IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. 22-CR-35-JLS

LUKE MARSHALL WENKE,

Defendant.

GOVERNMENT RESPONSE TO DEFENDANT'S DISCOVERY REQUEST

Pending before the court is an Amended Petition for Offender Under Supervision (Dkt. 88). Generally, the petition alleges the defendant violated a term and/or condition of his supervised release by having direct or indirect contact with individuals the court had ordered the defendant to have no contact with.

On October 16, 2023, the defendant filed a discovery demand (Dkt. 81). The following constitutes the government's response.

1. At the time of this response the government has provided, under separate cover, all statements, both written and oral, currently in the government's possession made by the defendant. Such statements included those made during the course of an interrogation by a person the defendant knew was a government agent.
2. A copy of the defendant's criminal history will be provided under separate cover.
3. The documents the government intends to rely on at the hearing were provided to the defendant under separate cover.
4. The government will not offer any physical or mental examination reports at the hearing.

5. The government will not offer any opinion testimony Pursuant to 702, 703 or 705 of the Federal Rules of Criminal Procedure.
6. The chronological reports from the United States Probation Department were provided to the defendant under separate cover.

The Court Should Deny the Defendant's Request to require The Testimony of RG, Katie [redacted] and Brett [redacted]

Revocation proceedings are not deemed part of a criminal prosecution, and, therefore, defendants in such proceedings are not entitled to 'the full panoply of rights' that criminal defendants generally enjoy." *United States v. Carthen*, 681 F.3d 94, 99 (2d Cir. 2012) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)). The Supreme Court has consistently rejected efforts to impose "rigid requirements that would threaten the informal nature of probation revocation proceedings or interfere with exercise of discretion by the sentencing authority." *Black v. Romano*, 471 U.S. 606, 611 (1985).

Consistent with that flexible approach, the Federal Rules of Evidence do not apply in supervised release revocation hearings, *see* Fed. R. Evid. 1101(d)(3), and hearsay is generally admissible. *See United States v. Jones*, 299 F.3d 103, 110 (2d Cir. 2002); *see also United States v. Aspinall*, 389 F.3d 332, 344 (2d Cir. 2004) (in supervised release revocation proceedings, "normal evidentiary constrictions should be relaxed"), *abrogated on other grounds by United States v. Booker,* 543 U.S. 220 (2005).

A district court may consider the out-of-court statements of an adverse witness if "the court determines that the interest of justice does not require the witness to appear." Fed. R. Crim. P. 32.1(b)(2)(C). "This requirement reflects the principle ... that the 'minimum requirements of due process' in a parole revocation hearing include the right of the defendant to 'confront and cross-examine adverse witnesses (unless the hearing officer specifically finds

good cause for not allowing confrontation).' " *United States v. Williams*, 443 F.3d 35, 45 (2d Cir. 2006) (quoting *Morrissey,* 408 U.S. at 489); *see Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (extending *Morrissey* to probation revocation hearings); *Jones*, 299 F.3d at 109 ("[T]he constitutional guarantees governing revocation of supervised release are identical to those applicable to revocation of parole or probation.").

In analyzing whether the "interest of justice" requires the witness to appear under Rule 32.1, courts "balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay." *Williams*, 443 F.3d at 45. "The defendant's interest is entitled to little weight if the defendant caused the declarant's absence by way of intimidation." *Carthen*, 681 F.3d at 100 (citing *Williams*, 443 F.3d at 45).

Here the defendant requests R.G., Katie [redacted] and Brett [redacted] testify at the revocation hearing. The court should deny this request since any proffered hearsay statements would be reliable. Furthermore, the evidence in support of the violations will consist of, among other things, the testimony of the defendant's United States Probation Officer (who is subject to cross examination), the defendant's social media posts and letters the defendant sent from the Chautauqua County Jail while incarcerated at the facility.

DATED: Buffalo, New York, November 1, 2023.

TRINI E. ROSS
United States Attorney

BY: s/MICHAEL DIGIACOMO
Assistant United States Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202
716-843-5885
michael.digiacomo@usdoj.gov