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Via Electronic Delivery

Judge James M. Burke
Supreme Court, New York County
Part 99
jburke2@nycourts.gov

CC: Ms. Joan Illuzi-Orbon, Esq.
New York County District Attorney's Office
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New York, New York 10013
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Re: People v. Weinstein: 2673 / 2019, 2335 / 2018

Dear Judge Burke,

I am writing in reference to Harvey Weinstein, who was found guilty of one count of Criminal Sexual Act in the First Degree, in violation of Penal Law § 130.50(1), and one count of Rape in the Third Degree, in violation of Penal Law § 130.25(1). Please accept this letter as our request that the Court sentence Mr. Weinstein to a period of incarceration of five years. Having presided over the trial in this case, the Court is well familiar with the evidence the jury considered in determining Mr. Weinstein's guilt. We ask also that you please consider the following in determining the appropriate sentence.

I. Mr. Weinstein's Background

By way of background, Mr. Weinstein, like most people, is complicated and the trial did not fairly portray who he is as a person. His life story, his accomplishments, and struggles are simply remarkable and should not be disregarded in total because of the jury's verdict.

Mr. Weinstein is currently 67-years-old. He was most recently married to his former wife Georgina Chapman for 10 years. They have two children, ages six and nine years old. Mr. Weinstein also has three children from his previous marriage, ages 17, 22, and 24. He is deeply involved in the lives of his six-year-old son and his nine-year-old daughter; they are the love of his life and continue to bring him constant joy.

Mr. Weinstein grew up in Electchester, which is a controlled rent community opposite the city projects of Pomonok, Queens. Coming from a lower middle class background, he attended John Bowne High School and then the University of Buffalo before dropping out to support his family upon his father's death. It was not until years later that he received an honorary degree from the University of Buffalo. When his success came, he remembered his father's words: "pass it on."

Mr. Weinstein's commercial success and contribution to the arts and entertainment industry are certainly well known. Even so, Mr. Weinstein always remained involved in the forefront of various social justice causes while producing films and building his career. In fact, with his insistence and support, many of his movies promoted social justice themes and causes in order to better society. One such example—one of the films he is most proud of—is a film called "Bully," which exposed child abuse in schools and resulted in him receiving numerous awards from the LGBT community.

Mr. Weinstein has tried in his life's work, through charitable endeavors, to even the odds for people who were not always afforded equal opportunities. Harvey Weinstein has always been a force in philanthropy in this country. Mr. Weinstein was an organizer of the concert for New York for 9/11. Along with other producers, they raised \$100 million for the firemen, policemen, and first responders, as well as the people who suffered great loss as a result of that national and New York tragedy. The funds from the concert went directly to those who needed it most, as it was organized in such a way there were no expenses.

When Hurricane Sandy hit, Mr. Weinstein also raised funds for its victims. In another concert event, Mr. Weinstein and others raised a total of approximately \$77 million for those victims, including people who lost their homes, their businesses, as well as the firemen and first responders. Because of the ongoing interest in both of these events, money continued to pour in yearly based on record, DVD, and television sales. His efforts thus provided a constant stream of income to help these families and all those affected.

Mr. Weinstein was also one of the early organizers of AMFAR, an AIDS organization that raised over \$170 million over the course of 25 years at the Cannes Film Festival in France.

Mr. Weinstein was on the board of "Robin Hood" up until October 2017 when the New Yorker article came out. That organization raised \$2.5 billion dollars for projects, schools, advocacy and vocational programs, shelters, treating the homeless, improving care for the poor, and all-around improvement of the lives of individuals in great need.

Mr. Weinstein was also active with Paul Newman's Hole in the Wall Gang to treat children who had serious diseases. Mr. Weinstein personally donated \$1 million to Mr. Newman's camp, as well as participated in fundraising millions of dollars on behalf of the camp. Mr. Weinstein has support 20 or 30 various charities in New York City and around the world. He organized two events for Nelson Mandela, raising millions of dollars in the process for Mr. Mandela's charity, The Children of Mandela.

