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January 10, 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 request individual and sequestered voir dire of all jurors who are not dismissed for cause or hardship, following the Court's preliminary screening process. Now that we are a few days into jury selection and we have had the opportunity to review the written jury questionnaires, we have learned that: (1) some jurors have not been candid in their responses; (2) at least one juror has expressed an ulterior financial motive for serving on Mr. Weinstein's jury and that he would find him guilty; (3) a number of jurors have been victims of or had exposure to sexual assault or domestic violence; and (4) nearly all jurors have heard about this case, which must be explored during voir dire.

In addition, this Court's Order denying Mr. Weinstein's motion for an adjournment to allow the publicity to dissipate from the recent California case requires adding the California case to the list of topics that must be covered during voir dire. Indeed, the Court suggested that any prejudice from the California case was a topic that could be explored during voir dire; but that takes time. While we appreciate the Court's desire to conserve judicial resources by limiting voir dire to a maximum of 45 seconds per juror, the parties have only been in court for half days this week addressing hardship excuses and jurors who say they cannot be fair. A vast amount of effort is being placed into qualifying potential jurors whom the parties will have virtually no time to speak with. We submit that it is the second part of the voir dire process into which the Court and the parties should be investing the most time learning about the jurors.

Finally, based on our legal research, we believe the Court is required to strike all 32 prospective jurors who remained in the venire from the panel that was convened on January 8, 2020, on the ground that those jurors were exposed to unfairly prejudicial inadmissible evidence due to the statement made by prospective juror Ava Lim, when she said in open court: "I have a

close friend who had an encounter with defendant in his hotel room, and I do not think I can be a fair juror in this case.”

1. Request for Individual and Sequestered Voir Dire

The United States Supreme Court has recognized that individual and sequestered voir dire may be warranted in some circumstances. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 602 (1976) (“[I]t may sometimes be necessary to question on voir dire prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information”) (Brennan, J., concurring).

State and federal courts in New York and elsewhere have ordered individual sequestered voir dire to protect the defendant’s constitutional right to an impartial jury. *See, e.g., People v. Sloan*, 79 N.Y.2d 386, 583 N.Y.S.2d 176 (1992) (ordering individual sequestered voir dire of jurors in a case involving a robbery and assault based on the publicity of the case); *People v. Ricks*, 218 A.D.2d 820, 631 N.Y.S.2d 56 (2d Dep’t 1995) (individual sequestered voir dire of jurors regarding pre-trial publicity in a murder case); *People v. Knapp*, 113 A.D.2d 154, 495 N.Y.S.2d 985 (3d Dep’t 1985) (trial court granted defendant’s request “to individually examine the potential jurors” based on pre-trial publicity); *United States v. Wilson*, 493 F. Supp. 2d 397, 400-01 (E.D.N.Y. 2006) (ordering voir dire take place in “an individually sequestered setting” in order to “uncover any potential bias” from pre-trial publicity in a capital case). At least one court has found that denying a defendant’s request for individual voir dire, because the court found it inconvenient, was an abuse of discretion. *See United States v. Blitch*, 622 F.3d 658, 667 (7th Cir. 2010) (finding abuse of discretion when trial judge decided not to conduct individualized voir dire on the issue of juror bias because of scheduling concerns regarding the judge’s upcoming commitment to sit by designation on another court).

Sequestered individual voir dire promotes honesty because juror privacy is preserved and it avoids public judgment of jurors’ answers. Those concerns take on heightened significance when, as here, there is massively intense media coverage and the issues in the case are sensitive, polarizing, and deeply personal.

Jury selection has revealed that some jurors have not been candid in their written juror questionnaires, which supports the need for individual sequestered voir dire. At 2:05 P.M. on January 7, 2020, after jurors completed the written questionnaires in court, a prospective juror in this case tweeted to his/her nearly 7,000 followers:

If anyone knows how a person might hypothetically leverage serving on the jury of a high-profile case to promote their new novel, [REDACTED], which [REDACTED] called “a darkly funny book” and “a witty black comedy,” dm me, please.

Over the course of the day, the tweet prompted several comments, including: “I don’t know if this counts as jury-tampering but he’s guilty.” This comment was “liked” by the juror. See Exhibit A.¹

This juror assured the Court and the parties in his questionnaire that s/he would be able to decide the case exclusively on the evidence presented in Court, that s/he would be an impartial juror, and that s/he would be able to follow the Court’s instruction to “avoid all media coverage and not look on the internet for this case for any purpose.” Instead, this juror is already prepared to find Mr. Weinstein guilty, has tweeted about the case, and is considering how to profit from it.

