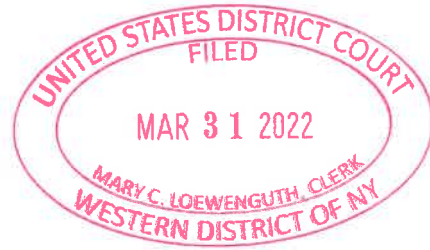


UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

22-CR-35 (JLS) (HKS)

LUKE MARSHALL WENKE,

Defendant.

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**AMENDED PRETRIAL ORDER**

This order will govern the conduct of the trial in this case.

**I. SCHEDULE**

A jury trial is scheduled to begin on **May 2, 2022 at 9:30 a.m.**, at the United States Courthouse, 2 Niagara Square, Buffalo, New York, with respect to Defendant Luke Marshall Wenke. **This is a date-certain trial that will not be adjourned.** Jury selection will begin at that time and will continue until a jury has been selected. The trial will proceed each following day, beginning at approximately 9:00 a.m. and continuing until approximately 5:00 p.m. Counsel and the parties should plan on this schedule, but we will discuss the schedule in more detail at the final pretrial conference.

Counsel must notify the Court immediately if the parties reach a pretrial resolution of this matter. The Court encourages the Government to set a deadline for disposition of the case by plea. This will allow for orderly disposition of cases and avoid unnecessary effort and expense of counsel and the Court.

A final pretrial conference is scheduled for **Monday, April 25, 2022, at 2:00 p.m.** at the United States Courthouse, 2 Niagara Square, Buffalo, New York. A final status conference is scheduled for **Friday, April 29, 2022, at 2:00 p.m.** at the United States Courthouse, 2 Niagara Square, Buffalo, New York. The attorneys who will actually try the case, any paralegal who will be present in the courtroom during the trial, and the defendant must be present at the final pretrial conference and the final status conference.

## **II. PRETRIAL SUBMISSIONS**

Unless otherwise indicated below, the following pretrial submissions must be filed and served via CM/ECF by **April 14, 2022 at noon**:

### **A. *Voir Dire* Preparation**

All parties must submit—on a separate page—the name, firm (if applicable), and business address of each attorney who will try the case, as well as the names of any paralegals or other assistants who will be in court and seated at counsel's table.

Defendant must submit—on a separate page—his full name and address (city/town/village and state).

The Government must submit a list of its prospective witnesses.

Defendant must submit a list of his prospective witnesses.

For proper identification to the jury, the parties' witness lists should include the following:

1. The witness's full name;
2. The witness's occupational association (*e.g.*, FBI, Erie County Sheriff's Department, victim bank teller, etc.);
3. The witness's address (city/town/village and state); and
4. A brief statement of the general subject matter the party expects the witness to cover (*e.g.*, John Doe, chemist who analyzed drugs; Mary Smith, victim teller at bank, etc.).

The Court will conduct *voir dire* by asking the panel a standard list of questions. The parties may file, by the date above, proposed questions that they would like the Court to ask the panel. A party's failure to file a list of proposed questions waives that party's right to request additional questions. In addition to filing their *voir dire* materials, the parties shall send them to the Court, via email to [sinatra@nywd.uscourts.gov](mailto:sinatra@nywd.uscourts.gov), **in Microsoft Word format**.

The parties also shall discuss and work to agree on a concise statement of the case for the Court to use with the jury venire. They shall submit the agreed-upon statement of the case **in Microsoft Word format** to the Court, via email to [sinatra@nywd.uscourts.gov](mailto:sinatra@nywd.uscourts.gov), by **April 21, 2022 at noon**. The parties need not file this joint statement of the case.

**B. Jencks Act (18 U.S.C. § 3500) Material**

The Court prefers that Section 3500 material be exchanged according to a previously-established schedule. And the Court encourages the parties to exchange Section 3500 material as soon as practicable, given the circumstances of the case. This practice avoids lengthy delays during trial and affords the defense a reasonable opportunity to review the material.

The Government shall prepare and submit a separate Section 3500 exhibit list using the Court's form, a copy of which is attached. One courtesy copy of each Section 3500 exhibit shall be tabbed for reference and bound in a three-ring binder and provided to the Court when complete.

**C. Exhibit Lists and Exhibits**

The Government must file an exhibit list on the form attached at the end of this order, which briefly describes each proposed exhibit. This list must include **all exhibits** that the Government intends to use during its case-in-chief. Defendant also must file an exhibit list containing those exhibits that he expects to introduce in his case-in-chief.

The parties also shall include on their exhibit lists exhibits that they reasonably anticipate they will use during cross-examination for impeachment, to refresh a witness's recollection, or otherwise.

All exhibits shall be denominated by number, and all sub-exhibits shall be designated alphabetically. All exhibits on the exhibit list must be physically tagged and marked with the appropriate stickers before trial begins. To the extent that there are joint exhibits, those exhibits shall be listed on the Government's exhibit list only.