And with respect to his background, it is of course important to note that Mr. Weinstein has no criminal history. See, e.g., *People v. Artuso*, 87 A.D.2d 873, 873 (N.Y. App. Div. 1982) (finding sentence excessive based upon defendant’s minimal criminal history). In providing this information, counsel and Mr. Weinstein do not in any way intend to denigrate the seriousness of the conduct for which he was found guilty. Nonetheless, Mr. Weinstein’s background—as detailed above, should be given substantial consideration in reaching a just and appropriate sentence. See *People v. Prentice*, 91 A.D.2d 1202, 1202 (N.Y. App. Div. 1983) (acknowledging that court should consider, *inter alia*, defendant’s prior record and conduct and potential for rehabilitation when imposing sentence).

Mr. Weinstein’s serious, ongoing health concerns will be addressed in a separate filing under seal.

II. The Collateral Consequences Mr. Weinstein Has and Continues to Face.

Since the New Yorker article was published in October 2017, Mr. Weinstein’s life has been destroyed. His wife divorced him, he was fired from The Weinstein Company, and in short, he lost everything. Not only that, but Mr. Weinstein was constantly maligned by the media, having long since been convicted in the court of public opinion before ever stepping foot in Part 99. Mr. Weinstein cannot walk outside without being heckled, he has lost his means to earn a living, simply put, his fall from grace has been historic, perhaps unmatched in the age of social media. Even just during trial itself, he had to endure seeing and hearing the allegations against him splashed on the cover of newspapers on every street corner, and reaching across the globe. He had to live with the reality that the media storm was so severe it was almost impossible to protect his minor children from it. And on top of it all, he had to endure descriptions of his appearance, his hygiene, his genitalia, and the most deeply personal and intimate matters become the subject of national and international scrutiny and intrigue. Deserved or not, this is certainly a unique and extremely severe consequence that Mr. Weinstein had to endure, and in the age of social media and given his fame, virtually unrivaled when compared to any other defendant in the state of New York if not nationally. Cf. *People v. Muniz*, 29 Misc.3d 466 (N.Y. Sup. Ct. 2010) (defining collateral consequences as, *inter alia*, “consequences that are peculiar to the individual . . .”).

III. Counts of Conviction

As this Court is aware, Mr. Weinstein was found not guilty of predatory sexual assault and forcible rape. His conviction as to Jessica Mann did not involve forcible compulsion as the jury rejected this claim. Both Ms. Mann and Ms. Haley continued consensual relationships with Mr. Weinstein after the alleged assaults and contacted him for jobs, tickets, and professional advice. The description of these relationships offered by the complaining witnesses were extremely complicated.

IV. Effects of a Custodial Sentence

As other courts have recognized, serving time in custody does not affect all defendants equally. See *United States v. Baker*, 445 F.3d 987 (7th Cir. 2006). As an individual with no criminal history having spent no time previously incarcerated, his health concerns, his age, and as famous as he is, a custodial

sentence will no doubt prove much more difficult for Mr. Weinstein than most other inmates, which further counsels in favor of a sentence of five years' imprisonment.

V. Deterrence

With respect to deterrence, counsel will again note that Mr. Weinstein is a first-time offender. See *Gall v. United States*, 552 U.S. 38, 54 (2007) (“a sentence of imprisonment may work to promote not respect but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing”). At his age and with his health, having been judged guilty by the nation at large well before trial, specific deterrence is a minor, if any, consideration.

In *Gall* itself, the Supreme Court held that sentencing judges can impose a significantly lower sentence (than the advisory guidelines range) based on a defendant's post-offense rehabilitation. *Gall*, 552 U.S. at 38. Mr. Weinstein, of course, has remained release on bond since charges were initially brought in 2018. He appeared in court every time he was required. He abided by its orders, did everything required of him, and as could be expected of a man of his character, steered clear of any criminal conduct in that timeframe.

Mr. Weinstein's age is also a factor that militates against heavily weighting the need for deterrence. In December 2017, the United States Sentencing Commission released a study titled “The Effects of Aging on Recidivism Among Federal Offenders.”¹ That study found, *inter alia*, that older offenders “were substantially less likely than younger offenders to recidivate following release.” Specifically:

Over an eight-year follow-up period, 13.4 percent of offenders age 65 or older at the time of release were rearrested compared to 67.6 percent of offenders younger than age 21 at the time of release. The pattern was consistent across age groupings, and recidivism measured by rearrest, reconviction, and reincarceration declined as age increased.