Another juror posted to Facebook about jury service in this case. When a friend messaged the juror if s/he had been “paneled for Weinstein,” this juror reacted with a laughing emoji – 😂. A redacted copy of the Facebook post is attached hereto as Exhibit B. Besides the fact that the juror was discussing the case on Facebook, making light of jury service in a case where the defendant faces life in prison suggests that this juror lacks the seriousness and diligence required for jury service in this case.

We have also learned that a juror authored a book, to be published in the Summer of 2020, about women who “negotiate fraught friendships, sexuality, class, and *predatory older men* on the journey from innocence to independence.” (emphasis added). But when asked in Question #72 of the written questionnaire “Is there anything else that you believe the Judge and the parties should know about your qualifications to serve as a fair and impartial juror in this case?,” the juror’s response was “No.” Clearly, the fact that the prospective juror has written a book that involves women who negotiate “predatory older men” – the very accusation made against Mr. Weinstein – is something the Court and the parties “should know about,” but the juror omitted it from his/her questionnaire.

These examples from the opening days of jury selection demonstrate that more must be done to ensure a meaningful, constitutionally sufficient voir dire that will uncover all of the information that the Court and the parties “should know about” the potential jurors. There is a clear need to question further even those jurors who gave answers on the questionnaires that might not otherwise disqualify them.

Another reason why the Court should conduct sequestered individual voir dire is that the written questionnaires from the first day of jury selection have revealed that a high percentage of prospective jurors have personally experienced, or have a connection to someone that has experienced, sexual assault and/or domestic violence. The prosecution intends to offer Dr. Barbara Ziv, a forensic psychiatrist, as an expert witness in this case. We expect Dr. Ziv will attempt to offer an opinion that sexual assaults are more prevalent than people generally realize because a large majority of sexual assaults go unreported to law enforcement. Statements made by prospective jurors who have a connection to sexual assault or domestic violence may be viewed in the eyes of the rest of the jury pool as extrinsic evidence corroborating Dr. Ziv’s opinion. The other prospective jurors must not be exposed to such statements, which carry the

¹ To protect juror privacy, we have redacted the exhibits, but will provide unredacted copies to the Court.

risk of converting voir dire into an improper form of unfairly prejudicial and inadmissible extrinsic evidence that improperly bolsters the prosecution's expert witness. While the prospective jurors who made such indications on their questionnaires should be dismissed for cause, to the extent any follow-up questioning is required – particularly in light of the anticipated testimony from Dr. Ziv – it should be in camera, to both avoid contaminating the jury pool and avoid publicly revealing personal, highly-sensitive information.

Due to the nature of the allegations, Mr. Weinstein's constitutional right to uncover potential bias against him requires that these jurors be asked about these matters, which are extremely private and sensitive. *Sampson v. United States*, 724 F.3d 150, 167 (1st Cir. 2013) (“When a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias.”) (citing *United States v. Torres*, 128 F.3d 38, 47-48 (2d Cir. 1997)). These jurors cannot (and should not) be expected to answer questions about sexual assault and domestic violence in front of dozens of strangers, including the throngs of reporters who attend court each day.

In fact, widely-read media outlets, such as the *New York Times*, have already published the name of a prospective juror and the responses the juror gave in open court during the first day of jury selection. See <https://www.nytimes.com/reuters/2020/01/07/arts/07reuters-people-harvey-weinstein.html>. To be sure, publishing the names and responses of jurors in the newspaper is atypical for any criminal case. We expect that this will have a chilling effect going forward, as jurors may not want their voir dire answers published.