Counsel shall confer before submitting exhibit lists, and must identify the exhibits for which admissibility is not contested and the exhibits that they will stipulate into evidence. Counsel should be prepared to discuss stipulating exhibits into evidence at the final pretrial conference. Notwithstanding any agreements reached by counsel, **all exhibits (including joint exhibits) must be formally moved into evidence at the appropriate time during trial.**

By **April 21, 2022 at noon**, counsel for the other side shall specify the exhibits to which they will object and the grounds.

At the final pretrial conference, each party must provide the Court and opposing counsel with courtesy copies of the exhibits, bound in three-ring binders with tabs for each exhibit. Each party also must provide the Court with a second, complete set of documentary exhibits in electronic format (*e.g.*, CD or flash drive).

At the close of trial, counsel for each party shall submit a final exhibit list, specifying the date an exhibit was marked and admitted into evidence, which the Court shall file as a court Exhibit.

**D. Witness Lists**

The parties shall file a list of names and addresses (city/town/village and state) of all prospective witnesses. For each witness, the parties shall provide a brief summary of the anticipated testimony, including anticipated date and length of testimony (in hours and minutes). The parties should include expected rebuttal witnesses on their lists but need not summarize those witnesses' anticipated testimony. Failure to meet these requirements with respect to any witness may result in preclusion of testimony by that witness. These lists are in addition to those required in Section II.A for use at *voir dire*.

**E. Stipulations**

The parties should consider appropriate stipulations concerning undisputed facts or testimony—especially stipulations that would relieve custodians of business records and chain-of-custody witnesses from appearing at trial.

If the Government wishes to present proof by stipulation, it must submit to opposing counsel proposed stipulations of fact or testimony by **April 14, 2022 at noon**, with a request that Defendant agree to the stipulations. Defendant shall notify the Government as soon as possible, but not later than **April 21, 2022 at noon**, whether he will agree to the proposed stipulations.

The parties need not file proposed stipulations with the Court as part of their pretrial submissions. The Court will discuss the proposed—and any agreed-upon—stipulations with the parties at the pretrial conference to prepare a list of uncontroverted facts to which the parties will stipulate.

**F. Impeachment of Witnesses under Federal Rules of Evidence 608 and 609**

Both the Government and Defendant must file a notice if they intend to impeach any witness—including Defendant, should he choose to testify—by evidence of his or her character or specific instances of conduct under Federal Rule of Evidence 608, or by evidence of a prior conviction under Federal Rule of Evidence 609.

The notice shall include the specific nature of the proposed impeachment evidence, including the dates of the prior acts or convictions, and citation to case law that may assist the Court in determining admissibility. A party who files such a notice shall attach copies of any relevant exhibits that it seeks to introduce.

**G. Evidence of Other Crimes, Wrongs, or Acts under Federal Rule of Evidence 404(b)**

The Government must file a notice if it intends to introduce evidence of other crimes, wrongs, or acts under Federal Rule of Evidence 404(b), whether in its case-in-chief or as rebuttal evidence.

The notice shall include the specific nature of any such evidence, including: the dates of the prior crimes, wrongs, or other acts; the specific purpose(s) under Federal Rule of Evidence 404(b) for which the evidence will be introduced; and citation to any case law that may assist the Court in determining admissibility. The government shall attach to the notice copies of any relevant exhibits that it seeks to introduce.

#### **H. Tapes and Transcripts**

The Government must submit to the Court and to opposing counsel the final version of any transcripts of tapes of electronic eavesdropping or monitoring that it intends to introduce to the jury. Transcripts need not be filed with pretrial submissions.

Defendant must file any objection to the transcripts or move against them by following the procedures set forth in paragraph J, below.

#### **I. Expert Testimony**

The parties shall provide the Court and opposing counsel with the identity, address (city/town/village and state) of any expert witness and a brief summary of his or her qualifications and expected testimony, **including anticipated date and length of testimony (in hours and minutes).**



The Court encourages counsel to stipulate to each expert witness's qualifications before the final pretrial conference. Failure to include an expert witness on the expert witness list may result in preclusion of that witness's testimony.

**J. Trial Memoranda and Motions *in Limine***

By **April 14, 2022 at noon**, each party shall file a trial memorandum outlining the facts it expects to prove at trial and addressing any legal issues, including any evidentiary issues, that it expects to arise at trial. Each party's trial memorandum should note the facts that party deems uncontroverted and that are the subject of a proposed stipulation.

By **April 21, 2022 at noon**, each party may file a response to the other party's trial memorandum that supplements or contests the facts outlined in the opposing party's trial memorandum and addresses any additional legal or evidentiary issues expected to arise at trial. If either party has agreed to proposed stipulations regarding any uncontroverted facts, it should note those facts in its response.

Both the Government and Defendant must file any motions *in limine* concerning any potential evidentiary proof or procedural issues that may arise during the trial by **April 14, 2022 at noon**. Oppositions to any motions *in limine* are due by **April 21, 2022 at noon**. All motions *in limine* must be accompanied by memoranda of law that include citations to relevant case law, to assist the Court in resolving the issues. The Court will hear argument on the motions *in limine*, if necessary, at the final pretrial conference.

