

The Testimony That Could Seal Harvey Weinstein's Conviction

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By Angelina Chapin

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The trial against Harvey Weinstein began on Monday and while the disgraced media mogul is facing charges of sexually assaulting two women, his potential conviction could hinge on the statements of three others who say he sexually abused them, too.

The three women have not been publicly identified, and their allegations involving rape and two incidents of forced oral sex are not part of the criminal charges. They will be allowed to testify in the trial, however, due to the Molineaux Rule, which says that other accusations can be used to establish, among other things, a pattern to an offender's criminal behavior. That means their testimony could be pivotal to the prosecutors' case that Weinstein was a predator — an allegation he has denied.

In the Me Too era, legal experts and advocates for women hope to see more accusers testify as witnesses in sexual assault trials, which are notoriously unfair towards victims. Survivors are often victim-blamed by defense attorneys who perpetuate the myths that survivors can only be credible if they immediately go to police after being assaulted, cut off contact with their abusers, and have physical proof of the assault. At the Weinstein trial, his attorneys will likely use emails from his accusers asking to see him again or saying "I love you" to prove the alleged abuse was consensual. (In reality, such behavior is common from survivors coping with trauma.)

But it's harder for defense attorneys to discredit victims when the case is a matter of he said, she said, she said, she said, she said, she said.

"How can you have a mistaken belief about consent 10 times?" said Casey Gwinn, a former prosecutor and president of Alliance for HOPE International, an organization that provides services to victims of sexual violence. "How many times can you say 'Wow, I just didn't get that?'"

Take the accusations against comedian Bill Cosby, for example. At his 2017 trial for sexual assault, only one witness, besides plaintiff Andrea Constand, was allowed to tell her story, and the judge declared a mistrial. During his second trial in 2018, with the Me Too movement in full swing, the judge allowed five accusers to testify and the jury convicted Cosby of sexual assault.

The tactic of allowing testimony by accusers outside those involved in the specific case is still controversial, however. Allegations of someone's past behavior cannot be used to prove they are guilty of a current charge, unless it meets certain criteria, such as proving an offender's motive or identity, according to state and federal laws. When judges consider whether or not to admit testimony of what's known as "prior bad acts," they have to weigh the evidence's importance against how much it will prejudice jurors.

In Cosby's case, Judge Steven O'Neill may have allowed more witnesses in the second trial because of social pressures driven by the Me Too movement, said Wesley Oliver, the director of the criminal justice program at Duquesne University. But Oliver worried about jury prejudice if this evidence becomes more common, and said there should be limits around the number of accusers who can testify as witnesses.

"We know there's a risk a jury will say 'Well, listen, he was guilty of one of the 50 accusations so we'll just convict him,'" Oliver said. "We don't want it to work that way."

While judges must decide whether prior bad acts meet the rules, at least 14 states now make a special exception for accusations in sexual assault cases, since there is rarely physical evidence and convictions in such cases are rare. While New York is not one of those states, the Molineaux Rule does state that allegations of prior sexual misconduct can be admitted for specific reasons, such as to prove an offender repeatedly followed the same plan or had a specific motive.

The three witnesses who will testify in Weinstein's case show his "modus operandi" of "luring women to his apartment or hotel room under the guise of reading a script or talking about business," said Douglas Wigdor, a lawyer whose client will tell her story at Weinstein's trial. Two of the witnesses say he assaulted them in hotel rooms, which mirrors one of the plaintiff's accusations of being raped in 2013. Wigdor's client said after getting a call from Weinstein's office to come in and read a screenplay, he raped her at his luxury apartment building in Manhattan. Mimi Haleyi, Weinstein's former production assistant and the other plaintiff in the criminal case, said she was forced to perform oral sex after being summoned to his apartment for a meeting in 2006.

While Wigdor told HuffPost that in his experience, judges have always been amenable towards admitting "prior bad acts witnesses" in sex assault cases, others say it has become more common. Gwinn said that during his career as a prosecutor between 1985 and 2004 he "virtually never" saw this kind of evidence, but that police officers, prosecutors and judges have been influenced by cultural movements over the past decade. But he said there is still a long way to go before survivors see justice in courtrooms.

"If the rapist is a nobody and the victim is a nobody, I'm not so sure that judges feel as much pressure as they do in high-profile cases," Gwinn said. "Most rapists are not Hollywood producers."

Gloria Allred, the civil rights lawyer who represented three of the witnesses at Cosby's retrial, said she believes prosecutors are more likely to take on serial predators and to request testimony from accusers outside of the criminal case.

"This is a new day," Allred said. "Whatever happens in Weinstein, we're never going back."