PT. 99 JAN - 8 2020

January 8, 2020

Hon. James Burke
New York Supreme Court for New York County
Part 99, Room 1530
100 Centre Street
New York, NY 10013

Re: *People v. Harvey Weinstein*, Ind. No. 2335/2018

Dear Judge Burke:

We write to seek recusal of Your Honor from this case based on the prejudicial and inflammatory comments made by the Court to Mr. Weinstein yesterday morning, which received widespread press attention, in which the Court admonished Mr. Weinstein for using his cell phone in the courtroom before Court was in session:

> Mr. Weinstein, I could not implore you more to not answer the following question: Is this really the way you want to end up in jail for the rest of your life, by texting in violation of an order? Is it?

These comments reflect the Court's animus towards the Defendant and have created a situation in which the Court's "impartiality might reasonably be questioned," in violation of New York State's Rules of Judicial Conduct. 22 NYCRR 100.3(E)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."). This animus is supported and compounded by the Court's failure to adequately safeguard Mr. Weinstein's right to a fair and impartial jury in this case. Faced with extreme and unfairly prejudicial negative publicity both pre-trial and now during jury selection, this Court has refused the defendant's requests for additional necessary procedural safeguards.

First, the Appellate Division denied the defendant's change of venue motion, filed August 20, 2019.

Second, the Court denied Mr. Weinstein's request to adjourn his trial for a cooling off period, after the Los Angeles County District Attorney's Office held a press conference on January 6, 2020, the eve of Mr. Weinstein's jury selection, announcing "Harvey Weinstein has been charged with raping one woman and sexually assaulting another in separate incidents over a two-day period in 2013." *See* http://da.lacounty.gov/media/news/hollywood-producer-harvey-weinstein-charged-sexually-assaulting-two-women-2013. This unprecedented press conference was no coincidence and was orchestrated to inflict maximum damage to Mr. Weinstein by unleashing a storm of extremely negative publicity, just as his jury was about to be selected in this case. There was no reason for the Los Angeles DA's Office to make the announcement when it did, other than to unfairly taint the jury pool in this case.

Third, the Court denied Mr. Weinstein's request for additional time to voir dire jurors, announcing its intention to permit just 15 minutes of voir dire per each panel of 20 jurors, i.e., 45 seconds per juror. That short amount of time is inadequate to address the multiple complex and nuanced issues that must be explored in the trial of a case credited with sparking the #MeToo movement.

Fourth, the Court denied Mr. Weinstein's request to have his jury consultant, who is a member in good standing of the New York State Bar, sit at counsel table to consult with other members of his trial team during voir dire.

For these reasons, it has become clear to Mr. Weinstein that the Court has already violated its own mandate to the potential jurors by deciding that Mr. Weinstein is guilty before it has heard any of the trial evidence. Accordingly, we seek the Court's recusal from this matter and assignment of the trial to another judge. It is a "clear abuse of discretion" to deny recusal when a judge's "impartiality might reasonably be questioned." *Concord Assocs., L.P. v. EPT Concord, LLC*, 15 N.Y.S.3d 270, 273 (N.Y. App. Div. 2015). Actual bias is not necessary for recusal; a mere "appearance of bias" mandates recusal in order to preserve the public's confidence in the judicial system. *People v. Zappacosta*, 77 A.D.2d 928, 929, 431 N.Y.S.2d 96, 98 (N.Y. App. Div. 1980) (trial court erred in grand larceny case by denying recusal motion because "[a]lthough the instant record leaves no doubt as to the trial court's actual impartiality and total absence of any real prejudice, we must be constantly vigilant to avoid even the appearance of bias which may erode public confidence in the judicial system as quickly as would the damage caused by actual bias.").

In the alternative, to safeguard Mr. Weinstein's constitutional right to a fair and impartial jury we request the following relief: (1) an adjournment of the trial to permit the extreme negative publicity generated by the LA charges to dissipate (2) more time to conduct voir dire, and (3) permit Mr. Weinstein's jury consultant to sit at counsel table during voir dire, to consult with the rest of the trial team.

