NEWS ADVISORY

New York State
Unified Court System

Hon. Lawrence K. Marks
Chief Administrative Judge

Contact:
Lucian Chalfen
Public Information Director

Arlene Hackel, Deputy Director
(212) 428-2500

www.nycourts.gov/press

Date: April 17, 2019

People of the State of New York v Harvey Weinstein

WHAT: **Pretrial Molineux and Sandoval motion hearings** in the PSNY v Harvey Weinstein case (02335-2018) will be conducted on **Friday, April 26**, **Part 99,** with Justice James M. Burke presiding.

The Court has received applications from both the prosecution and defense that portions of these proceedings be closed to the press and public.

As this case has generated substantial press and public interest, we are alerting members of the media about the **potential sealing of the courtroom**, allowing any media outlets who wish to be heard regarding the potential closure time to prepare and submit the required papers to the Court by **Monday April 22, 2019**.

WHEN: Friday, April 26, 2019 at 9:30 a.m.

WHERE: New York County Supreme Court-Criminal Term
100 Centre Street, Part 99, Room 1530
Lower Manhattan

###

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 99

The People of the State of New York	:	
- against -	:	Decision and Order
Harvey Weinstein,	:	Ind. No. 2335/18
Defendant.	:	

James M. Burke, J.:

The Court is in receipt of the motions of the defendant and the People regarding Molineux/Sandoval evidence in the above-titled action. This Court will be conducting a Molineux/Sandoval hearing regarding the admissibility of evidence.

Specifically, at the Molineux component of the hearing, the Court will determine whether to allow certain evidence on the People's direct case. At the Sandoval component of the hearing, the Court will determine, should the defendant testify at trial, whether to allow the People to use certain evidence for the purpose of impeaching the defendant's credibility. On application of both sides, the Court has conditionally sealed the submissions of the defendant and the People. Prior to the Molineux/Sandoval hearing, the Court will conduct a preliminary hearing on the issue of whether the courtroom should be closed, as well as on the sealing of the attendant written submissions, and will render a decision. See People v Arthur, 178 Misc2d 419 (Sup Ct NY Co 1998).

In their Molineux application, the People seek to introduce evidence of uncharged crimes and bad acts purportedly committed by the defendant on their direct case. In their Sandoval application, should the defendant testify, the People seek to use bad acts and uncharged crimes purportedly committed by the defendant, submitting that this evidence bears on the defendant's credibility. The defendant opposes the People's Molineux and Sandoval applications and specifically opposes the introduction or use of uncharged crimes and bad acts for any purpose.

As such, the Court has determined that prior to the Molineux/Sandoval hearing, this Court will conduct a preliminary hearing regarding whether the substantive arguments regarding the admissibility of this evidence will be conducted in an open or closed courtroom.

To that end, the Court has received written submissions from the People and the defendant regarding their positions as to the basis of closure of the courtroom during the substantive arguments.

The press has also been notified and is being given an opportunity to state their position in writing, and also whether the conditionally sealed motion papers and record should be unsealed. All of the submissions regarding this preliminary issue will be placed in the public court file.

At the preliminary hearing and in open court, the People and the defendant

will be permitted to present legal arguments as to whether the courtroom will be open or closed during the substantive portion of hearing on the admissibility of this evidence, and the press and public will also be allowed to present their position. The Court will also hear all parties' positions on the sealing of the concomitant records and submissions. At the conclusion of this preliminary hearing, the Court will render a decision regarding closure and sealing.

This shall constitute the Decision and Order of this Court.

New York New York

April 17, 2019

James M. Burke, A.J.S.C.

HON. JAMES M. BURKE

PT. 99 APR 17 2019

DISTRICT ATTORNEY
COUNTY OF NEW YORK
ONE HOGAN PLACE
New York, N. Y. 10013
(212) 335-9000

CYRUS R. VANCE, JR.
DISTRICT ATTORNEY

April 16, 2019

Honorable James Burke
Supreme Court of the State of New York
Part 99
100 Centre Street
New York, NY 10013

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

Dear Judge Burke:

This letter is in response to the Court's communication of April 11, 2019, seeking the position of the parties on closure of the courtroom during the *Sandoval* and *Molineux* hearings to be conducted on April 26, 2019. The People seek an order of this Court, closing the courtroom to the public and the press during these hearings.[1] In response to the specific questions posed by the Court, this letter provides (1) the reasons for closure, (2) the legal basis therefor, and (3) the procedures required prior to excluding the public and press.