Individual and sequestered voir dire is also necessary to prevent the spread of prejudicial information across the venire. The overwhelming majority of jurors who have filled out a questionnaire so far reported hearing about this case. Their knowledge and feelings about the case must be individually explored. During that questioning, some jurors may express negative feelings about Mr. Weinstein or the case or blurt out information (whether true or false) that they learned in the media, of which their fellow jurors were not aware. This has already happened. During the proceedings on January 8, 2020, a prospective juror stated, in open court: “I have a close friend who had an encounter with defendant in his hotel room, and I do not think I can be a fair juror in this case.” 1/8/20 Tr. 173:15-18. As we discuss below, this unfairly prejudicial inadmissible evidence must result in striking the other jurors from that panel. Individual sequestered voir dire will avoid that issue going forward.²

While individual sequestered voir dire of each juror will take more time, the Court and the parties have already allotted six full days selecting the venire, but have only been in court in the mornings. It would render this effort meaningless to spend a mere 15 minutes on voir dire after proceeding so thoroughly to this point. The Court should not elevate expedience over the need to vigorously protect Mr. Weinstein's constitutional rights. Those rights can only be adequately preserved through thorough, searching, and patient voir dire, conducted individually and outside

² We submit that the Court should instruct all subsequent juror panels that appear for preliminary screening that if they know they cannot be fair and impartial, they should not state the reason in open court.

the presence of the other jurors. Yesterday, the Court acknowledged that the jury timeline can be adjusted if necessary. Based on the information contained herein, we suggest it would be an abuse of discretion not to adjust the voir dire timeline in this case, going forward.

2. Motion to Strike the 32 Potential Jurors from the January 8, 2020 Venire

On January 8, 2020, during the Court's questioning of the venire, the Court asked prospective jurors if they would be able to consider the evidence fairly:

The trial is to be conducted for you to decide whether the defendant is guilty or not guilty. Does everyone understand that? Is there anyone here who is going to say well, if he's indicted, he's guilty, I do not even need to hear any evidence, my mind is already made up, does anyone feel that way?

1/8/20 Tr. 166.

In response to that question, a prospective juror on the venire named Ava Lim gave the following response in open court:

THE PROSPECTIVE JUROR: My name is Ava L.I.M. I have a close friend who had an encounter with defendant in his hotel room, and I do not think I can be a fair juror in this case.

1/8/20 Tr. 173. This statement was made in front of the 32 prospective jurors who subsequently filled out jury questionnaires and remain part of the pool of potential jurors.

Following the conclusion of the Court's questioning and during a conference outside of the presence of the prospective jurors, counsel for Mr. Weinstein moved to have the entire venire dismissed on the grounds that Ms. Lim's statement had infected the entire jury pool. 1/8/20 Tr. 186. The Court denied this request. 1/8/20 Tr. 189. Based on our legal research, however, we believe these 32 jurors must be stricken.

The Sixth Amendment right to jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury." *People v. Branch*, 46 N.Y.2d 645, 652 (1979). Thus, "even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury." *Mach v. Stewart*, 137 F.3d 630, 633 (internal quotation marks and citations omitted). Due process requires that the jury be able to deliberate free from undue bias and able to decide a case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). See also N.Y. Const. art. I, § 6.

The Court of Appeals has found that prejudicial remarks from recused prospective jurors can create a likelihood of substantial prejudice if those remarks "**relate to defendant's guilt**, refer his reputation in the community, or provide an expert-like opinion regarding the likelihood that

he had been falsely accused.” *People v. Wells*, 7 N.Y.3d 51, 60 (2006) (emphasis added); see also *People v. Ayuso*, 254 A.D.2d 26, 26 (1st Dep’t 1998) (requiring that a defendant show that the statements “suggested defendant’s involvement in the crime charged [or] presented [] potential for substantial prejudice to defendant”). At issue in *Wells* was a statement made by a prospective juror in front of a panel of 27 other prospective jurors, in response to the court reading a list of potential witnesses and asking if they were familiar with any of those individuals. *Wells*, 7 N.Y.3d at 59. The prospective juror at issue replied that he was “good friends” with a detective whose name was on the list. *Id.* When the court asked if this friendship would affect his ability to be fair and impartial, the prospective juror replied, “I think he’s an honest guy so I would tend to be swayed by what he says.” *Id.* While the Court of Appeals did not find that the statements in *Wells* required removal of the full panel, the case is still instructive here. The statements at issue in that case were made about a witness, rather than the defendant, and had a tendency to bolster the credibility of that witness, rather than having a tendency to relate to the defendant’s guilt. *Id.* at 60.