Finally, with respect to deterrence, this Court should also consider the arguments put forward by the highly influential and now retired Judge Richard Posner, in a fairly recent opinion, *United States v. Presley*, 790 F.3d 699 (7th Cir. 2015). In *Presley*, Judge Posner cast serious doubt on the additional deterrence value provided by lengthy sentences, and ultimately advocated against the general imposition of lengthy sentences. More specifically, Judge Posner relied on emerging academic literature in the field of economics, citing what economists call the “discount rate.” *Id.* at 701. According to that theory, “[c]riminals . . . tend to have what economists call a ‘high discount rate’—that is, they weight future consequences less heavily than a normal, sensible, law-abiding person would.” *Id.* In other words, the length of a sentence has less of a deterrent effect on such an individual than “the likelihood that he will be caught, imprisoned, and convicted.” *Id.* Thus, “[a]n increase in the length of a sentence may therefore add little additional deterrence, since every sentence increment is an increment in future, not present, punishment.” *Id.* Applying this theory to

¹ Available at <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders> (last accessed March 6, 2020).

the present matter then, it becomes clear that sentencing Mr. Weinstein to a lengthy term of imprisonment would provide little additional deterrence than the sentence counsel requests, especially given his non-existent criminal history, and the fact that he has never been previously incarcerated for anything other than a nominal period. *See also United States v. Poke*, 793 F.3d 759, 761 (7th Cir. 2015) (reiterating the *Pressley* opinion's concern with the limited added deterrence effect of a lengthy sentence in light of the "discount rate").

VI. The Need to Avoid a De Facto Life Sentence.

As federal courts have sternly cautioned, "[t]here is a worthy tradition that death in prison is not to be ordered lightly, and the probability that a convict will not live out his sentence should certainly give pause to a sentencing court." *United States v. Wurzinger*, 467 F.3d 649, 652 (7th Cir. 2006) (citing *United States v. Crickson*, 240 F.3d 652, 656 (7th Cir. 2001); *United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1988) (Posner, J., concurring) (additional citations omitted)). Indeed, "[d]eath is by universal consensus a uniquely traumatic experience, and prison often deprives defendants of the ability to be with their families or to otherwise control the circumstances of death." *Id.* citing John A. Beck, *Compassionate Release from New York State Prisons: Why Are so Few Getting Out?* 27 J.L. Med. & Ethics 216, 223-24 (199); Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 Elder L.J. 173, 192 (1996); Sasha Abramsky, *Prisoner's Dilemma: Lifers*, Legal Aff., Apr. 2004 at 40, 41, 43. And another point that needs no additional gloss from counsel: "[a] sentence that forces this experience on a prisoner is quantitatively more severe than a sentence that does not consume the entirety of a defendant's life, inflicting greater punishment and creating a stronger deterrent effect." *Id.* (internal citations omitted).

U.S.S.G. § 5H1.1, an advisory policy consideration regarding age by the Sentencing Commission that is required to be considered as stated in § 3553(a)(5), provides the following:

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.

According to the 2010 census, a white male born in 1970 has an average life expectancy at birth of 68 years old.² The census did not track life expectancy for individuals born prior to 1970. However, for each subsequent year moving forward, life expectancy increased. It is thus reasonable to assume life expectancy continued to trend downward the longer ago an individual was born, and certainly so for individuals born in 1952 like Mr. Weinstein. According to this study, he has almost certainly outlived life expectancy compared to others in his demographic category.

² See <https://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/vitstat.pdf> (last accessed March 6, 2020).

According to the Center for Disease Control, a 50-year-old white male as of 2003 (when Mr. Weinstein was 51), had an average life expectancy of an additional 28.7 years.³ Subtracting for the additional year Mr. Weinstein has already lived, and the 16 years that have since passed, an average white male of Mr. Weinstein's age could then be expected to live an additional 11.7 years. That figure, of course, does not account for Mr. Weinstein's specific health concerns, let alone his looming imprisonment of at least five years. Given his age and specific medical risk factors, any additional term of imprisonment above the mandatory minimum—although the grave reality is that Mr. Weinstein may not even outlive that term—is likely to constitute a de facto life sentence.