As this Court is well aware, this case has generated extensive media coverage and will continue to do so in light of the celebrity status of the defendant and others in the entertainment field who have had dealings with him. The public's appetite for information relating to the defendant shows no sign of abating. To strike the proper balance in this case between the public's and press's qualified right to attend court proceedings and the defendant's right to a fair trial by an impartial jury, the Court should—after hearing in open court from the parties and representatives of the media, and making specific findings on the record—order that the *Sandoval* and *Molineux* hearings be closed to the public and the press. However, the Court should make clear that any evidence that it determines is admissible will be made public at the trial of this matter, or earlier if disclosure will not compromise the defendant's right to a fair trial.

The First Amendment guarantees the public and the press a qualified right of access to criminal trials. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion). Although the public acquires information about trials primarily from the press, "the press is not imbued with any special right of access," but rather possesses "the same right of access as the public." *Courtroom Television Network LLC v. State of New* York, 5 N.Y.3d 222, 229 (2005) (quoting *Richmond Newspapers*, at 573). "Thus, the press has 'no right to information about a

[1] We believe that the defense is also moving for closure of these proceedings.

trial superior to that of the general public.'" *Id.* at 229 (quoting *Nixon v. Warner Communications, Inc.*, 432 U.S. 589, 609 (1978)). In addition to trials, other court proceedings, such as pretrial hearings, are presumptively open to the public and the press. *E.g.*, *Matter of Associated Press v. Bell*, 70 N.Y.2d 32, 38 (1987) (*Huntley* hearings); *Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430, 440 (1979) (competency hearings); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) (*Press-Enterprise II*) (preliminary hearings); *Gannett Co., Inc. v. DePasquale*, 43 N.Y.2d 370, 380-81 (1977), *aff'd*, 443 U.S. 368 (1979) (suppression hearings).

However, the right of the public and the press to attend court proceedings is not absolute and the trial court "has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity" by taking measures that preserve a defendant's right to a fair trial. *Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d at 438 (*quoting Gannett*, 443 U.S. at 378). "The public's right of access may be limited where there is a compelling governmental interest and closure is narrowly tailored to serve that interest." *Matter of Daily News, L.P. v. Wiley*, 126 A.D.3d 511, 512 (1st Dept. 2015) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*)).[2] Accordingly, where a defendant seeks to exclude the public from a pretrial proceeding, he must move for relief, on the record in open court, and show "a strong likelihood" that specific evidence would prejudice his right to a fair trial if disclosed. *Matter of Daily News, L.P. v. Wiley*, 126 A.D.3d at 513; *Matter of Associated Press v. Bell*, 70 N.Y.2d at 39 (defendant bears burden of showing that his right to fair trial may be compromised by an open proceeding). Moreover, the trial court must make "specific findings" that closure will prevent "a substantial probability" that the defendant's right to a fair trial will be prejudiced by publicity and that "there are no reasonable alternatives to closure to protect the defendant's fair trial rights." *Matter of Daily News, L.P. v. Wiley*, 126 A.D.3d at 513 (citing *Matter of Associated Press v. Bell*, 70 N.Y.2d at 39 and *Press-Enterprise II*, 478 U.S. at 13-14).

In *People v. Arthur*, 178 Misc.2d 419 (Sup. Ct., N.Y. Co. 1998) (Kahn, J.), a case that "generated intense media scrutiny and an enormous amount of pretrial publicity all over the world," the trial court granted the motion of the People, joined by the defendant, to seal the moving papers, responses, and the court's decision on the People's application to introduce evidence of uncharged crimes or bad acts allegedly committed by the defendant, pursuant to *Molineux* and *Sandoval*. *Id.* at 420, 423. The court concluded that until such time as the evidence was determined to be admissible, either because the defendant chose to testify (*Sandoval*), or the court determined that probative value outweighed prejudice (*Molineux*), the publication of the evidence "would serve no purpose other than to arouse negative public sentiment toward the defendant and would have a devastating effect on defendant's ability to select an impartial jury." *Id.* at 425. The court further held that any measure short of sealing the documents, including "the most probing *voir dire* followed by the clearest jury instruction, could not

[2] Likewise, decisions to seal or disclose records fall within the court's inherent power to control the records of its own proceedings. *Matter of Daily News, L.P. v. Wiley*, 126 A.D.3d at 512 (citing *Matter of Crain Communications v. Hughes*, 74 N.Y.2d 626, 628 (1989) (holding that mandamus did not lie because decision to initially seal or to later disclose court records involved balancing of competing interests through exercise of judicial discretion)).

effectively eliminate the prejudicial impact on the jury of the publication of defendant's alleged uncharged bad acts in this case." *Id. Accord People v. Arroyo*, 177 Misc.2d 106, 112 (Schoharie County Ct.1998) (denying motion to close courtroom during suppression hearing, but granting motion to seal *Sandoval* motion on ground that if defendant chose not to testify, "the prosecution is totally precluded from using the information").[3]

This reasoning is fully applicable here and should result in (1) continuing the sealed status of the parties' *Molineux* and *Sandoval* motions and responses and (2) closing the April 26 hearing on the admissibility of this evidence. Moreover, in this case, another pertinent consideration is the privacy of those potential witnesses who have been victims of sexual assault and whose identity is protected by law. *See* Civil Rights Law § 50-b(1); *People v. Hodges*, 172 Misc.2d 112, 116 (Sup. Ct., Kings Cty. 1997). If the Court precludes such witnesses from testifying at trial, their identities should remain protected from public disclosure.