Here, on the other hand, Ms. Lim’s statement was made about Mr. Weinstein, and anyone who heard it would understand that she believes Mr. Weinstein is guilty based on personal knowledge of a friend’s experience and is unable to act in an unbiased manner for this trial. Such statements “presented [] potential for substantial prejudice to” Mr. Weinstein (*Ayuso*, 254 A.D.2d at 26) and are precisely the type which the Court of Appeals suggested may “warrant additional remedial action by a trial court.” *Wells*, 7 N.Y.3d at 60. Such unfairly prejudicial inadmissible evidence is particularly problematic where, as here, the very heart of the prosecution’s case is that Mr. Weinstein has a history of sexual violence and the prosecution intends to present the testimony of *Molineux* witnesses regarding their prior experiences with Mr. Weinstein. Ms. Lim essentially served as an unsworn improper *Molineux* witness for Mr. Weinstein’s conduct in front of 32 prospective jurors during the Court’s examination of the venire, for a case that will heavily feature the testimony of multiple *Molineux* witnesses.

Other jurisdictions have outlined similar standards for determining whether a panel must be stricken due to a prospective juror’s prejudicial statements. Federal courts require a showing that the statement to which the panel is exposed “‘exhibit[s] actual bias: That is, either an express admission of bias, or proof of specific facts showing such a close connection to the circumstances of the case that bias must be presumed.’” *U.S. v. Trujillo*, 146 F.3d 838, 842-43 (11th Cir. 1998) (quoting *U.S. v. Koury*, 901 F.2d 948, 955 (11th Cir. 1990)). Other states ask whether the remarks were “inherently prejudicial and deprived [defendant] of his right to begin his trial with a jury free ‘from even a suspicion of prejudgment or fixed opinion.’” *Sinyard v. State*, 531 S.E.2d 140, 143 (Ga. Ct. App. 2000) (quoting *Lingerfelt v. State*, 249 S.E.2d 100, 103 (Ga. Ct. App. 1978)); see also *Moore v. State*, 274 S.E.2d 107, 108 (Ga. Ct. App. 1980) (“If such knowledge was sufficient to authorize the disqualification of the panel member who made the statement, as the trial court evidently concluded, it was necessarily sufficient to require the disqualification of the others.”). Under any of these standards, the Court must grant Mr. Weinstein’s application to strike the panel.

In *Mach*, 137 F.3d at 633, the Ninth Circuit addressed a similar situation. There, the defendant was accused of sexually abusing a child. During voir dire, one of the prospective jurors, a social worker in child protective services, repeatedly related her experience that sexual assault had been confirmed in every case it was reported. *Id.* at 632. The trial court instructed the jury "to make determinations based on the evidence rather than on their own experiences or feelings," excused the juror for cause, and denied the defense motion for a mistrial. *Id.* at 632-33. Following the affirmance of the defendant's convictions in the state court, the Ninth Circuit granted *habeas* relief because the defendant had been deprived of his Sixth Amendment right to a fair and impartial jury. The Ninth Circuit strongly condemned the state court's refusal to strike the panel, with words equally applicable to the present case:

The error in this case, the jury's exposure to an intrinsically prejudicial statement . . . occurred before the trial had begun, resulted in the swearing in of a tainted jury, and severely infected the process from the very beginning. ***To force a defendant to trial, over his objections, before such a jury, when an unbiased jury can be impaneled without any substantial loss to the court or the prosecution, serves no legitimate interest.***

Mach, 137 F.3d at 633 (emphasis added). Here, the prejudice was also substantial. Notably, Ms. Lim spoke from personal knowledge and made herself an unsworn fact witness. And Ms. Lim spoke to the very issue for the jury in this case.

Under similar circumstances, the Appellate Division has approved striking a panel, or even granting a mistrial, when such a remedy was ordered by a trial court or sought by a prosecutor. See *People v. Carrasco*, 262 A.D.2d 50, 51 (1st Dep't 1999) (approving mistrial and strike of sworn jurors where prospective jurors discussed merits of case and court could not determine which prospective jurors had prejudged the case and which had been tainted); *People v. Purcell*, 103 A.D.2d 938, 939 (3d Dep't 1984) (affirming conviction where prosecutor successfully moved to strike entire panel after prospective juror blurted out "I think he's innocent"). The mere fact that a prosecutor or trial judge initiates the need to strike a tainted panel does not necessarily render this remedy any more appropriate. Rather, trial courts should err on the side of striking a panel when it is requested by the defense to insure the protection of a defendant's constitutional right to a fair and impartial jury.