VII. Response to People's Sentencing Letter

Mr. Weinstein was convicted of two counts at trial and acquitted of the three most serious counts. At trial, the People were allowed to call, over objection, several Molineux witnesses, all of whom were significantly impeached through cross examination or other witnesses who called their claims into question. Due to a discovery violation, Mr. Weinstein was unable to call Gloria Busse, who we submit would have further cast doubt on the testimony of Tarale Wulffe.

The People now ask this court to rely on more uncharged conduct in fashioning what they surely hope will be a draconian sentence. To that end, by and large, the People ask that your honor consider 36 alleged bad acts in arriving at an appropriate sentence. We submit that this request is inappropriate and intend on expounding upon these issues at sentencing.

First, these allegations have not been admitted, proven, or subject to adversarial testing in any meaningful manner and for the most part mirror allegations made by the People in other filings. Reliance upon the People's proffer would be improper.

Second, even under the federal standard, which does not apply, the People neglect to mention that under 18 U.S.C. § 3553(a) (the "3553(a) factors"), or at least the ones it tendentially cites, federal courts are not permitted by Due Process to consider whatever unsupported conjecture the People ask it to. Rather, in order for "relevant, uncharged conduct" must be proven by a "preponderance of the evidence" standard" before a sentencing court can give it any weight or effect. *See United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000) ("proof by a "preponderance of the evidence" is the applicable burden of proof when a sentencing judge is asked to assess disputed facts relevant to sentencing") (citing *United States v. Watts*, 519 U.S. 148, 156-57 (1997) (per curiam) and *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986)). In its letter, the People made no mention of this standard, or anything remotely resembling an attempt to meet it. In the first instance, then, as again, these allegations have not been admitted, proven, or subject to adversarial testing in any meaningful manner, they must be wholly disregarded.

Third, the alleged bad acts cited by the People do not constitute "relevant conduct," and thus, even in federal court, and even if proven, would not be proper for consideration at sentencing. The

³ See https://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf (last accessed March 6, 2020).

Sentencing Guidelines define relevant conduct in part as: “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and, in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” U.S.S.G. § 1B1.3 (a)(1)(A)(B). These alleged acts cited by the People—many of which are not even sexual in nature (e.g. “abusive behavior in the workplace”) and the vast majority of which have nothing to do with Miriam Haley or Jessica Mann—in no way constitute relevant conduct.

Fourth, in the course of the People’s efforts to bootstrap these allegations to its sentencing request, it is unclear if it has met requirements under both C.P.L. § 245.20(1)(k) and *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* applies equally to material relevant to both *guilt* itself as well as *punishment*. See *United States v. Frank*, 11 F.Supp.2d 322, 327 (S.D.N.Y. 1998) (citing *Brady*, 373 U.S. at 87). C.P.L. § 245.20(1)(k) has expressly incorporated this requirement, mandating that the People *automatically* disclose, within the time limitations of § 245.10 that have long since passed, “[a]ll evidence and information . . . that tends to . . . mitigate punishment.” If not met, considering the requested acts would be all the more improper.

Finally, as the court observed, all of the People’s evidence was vigorously contested at trial. To add weight to a sentence based upon mere allegations, some of which predate even Ms. Sciorra’s rejected claims, would violate Due Process.

Based on the foregoing, Mr. Weinstein, through counsel, requests the Court expressly disregard the People’s request to use these alleged other bad acts as a basis for its sentencing determination as set forth in its March 6, 2020 letter.

VII. Conclusion

Based on the foregoing, Mr. Weinstein, through counsel, respectfully requests that the Court sentence him to a term of imprisonment of five years.

Sincerely,

/s/ Damon M. Cheronis
Damon M. Cheronis

/s/ Donna Rotunno
Donna Rotunno

/s/ Arthur Aidala
Arthur Aidala