

# Harvey Weinstein criminal trial begins amid media frenzy

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Jury selection in the New York criminal trial of Harvey Weinstein began this week amid an international media campaign presuming the former Hollywood producer's guilt. The case involves far more than the personal fate of a single individual. What is at stake in Weinstein's prosecution is the fundamental due process right to a fair trial.

Hours after an initial hearing in New York on Monday, prosecutors in Los Angeles announced four new criminal charges against Weinstein. The move was timed to ensure that almost all of the 120 prospective jurors who appeared Tuesday for jury selection in the New York case would have heard the news.

In court Tuesday, Weinstein's lawyers asked the court to delay the trial on the grounds that the timing of the Los Angeles charges and the media coverage have made it impossible to fulfill the most fundamental element of a fair criminal trial: empanelling a jury of twelve people capable of presuming the defendant's innocence.

Far from attempting to control the influence of the media over jurors, Presiding Judge James M. Burke is deliberately unleashing it. He denied this request and said the new charges in Los Angeles had a "next to meaningless" impact on the ability of the New York jury pool to presume Weinstein's innocence. Jurors "will be deciding ... based on what they hear inside the courtroom regardless of what the press or anybody else has said about the case outside the courtroom," Burke said.

Burke also denied two additional motions, one to move the trial outside of Manhattan where the jury pool would be less impacted by biased media coverage, and another to "sequester the jury." Jury sequestration is a procedure used in high profile cases and is aimed at ensuring fairness by keeping jurors in an isolated location—usually a hotel—where they are not allowed access to news or mass media for the duration of the trial. Burke's ruling on sequestration ensures that the jurors will be open to maximum influence by the media throughout the course of the trial.

Burke's claims that jurors will not be impacted by press coverage was undercut by the fact that 40 of the 120 potential jurors interviewed on Tuesday asked to excuse themselves, stating that they could not be fair to Weinstein.

These were likely the more honest in the pool. The *USA*

*Today* noted the likelihood that potential jurors will lie about their biases in order to stay on the jury and secure a conviction. Citing Touro University law professor Richard Klein, the paper wrote, "Some jurors may have ulterior motives for getting picked for the jury, including because they support the #MeToo movement or that they seek a book deal from the experience."

After denying Weinstein's motions Monday, Burke threatened Weinstein on Tuesday for attempting to use his cellphone in the courtroom, asking, "Is this really the way you want to end up in jail for the rest of your life?"

The cellphone episode soon became a prime example of how the media twists events to whip up popular prejudice against Weinstein and present his guilt as pre-ordained.

News that Weinstein used a cellphone in court quickly became breaking news, not to show the judge's blatant prejudice, but to establish Weinstein's guilt. Remarkably, in *Vanity Fair*, Maureen O'Connor accused Weinstein of having "a cell phone entitlement problem," which, she wrote, proves that he is "unable or unwilling to abide by instructions, rules, and boundaries set by anyone but himself"!

In any event, the cellphone incident may well have been a set-up. Weinstein's lawyers explained that a bailiff saw an attorney hand their client his phone but did not tell Weinstein or his lawyers to put their phones away. Instead, the bailiff informed the judge secretly of the phone use. Weinstein did not use his phone during the hearing, but rather before the judge entered the courtroom and as Weinstein sat in the gallery awaiting the commencement of proceedings.

Yesterday, Weinstein's lawyers demanded Burke step down as presiding judge, claiming his threat about Weinstein's cellphone use was "prejudicial and inflammatory" and showed the "court's animus" toward Weinstein. "Faced with extreme and unfairly prejudicial negative publicity both pre-trial and now during jury selection, [Burke] has refused the defendant's requests for additional necessary procedural safeguards," they wrote, referring to his decision to deny their motions Monday.

Judge Burke also rejected a request by Weinstein's lawyers to call as a witness New York police detective Nicholas DiGaudio, who had urged one of Weinstein's accusers to delete text messages that might show a consensual relationship and urged a second accuser to lie when she told DiGaudio that

she believed a third accuser's relationship with Weinstein was in fact consensual. The judge refused to allow DiGaudio to testify on the arbitrary ground that other witnesses could also testify about their interactions with the detective.

Burke's evident prejudice against Weinstein is further proof of the overwhelming impact of the media hysteria against the former producer. Burke is well aware that the immense attention to the case has placed his own career on the line. In 2018, California Superior Court Judge Aaron Persky was recalled from the bench after he gave a relatively lenient sentence to Brock Turner, a Stanford University student who was convicted of sexual assault after facing a similar trial-by-media in 2016. For this, Persky was denounced in the national media as a public enemy and "rape denier."

During Tuesday's hearing, Weinstein's lawyers held up copies of New York tabloids in court to show what headlines potential jurors would have seen the morning they came to court.

"Pig in a poke," read the headline of the *New York Daily News* alongside Weinstein's photo on the first day of jury selection, while the *New York Post's* front page read, "Ready for his close-up"—a reference to reports that prosecutors will use "humiliating naked pics" of Weinstein at trial, which is scheduled to begin in two weeks after a jury has been empanelled.

On Tuesday night, *Daily Show* host Trevor Noah captured the tone of the media when he asked guest Ronan Farrow, "Do you think the Harvey Weinstein trial is going to go in the direction the public hopes, or is he powerful enough to somehow escape again?"

The coverage in the national media has been equally venomous. *Washington Post* "gender columnist" Monica Hesse wrote a column in the paper's style section mocking Weinstein for using a walker with tennis ball glides to enter court Monday, writing, "If tennis balls worked best for you, you might have opted for a less ostentatious color than neon yellow—heck, you could probably get them custom-dyed to match your suit. At the very least, you might have popped open a fresh can."

Hesse continued, referencing Weinstein's effort to mount a legal defense as proof of his guilt—that he is "erasing" his crimes: "Weinstein's career was about accruing power. His alleged crimes were about abusing it. And his defense is about erasing it, a special effect communicating that he's either too broken to punish or, possibly, to have committed the crimes in the first place."

The presumption of innocence is a foundational legal principle established through centuries of struggle against the arbitrary power of monarchs and star chambers. It holds that no government, prosecutor or policeman may bring to bear on an individual the repressive power of the state unless they have met their burden of proving that individual's guilt beyond a reasonable doubt.

The campaign in the corporate media to portray Weinstein as a monster (led by the filthy *New York Times*) is aimed at undermining popular understanding of this fundamental democratic right. And the presumption only exists to the extent its democratic content is fully understood by the population from which jurors are drawn.

There are many Supreme Court cases which stress the axiomatic character of the presumption of innocence. Perhaps the most relevant one is the 1966 decision overturning the murder conviction of Sam Sheppard, an Ohio doctor wrongly convicted of murdering his wife in 1954 by a jury tainted by a media campaign led by the *Cleveland Press*.

The Supreme Court wrote that the press produced a "carnival atmosphere" and that it "deplored the manner in which the news media inflamed and prejudiced the public."

The fact that the trial judge technically told the jurors to respect the presumption of innocence did not mean the presumption was sufficiently understood by the jurors to have any real meaning. The court held, "The massive, pervasive, and prejudicial publicity attending petitioner's prosecution prevented him from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment."

The Supreme Court wrote:

"Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the pre-indictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. ... In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

As the *World Socialist Web Site* wrote in 2018: the presumption of innocence "is meaningless unless it applies universally, even to (and especially to) individuals who find themselves in the crosshairs of official public opinion."



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