There is no reason for the Court to diverge from the cautious course required by the Circuit Court in *Mach* and approved by the Appellate Division in *Purcell* and *Carrasco*. Striking this panel would cause no prejudice to the prosecution or the Court. The 32 seats in this venire can easily be filled by another group. The only loss would be the short period of time it would take to seat a new venire. Given the "potential for substantial prejudice to" Mr. Weinstein (*Ayuso*, 254 A.D.2d at 26), this limited loss of time is not a sufficient reason to require Mr. Weinstein to trial, over his objection, with a jury tainted in the prosecution's favor. *Mach*, 137 F.3d at 633.

This Court's denial of this motion would be an abuse of discretion and would entitle Mr. Weinstein to a new trial. See U.S. Const. amend. VI; N.Y. Const. art. I § 6; *Mach*, 137 F.3d at 633-34; *Sinyard*, 531 S.E.2d at 143 (reversing where court denied motion to strike panel after prospective juror made comment linking defendant to criminal activity similar to the charges for which he was on trial); *Lingerfelt*, 249 S.E.2d at 103 (reversing rape conviction where court denied motion to strike panel after prospective juror said defendant was a "Peeping Tom"); *State v. Strong*, 196 N.E.2d 801, 804-05 (Oh. App. Ct 1963) (reversing where court denied motion to strike panel where the "defendant was on trial for his life and these remarks coming at the very beginning of the trial while the stage was being set, were particularly damaging to the rights of the defendant"). This Court must take the steps necessary to protect Mr. Weinstein's Constitutional right to an impartial jury. For these reasons, we respectfully ask that the Court dismiss the 32 prospective jurors who remained from the January 8, 2020 panel of jurors.³

Conclusion

To select a fair and impartial jury under unusual circumstances, voir dire should not be business as usual. This is an unusual case, being tried under unusual circumstances, with an unusual amount of media attention, to which nearly every juror has been exposed. Jury selection in this case requires additional procedures to protect Mr. Weinstein's right to a fair and impartial jury. For all the reasons herein, we request individual sequestered voir dire of the prospective jurors and that the Court strike the 32 jurors from January 8, 2020.

Respectfully submitted,


Arthur L. Aidala

AA/clp
Enclosures

cc: ADA Joan Illuzzi
ADA Meghan Hast

³ If the Court does not strike the 32 jurors from the January 8, 2020 panel, this will be yet another topic that must be explored during the 15-minute voir dire.

Follow

If anyone knows how a person might hypothetically leverage serving on the jury of a high-profile case to promote their new novel, [REDACTED] which [REDACTED] called "a darkly funny book" and "a witty black comedy," dm me, please.

11:05 AM - 7 Jan 2020

10 Retweets 61 Likes

11 10 61

Replying to [REDACTED]

I guess it's too late to put "Acclaimed W***st*** Juror" on the jacket.

1 6

it is, but it might be enough to warrant a second edition.

4 boring parts, i.e. all of it.

Replying to [REDACTED]

I don't know if this counts as jury-tampering but he's guilty

1 3

it doesn't if I don't know who you're talking about.

3

Replying to [REDACTED]

Some signed copies for the courtroom couldn't hurt.

1 2

I could just hold one up and smile the whole time.

2 5

1 more reply




Replying to [REDACTED]

Whoever you have to sleep with to get on that jury, do it.

1 7

  · 4h
Replying to 




Hang the jury being a contrarian, get interviewed by news during the mistrial, drop a plug.

   1

  · 3h
Replying to 

Read it in the jury box during the boring parts, i.e. all of it.

   1

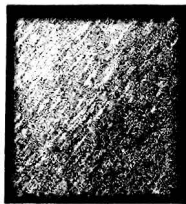
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Replying to 

Looks like you have already poor-jured yourself. Best to hire Rudy!

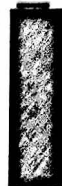


282.2K Likes



· 20h

Replying to



I don't know if this counts as jury-tampering but he's guilty



1



3



Exhibit B
(Redacted)

Exhibit B (Redacted)


  is at Criminal Court 100 Centre Street Mahattan. ...
5 hrs New York


Jury Duty all day yesterday



   20

5 Comments

 Like

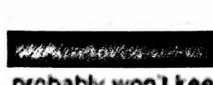
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Did you get paneled for Weinstein?

Like 6h

 1



The system needs smart jurors like you ...but they probably won't keep you 😊

Like 5h

 1



9 years ago I was on a criminal trial downtown. It was fascinating since I'd only done civil litigation in my career

 1