1. <u>The Court's Comments and Press Reaction</u>

On the morning of January 7, 2020, prior to proceedings in this case beginning for the day, the Court was made aware that Mr. Weinstein had used his cell phone while in the courtroom. The Court proceeded to admonish Mr. Weinstein, "[i]s this really the way you want to end up in jail for the rest of your life?" Such a comment is extremely prejudicial and evidences the Court's bias against Mr. Weinstein in either one of two ways. Either the Court was suggesting that an appropriate sanction for use of a cell phone in court was life in prison, *or* the Court was suggesting that Mr. Weinstein is guilty, would surely be convicted, and that the Court already knew that it intended to sentence him to life in prison.

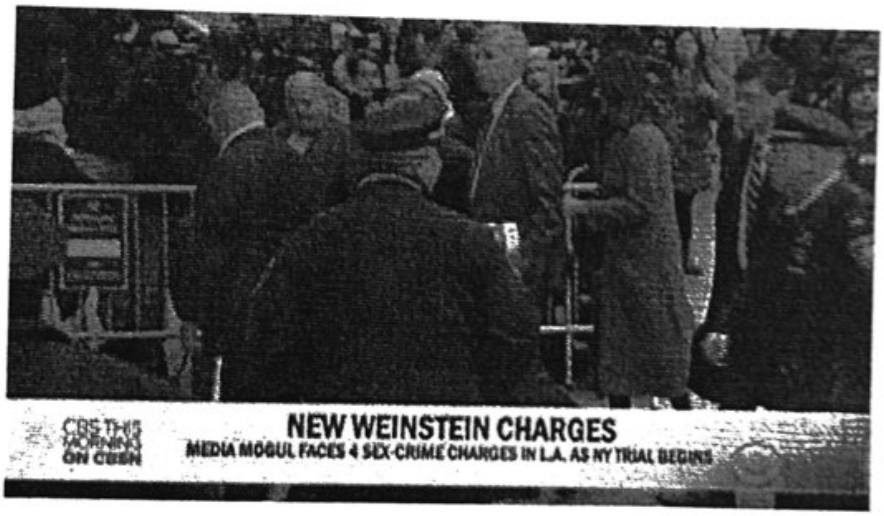
The Court's comments were so inflammatory, biased, and prejudicial that they have virtually gone viral. Attached hereto as Exhibit A is a list of news reports about the Court's comments. The Court's comments were published in *The New York Times*, the *New York Daily News*, and the *New York Post*, as well in *HuffPost*, *The Wrap*, *Fox News*, *Buzzfeed*, and the Hollywood publication *Deadline*. A tweet recounting the incident from a reporter has already been favorited over 18,000 times and retweeted close to 300 times. It is without question that damage has been done to the

appearance of fairness in this trial. Respectfully, the only remedy is for the Court to recuse itself from any further involvement in this case, particularly before a jury can be impaneled.

2. The Appellate Division Denied Mr. Weinstein's Change of Venue Motion

On October 3, 2019, the Appellate Division denied Mr. Weinstein's motion to change venue out of New York County, a motion which was made based on the overwhelmingly negative pre-trial publicity and interest his case had received. The extremely prejudicial negative pre-trial publicity has only intensified since the Court denied that motion and underscores the need for Your Honor to be recused from the case.

In New York County, Mr. Weinstein faces a daily gauntlet of reporters, gawkers, and negative backlash as he makes his way to Court each day. The courtroom has been filled to capacity with press. Reporters line the streets and the halls as Mr. Weinstein makes his way to Court, as the below photos illustrate:


CBS THIS MORNING ON CBSN
NEW WEINSTEIN CHARGES
MEDIA MOGUL FACES 4 SEX-CRIME CHARGES IN L.A. AS NY TRIAL BEGINS

This extreme press attention is observed by potential jurors who must walk the same gauntlet each day. The message to potential jurors is clear: this is a massively important case and your decision will be highly scrutinized; the wrong decision will subject you to public backlash and ridicule.

To help address the unfairly prejudicial environment in which this case is being tried, Mr. Weinstein has sought additional legal protections, which have been denied.