It is in everyone's interest that the Court is aware of potential issues in advance so it may carefully consider the parties' positions before making a decision. Not all issues can be anticipated, but many evidentiary issues can be—*e.g.*, (1) the possibility that witnesses assert their Fifth Amendment rights; (2) impeachment of witnesses or Defendant by character evidence, specific instances of conduct, or evidence of prior conviction; (3) admissibility of other crimes, wrongs, or acts to prove intent, motive, etc. under Federal Rule of Evidence 404(b); (4) authentication of tapes and voice identification; (5) obvious hearsay problems; (6) prior inconsistent statements; and (7) objections to expert testimony.

## **K. Jury Instructions and Verdict Forms**

By **April 21, 2022 at noon**, each party shall file and provide to defense counsel and the Court a **complete** set of proposed jury instructions—general and substantive—that address the general instructions to be given at the close of trial, any instructions on the specific offenses charged, and any instructions on issues particular to the case. In addition to filing the proposed jury instructions, each party also shall provide **an electronic copy** of the proposed jury instructions in **Microsoft Word format** to the Court by the same date, via email to [sinatra@nywd.uscourts.gov](mailto:sinatra@nywd.uscourts.gov).

Each proposed instruction must be consecutively numbered and set forth on a separate page. The instructions should be arranged in a logical sequence and must include an index or a table of contents. The source or authority shall be appended to the end of each instruction. Each proposed instruction should, when appropriate, be taken from L. Sand, et al., Modern Federal Jury Instructions; otherwise, each instruction should be supported by strong legal authority. If the instruction is modified from a form instruction, the party submitting that instruction must so indicate.

The parties may file any objections to the opposing party's proposed instructions by **April 27, 2022 at noon**, following the above guidelines.

The parties shall file any other proposed instructions, based on events that occurred during trial, as soon as possible using the procedures set forth above.

The parties shall file their proposed general or special verdict forms (if applicable) by **April 21, 2022 at noon**, and also shall provide a copy of their proposed verdict forms to the Court in **Microsoft Word format**, via email to [sinatra@nywd.uscourts.gov](mailto:sinatra@nywd.uscourts.gov).

The parties are reminded that these submissions are intended to assist the Court in formulating the final instructions to the jury. The Court will conduct a jury charge conference with counsel—and inform counsel of the Court’s intended jury charge and the general or special verdict sheet it intends to use—before closing arguments. Counsel may object to the intended instructions or request additional or alternative instructions at that time.

### **III. TRIAL PROCEDURE**

At the end of each trial day, the Court will advise counsel of its next-day schedule so they can make arrangements for witnesses and any other necessary accommodations. Counsel are responsible for ensuring that witnesses are available as needed.

Also at the end of each trial day, counsel will inform the Court and opposing counsel which witnesses they expect to call the following day. Counsel are expected to cooperate in scheduling witnesses. Counsel should have witnesses ready to testify, so there are no gaps in testimony. The Court may take witnesses out of turn—to accommodate witnesses or in the interest of fairness.

The jurors' time is valuable time, and the Court will not tolerate wasting that time with bench conferences concerning matters that could be resolved before the jury is summoned, during breaks, or in the evening. If the Court recesses to, for example, 9:00 a.m., it expects that proof will begin at that time. If counsel anticipate issues or need to see the Court, they must make arrangements to meet with the Court **before** the jury is scheduled to arrive or in the evening after the jury departs for the day.

Exhibits that are marked and received into evidence will remain for the duration of the trial on the counter next to the court reporter. In the evenings, each side is responsible for maintaining custody of its exhibits and returning them to court the next day, unless they make other arrangements with the Court.

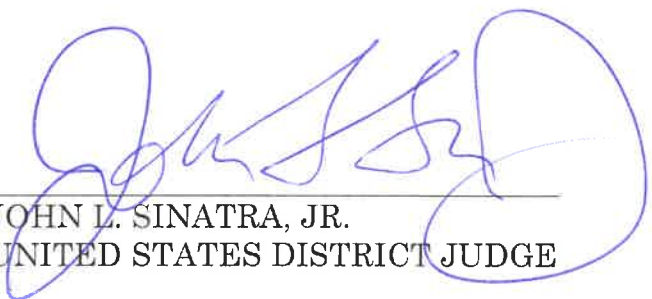
The Court may set time limits for opening statements and closing arguments and expects that, if imposed, counsel will adhere to those limits. We will address these time limits—and other items, such as recesses, objections, courtroom equipment, etc.—at the final pretrial conference.

IV. SPEEDY TRIAL EXCLUSION

As discussed at the appearance on March 21, 2022, time is excluded for purposes of the Speedy Trial Act, to and including jury selection on May 2, 2022, in the interests of justice under 18 U.S.C. §§ 3161(h)(7)(A) and 3161(h)(7)(B)(iv). *See* Dkts. 14, 16.

SO ORDERED.

Dated: March 31, 2022  
Buffalo, New York



JOHN L. SINATRA, JR.  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

## EXHIBIT LIST

Case No. : \_\_\_\_\_

Government

Date: \_\_\_\_\_

Defendant

[illegible]