Accordingly, pursuant to the authorities cited above, we respectfully submit that the Court, after giving any representatives of the press who so request an opportunity to be heard, make a finding, on the record and in open court, that closure of the courtroom for a determination of the *Sandoval* and *Molineux* motions is necessary to "prevent a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity and that there are no reasonable alternatives to closure to protect the defendant's fair trial rights." *Matter of Daily News, L.P. v. Wiley*, 126 A.D.3d at 513. *See Matter of Capital Newspapers Div. of Hearst Corp. v. Clyne*, 56 N.Y.2d 870, 872-73 (1982) (holding that trial court erred in not conducting preliminary inquiry before deciding to exclude newspaper reporter from midtrial *Sandoval* hearing) (citing *Matter of Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d at 442 (holding that motion to exclude press and public from hearing must be made on the record in open court and all proceedings on the motion must be recorded for appellate review)).[4]

---

[3] The court in *Arthur* aptly noted that the proffered evidence (pursuant to *Sandoval* and *Molineux*) was different in kind than that at issue in a suppression hearing where the public has a legitimate interest in challenges to the conduct of police and prosecutors, *i.e.*, in seizing evidence or interrogating suspects. 178 Misc.2d at 422. *See also Matter of Associated Press v. Bell*, 70 N.Y.2d at 38 (noting that the "need for an open proceeding may be particularly strong with respect to suppression hearings") (quoting *Waller v. Georgia*, 467 U.S. 39, 47 (1984)). Such considerations are not present when deciding whether closure is proper in a *Sandoval* or *Molineux* hearing.

[4] In *Matter of Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d at 442, the Court of Appeals noted that, if in the course of the argument on the closure motion that is conducted in open court, it becomes necessary for counsel to discuss certain items of evidence, the disclosure of which "would create the very prejudice sought to be avoided," counsel can request that such portion of the argument be continued *in camera*, in the presence of opposing counsel but out of the hearing of the public.

As stated above, the Court's order should make clear that any evidence it determines is admissible under *Molineux*, and under *Sandoval* should the defendant choose to testify, will be disclosed at trial, or earlier if disclosure will not compromise the defendant's right to a fair trial.

Respectfully submitted,

Joan Illuzzi-Orbon
Assistant District Attorney
(212) 335-4156

cc: Jose A. Baez, Esq.

Ronald S. Sullivan Jr.
Counselor at Law
712 H. Street, NE
Suite 1354
Washington, DC 20002
Direct: (202) 873-9120
Fax: (202) 863-1459
rsullivan@ronaldsullivanlaw.com

April 16, 2019

People v. Weinstein, Indictment No. 2335/2018

Via Email
Honorable James Burke
New York Supreme Court, Criminal Term
New York, New York

Dear Judge Burke:

Defendant Harvey Weinstein, by and through counsel, respectfully requests that the pretrial hearings regarding the *Sandoval* and *Molineux* motions pending before this Court, set to be heard on April 26, 2019, be closed to the public and the press. There are legally sufficient compelling reasons, as described below, for the Court to exercise its discretion to close the proceedings.

The presumption that trials be open to the public and that every citizen (and, by extension, the press) should be able to attend is well settled. This presumption sounds in the Constitution, US Const 1st, 6th, 14th Amends, as well as under state statutory, Civil Rights Law § 12, and case law, *People v Hinton*, 31 NY2d 71, 73 (1972); *People v Jelke*, 308 NY 56, 61 (1954). It is equally well settled, however, that the right to a public trial is not an "absolute right." *Gannett Co. v De Pasquale*, 43 NY2d 370, 377 (1977). Rather, when there is an overriding interest in protecting Sixth Amendment values, New York courts have made clear that

the "the public trial concept has . . . 'never been viewed as imposing a rigid, inflexible straightjacket on the courts. It has uniformly been held to be subject to the inherent power of the court . . . to protect the rights of parties and witnesses[] and generally to further the administration of justice.'" *Id.* (citing *People v Jelke*, *supra*, at 63). Furthermore, New York statutory law expressly affirms the right of the Court, at its discretion, to close the courtroom for cases regarding, *inter alia*, rape, assault with intent to commit rape, and criminal sexual acts, provided that the reasons for closure are given in open court. Judiciary Law § 4; *Westchester Rockland Newspapers, Inc. v Leggett*, 48 NY2d 430, 442 (1979); *United Press Ass'ns v Valente*, 120 NYS2d 642 (Sup Ct, New York County 1953) (trial court may close proceedings even as to sexual crimes not expressly named in § 4); *See also People v Jones*, 82 AD2d 674 (2d Dept 1981); *People v Roberts*, 151 AD2d 1028 (4th Dept 1989).