3. The Court Improperly Denied Mr. Weinstein's Request for an Adjournment Until the Negative Media Attention Generated by the California Case Has Dissipated

On January 6, 2020, the eve of jury selection in this case, the District Attorney for Los Angeles County, California released a new criminal complaint against Mr. Weinstein in which he was charged with one felony count each for forcible rape, forcible oral copulation, sexual penetration by use of force, and sexual battery by restraint. He faces up to 28 years in prison if convicted. As counsel has made clear to Your Honor, it was no coincidence that the California case was made public the same day that these proceedings got underway. This was nothing less than a coordinated effort against Mr. Weinstein, orchestrated by the office of District Attorney for L.A. County.[1] There was no need or logical reason for the charges to have been filed in California at this moment, except to prejudice Mr. Weinstein as his trial in New York begins, poison the jury pool, and ensure that he does not receive a fair trial. As such, it was improper for the Court to deny Mr. Weinstein's request for an adjournment of this trial until the media attention stirred up by the coordinated New York – Los Angeles effort has died down.

The media coverage of the California case was monumental on January 6 alone. Attached hereto as Exhibit B is a list of news article regarding the California case. At least 96 articles, including 20 articles within the New York media, 11 articles within the Los Angeles media, and 65 articles

[1] The Court should inquire into whether or not the People in this case knew about the timing of the California charges and took a position, especially since this issue was specifically discussed on the record on January 6, 2020.

within the national media were published yesterday regarding the new case. These articles go into detail regarding the new charges, discuss the scene inside and outside of the New York courtroom, and discuss the breadth of other allegations against Mr. Weinstein over the last two years, with many news outlets reporting that Mr. Weinstein has roughly 80 accusers. The online comments sections of these articles reflect the negative slant of the stories being published, with many questioning Mr. Weinstein's use of his doctor-prescribed walker and hoping Mr. Weinstein goes to jail – and with one commenter going so far as to say, "maybe they'll give him [Jeffrey] Epstein's cell."

It is undoubtedly the case that the prejudicial media coverage over the new criminal indictments has lit the "fires of prejudice" (*Groppi v. Wisconsin*, 400 U.S. 505, 510 (1971)), thus preventing Mr. Weinstein from receiving a fair trial at this time. It is an axiom of American law that criminal defendants have the right to be tried in a forum "free of prejudice, passion, excitement, and tyrannical power." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (internal citations omitted); *see also People v. Boss*, 261 A.D.2d 1, 3-4 (1st Dep't 1999) (noting that a fair trial requires quelling public passion and the press, in order to avoid a "carnival atmosphere") (internal citations and quotation marks omitted). The *Sheppard* case is instructive here. In that case, which involved a trial court conviction of second-degree murder for the bludgeoning death of the defendant's wife and where the defense had argued for a postponement of the trial to counter the prejudicial effects of press about upcoming judicial elections involving the judge and chief prosecutor in the case, the U.S. Supreme Court indicated that the trial court should have granted a postponement until the media coverage had dissipated:

> At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. *Voir dire* examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, ***it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections***.

Sheppard, 384 U.S. at 354 n.9 (emphasis added). This remedy is exactly the sort of cooling period that would benefit this case. It is the proper remedy where, as here, the most polarizing media story of the last two years, which caused the birth of an international movement, has been reignited. If a postponement to mitigate negative media coverage prejudicing the jury is not an appropriate remedy under these circumstances, it is hard to imagine when it would be more appropriate.

4. <u>The Court Denied Mr. Weinstein's Request For More Than 15 Minutes To Conduct Voir Dire</u>

Because of the torrent of prejudicial media coverage, as well as the Los Angeles County DA's maliciously-timed press conference, the Defendant requested that the parties be given additional

time to voir dire prospective jurors. A searching voir dire is critically important to increasing the likelihood that Mr. Weinstein's case is heard by an impartial jury, a right afforded to every criminal defendant by the United States Constitution. Instead, the Court afforded Mr. Weinstein just 15 minutes per 20 jurors. It is clearly unreasonable to expect that all potential biases—which may be latent and unknown even to the jurors themselves—will be surfaced in 45 seconds of question-and-answer.

