and obviously, I cannot drive. Luke, would

always be the one that would take me to the various places I needed to be. For the past two years he drove for a rideshare up in Buffalo and with him living in Olean and me living in Salamanca every day before he would go up to Buffalo he would come to my house check in and visit with his little brother for a while and see if I needed to go anywhere. Quite frankly, I always thought this was a tremendous gesture especially from a young man of his age to think of his mother before himself. Since Luke has been arrested, of course, I talk with him quite frequently and to be honest I have noticed a considerable difference in him. He seemed much more relaxed, patient and he has been thinking heavily about how he needs to change things. Luke is very fortunate that he has many friends and family here to support him.

Thank you for taking the time to read my letter.

Sincerely,

Janet McCaul


BEACH CLUB

Dear Lupe,

As your grandma I know the goodness in you. I'm hoping if you share this with your lawyer and the courts it could possibly help.

Here's a list of some of the good things you've done:

12/21 Gave blood - Connect Life

12/21 SPCA volunteer. Alternoon fundraiser dinner.

12/21 Empathy for lonely, older man - took Alfredo out to lunch.

2015 Fundraiser for cancer patient - Dinner theater at Good Times event center - directed, acted & played piano

~2016 Paid for 100's of American flags & placed in "gardens" of downtown Plean.

- Cares for mother who can't drive
- Close to & cares about sister (nurses aide) & 8yr. old Brother

2012 Associate degree in 1½ yrs. from J.C.C. Jamestown

- Substitute teacher - well liked

~2002 As a 10-12 yr. old you were very caring and waited on your great-grandma. To the degree that I thought you'd make a good nurse.

In 29 years I've never seen a temper or violence in you. What I have seen is a calm, caring, funny, witty, smart & talented person.

Love you, Grandma [redacted]