The Court may clearly and appropriately exercise its discretion to exclude the public and the press from the courtroom during the *Sandoval* and *Molineux* pretrial hearings scheduled for April 26th. In "a highly publicized case," this Court has the "inherent power" to close the proceeding in order to protect Mr. Weinstein's "right to a fair trial." *Westchester Rockland Newspapers, Inc. v Leggett*, *supra* at 439. These motions concern alleged, uncharged, and unproven misconduct that may ultimately never be allowed in evidence. To expose prospective jurors to such material will prejudice both Mr. Weinstein's and the People's right to a fair trial and an impartial jury. In *Daily News, L.P. v Teresi*, the Appellate Division affirmed the lower court's decision to seal all documents relating to a *Sandoval* motion, finding that the release of such materials "would have generated considerable media attention on irrelevant and prejudicial information at a crucial time, i.e., when jury selection was imminent and the impact on the . . . jury pool[] would be at its greatest." *Teresi*, 265 AD2d 129, 133 (3rd Dept 2000).

Pretrial proceedings, such as *Sandoval* and *Molineux* hearings, are "often a potent source for the revelation of evidence which is both highly prejudicial to the defendant's case and not properly admissible at trial." *Westchester Rockland Newspapers, Inc. v Leggett*, *supra* at 439. Such is the case here. The People's *Sandoval* motion seeks to introduce instances of uncharged, unproven accusations that have absolutely no bearing on the facts of the charges faced by Mr. Weinstein. Similarly, its *Molineux* motion contains allegations that the People likely will seek to adduce as an alleged pattern of criminal behavior in the minds of jurors rather than establish necessary elements of the current case. Both motions rely heavily on prejudicial descriptions of alleged behavior having dubious probative value. As important, any arguable probative value is outweighed by the undue prejudice associated with public disclosure of such unproved and uncharged allegations that will reach the jury pool in the instant matter.

Significantly, the Court has already engaged in the afore-described balancing of interests when it entered its original order to seal certain material in this case. In this sense, the Court has correctly recognized the potential injury to Mr. Weinstein's and the People's right to a fair trial unburdened by the form and substance of pre-trial and extra-judicial commentary that inevitably would result from an open *Sandoval* and *Molineux* hearing. The Court's analysis then retains the

same force as it does today. To hold an open hearing on this topic will inject prejudice into this matter than can be avoided by recognizing the compelling interest in ensuring a fair trial.

Should the *Sandoval* and *Molineux* pretrial hearings be held publicly, prospective jurors will be exposed to potentially irrelevant and unquestionably prejudicial information that will impede Mr. Weinstein's ability to receive a fair trial, particularly in the sensationalized media environment surrounding these proceedings. Indeed, the media frenzy surrounding Mr. Weinstein is a textbook example of the "exceptional and compelling circumstances" that justify the exclusion of the public and the press. *Poughkeepsie Newspapers, Inc. v Rosenblatt*, 92 AD2d 232, 234 (2d Dept 1983). As the *Leggett* Court explained, "in a well-publicized case, it is most likely that the substance of the evidence would be disclosed to the community from which the jurors would be drawn, even though the court might ultimately rule that the evidence should not be submitted to the jury at trial, and this would not only destroy the purpose for which the hearing was held, but would, perversely, have the very opposite effect of that intended and desired." *Westchester Rockland Newspapers, Inc v Leggett*, *supra* at 439. In such a situation, when it would otherwise be virtually impossible to find jurors unexposed to such proposed evidence of a prejudicial nature, it is proper for the Court to close the proceedings. *Gannett Co. v Falvey*, 181 AD2d 1038 (4th Dept 1992). This problem is particularly acute here in that the two hearings at issue will occur very close in time to the trial. The prejudicial impact of the unproven and uncharged alleged conduct will not abate in the minds of prospective jurors. The exposure will be fresh, and the impact will be palpable.

While the Court must honor the rights of the press and the public under constitutional and New York law, in occasions such as this one it may consider reasonable alternatives to an open hearing that are "consonant with constitutional free press guarantees..." *Gannett Co. v De Pasquale*, *supra* at 381). Accordingly, and for the foregoing reasons, the Defense requests that the pretrial *Sandoval* and *Molineux* hearings, set for April 26, 2019, be closed to the public and the press.

Sincerely,

Ronald S. Sullivan Jr., Esq.