As the Court of Appeals has long held, and reiterated just months ago, "nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury." *People v. Neulander*, 34 N.Y.3d 110 (Oct. 22, 2019) (Slip Op.) (murder conviction overturned due to juror misconduct); *People v. Branch*, 46 N.Y.2d 645, 652 (1979) (murder conviction overturned because bias juror impaneled). Protecting the right to an impartial jury is especially important in a high-profile case such as this one, which has received more media coverage than any other in recent memory. As the First Department has held, a criminal defendant's right to a fair trial means "a trial that is not dominated by a 'wave of public passion' (*Irvin v. Dowd*, 366 U.S. 717, 728), that is not overwhelmed by press coverage (*Murphy v. Florida*, 421 U.S. 794, 798), and that is not conducted in a 'carnival atmosphere' (*Sheppard v. Maxwell*, 384 U.S. 333, 358)." *See Boss*, 261 A.D.2d at 3.

Courts have afforded defendants ample time to conduct a searching voir dire in cases that have garnered a fraction of the publicity that this case has. For example, in *People v. Sloan*, 79 N.Y.2d 386, 583 N.Y.S.2d 176 (1992), the court ordered individual sequestered *voir dire* of jurors in a case involving a robbery and the assault of local television news anchor John Roland, based on the publicity of the case. Similarly, in *People v. Ricks*, 218 A.D.2d 820, 631 N.Y.S.2d 56 (2d Dep't 1995), the court conducted individual sequestered *voir dire* of jurors regarding pre-trial publicity in a murder case. In *People v. Knapp*, 113 A.D.2d 154, 495 N.Y.S.2d 985 (3d Dep't 1985), the "County Court granted defendant's request to individually examine the potential jurors" based on pre-trial publicity. The individual questioning of jurors clearly took longer than 45 seconds per juror.

More recently, it is our understanding that jury selection lasted three weeks in the retrial of the alleged killer of Etan Patz, the child who disappeared in 1979 and was one of the first children featured in a "milk carton campaign." *People v. Hernandez*, No. 4863/12 (N.Y. Sup. Ct.). While the *Hernandez* retrial attracted national media attention, the volume and prejudicial nature of the publicity paled in comparison to this case. The severity of the sentence faced by the defendant in *Hernandez* was the same as that faced by Mr. Weinstein – life in prison.

In order to increase the likelihood that Mr. Weinstein's constitutional right to an impartial jury is protected, the parties should be afforded more time than 45 seconds to voir dire each juror.

5. <u>The Court Denied Mr. Weinstein's Request for Participation of His Jury Consultant at Counsel Table</u>

Lastly, this Court's decision to not allow Mr. Weinstein's jury consultant to sit at the counsel table while the case proceeds through the jury impaneling process, was unnecessary and further counsels in favor of Your Honor's recusal. This morning, we requested that Mr. Weinstein's jury consultant, an attorney admitted to practice law in the State of New York, be allowed to sit with Mr. Weinstein's trial team during the proceedings. For some reason, the Court refused and insisted

that Mr. Weinstein's jury consultant sit in the last row of the courtroom behind members of the press. Mr. Weinstein is plainly entitled to have other attorneys participate in his defense under the Sixth Amendment to the U.S. Constitution. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006). There would be no actual prejudice to the prosecution from allowing Mr. Weinstein's full trial team to participate in his trial.

Conclusion

For the foregoing reasons, Mr. Weinstein respectfully requests that the Court recuse itself from this matter and that it be reassigned to another judge. In the alternative, Mr. Weinstein respectfully requests the following relief: (1) an adjournment of the trial to permit the extreme negative publicity generated by the LA charges to dissipate, (2) more time to conduct voir dire, and (3) that Mr. Weinstein's trial consultant be permitted to sit at counsel table during voir dire, to consult with the rest of the trial team.

Respectfully submitted,

Judd L. Siddala

attachments

cc: ADA Joan Illuzzi