Kevin Spacey sex-crimes case: What happens next and will it go to trial?

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Kevin Spacey leaves Nantucket Island, Mass. (Photo: Scott Eisen/Getty Images)

The Commonwealth of Massachusetts has officially launched its prosecution of Kevin Spacey for felony indecent assault and battery against a teen busboy in 2016 on Nantucket. So now it's time to ask: Will this case go to trial? And what might happen instead?

The only thing we know for sure at the moment is that the first pretrial hearing date in the case will be March 4 on Nantucket (/story/life/2019/01/07/kevinspacey-arraignment-sex-crime-charge/2466589002/) and that Spacey, 59, will not be present for the proceeding likely to focus on discovery, motions and evidence matters.

"At that time, the defense and the prosecution will tell the court if they are ready for trial or need more time. If they need more time another pretrial date may be set," says Arash Hashemi, a Los Angeles-based criminal defense lawyer who hosts a podcast, "Hashing Out the Law."

Spacey, who is being prosecuted under his real last name of Fowler, was <u>compelled by Judge Thomas Barrett to be physically present at his arraignment</u> (/story/life/2018/12/31/kevin-spacey-plead-not-guilty-sex-crime-charge/2450048002/) on the island on Monday. But the judge gave the two-time Oscar winner permission to be excused from the March hearing; his Los Angeles-based defense lawyer, Alan Jackson, will represent him.

What could happen next?



Kevin Spacey arrives at courthouse on Nantucket Island, Mass., on Jan. 7, 2019, to be arraigned on a charge of indecent assault and battery. (Photo: Steven Senne/AP)

Spacey could change his plea to guilty

He could do this anytime – even during a trial – but it's highly unlikely. For one thing, Spacey's legal team has already signaled, at a Dec. 20 probable cause hearing and in court documents, that they intend to attack the credibility of the accuser as a major component of his defense (/story/life/2018/12/26/whats-next-kevin-spacey-perp-walk-awaits-him-nantucket/2415032002/).

For instance, the accuser admitted to police he told Spacey he was 23 when he was actually 18. He accepted drinks from Spacey even though he was too young to drink. And, the defense notes, the accuser told police Spacey groped him for up to three minutes but he never moved away or told Spacey to stop.

"He lied and that goes to his credibility," says Adam Citron, a New York lawyer and former prosecutor who is familiar with Massachusetts law. "On the defense's side, their game is to destroy the victim's credibility or at least raise questions about it."

That could lead to reasonable doubt in a juror's mind.

Spacey could agree to a plea deal

Under this scenario, Spacey would plead guilty to a lesser charge in exchange for leniency on sentence. But that's unlikely, too, and the district attorney would first have to offer a deal. There are reasons he might not want to do that.

Citron says prosecutors call the shots on plea agreements but usually they at least consult the accuser. "Normally, if they offer a plea deal they will want the consent of the complainant and in many cases, because the complainant doesn't consent, they won't offer a plea. And that's probably the case here," says Citron.

The reason: If the plea deal goes through and the defendant later commits another crime, then the accuser and everyone else will blame the prosecutor. And state prosecutors are politicians, too: most of them are elected in the U.S.



The Club Car Restaurant on Jan. 7, 2019, in Nantucket, Mass. Kevin Spacey is accused of groping a teenage busboy in the restaurant's bar in 2016. (Photo: Rodrique Ngowi/AP)

Spacey also may spurn a plea deal because he's innocent – which he is until he's proven guilty beyond a reasonable doubt and a jury of 12 has unanimously voted to convict him. That's a deliberately high standard for the prosecution to meet and Spacey's lawyers may conclude they can win at trial.

"Spacey has no criminal history and they may determine the likelihood of his going to jail (even if convicted) is slim so it's worth the shot of taking it to trial," Citron says. "And anyway, I don't think the prosecution is going to offer a plea deal."

"It seems right now both Spacey and his defense (team) are adamant that Spacey is innocent, therefore I feel they will move forward with the intention of going to trial," adds Hashemi.

So there's likely to be a trial. Then what?

Discovery: First up in a criminal case, the prosecution (in this case the Cape & Islands District Attorney Michael O'Keefe and assistant district attorney Michael Giordino) has to turn over to the defense all of the evidence it has gathered and intends to present, including any evidence that exonerates or tends to exonerate the defendant.

Per <u>Supreme Court rulings (https://www.law.cornell.edu/wex/brady_rule)</u>, woe to the prosecutor who fails to do so; not only could the case be dismissed but the prosecutor may be subject to an ethics investigation resulting in serious professional repercussions.

By contrast, the defense doesn't have to share anything with the prosecution because a defendant has a constitutional right to avoid self-incrimination (https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/criminal-law/discovery_criminal_and_civil_theres_difference/).



The tiny Nantucket, Mass., courtroom was jammed for Kevin Spacey's arraignment on Jan. 7, 2019. His lawyers, Alan Jackson and Juliane Balliro, confer with assistant district attorney Michael Giardino, far right. (Photo: Nicole Harnishfeger/AP)

The discovery process will lead to a shake out of the evidence presented by both sides. The lawyers will then argue about the evidence at pretrial hearings where a judge will decide what's in and what's not.

What key evidence will prosecutors want to include? A Spacey trial is likely to feature another battle over admitting evidence of alleged "prior bad acts" by the defendant – <u>a battle that proved crucial for prosecutors who secured a conviction of Bill Cosby on sex-crime charges in Pennsylvania (/story/life/2018/04/26/bill-cosby-retrial-day-14-deliberations-resume-after-hearing-defense-star-witness/553644002/)last year.</u>

Judges may allow evidence of a pattern of prior alleged crimes (either charged or uncharged) to be introduced against a criminal defendant only if its "probative" value outweighs its "prejudicial" value. Usually they explain their reasons in court or in writing, if for nothing else than it looks better to an appellate court, says Citron.

At Cosby's first trial, in 2017, the judge allowed the district attorney to call one other Cosby accuser of a uncharged prior bad act. That trial ended in a hung jury and mistrial. <u>At the second trial, in April 2018, the judge allowed five other accusers to testify. (/story/life/2018/03/15/bill-cosby-face-up-5-other-accusers-second-trial-judge-rules/429407002/)</u> He did not explain why he changed his mind. Result: Conviction on all counts and a sentence of 3 to 10 years in prison. (Cosby is appealing and the prior bad acts testimony is one of his main causes.)

Spacey, too, has been accused by multiple men (/story/life/2017/11/07/kevin-spacey-scandal-complete-list-13-accusers/835739001/)(at least 15, plus more in London who have not been identified) of sexual assault, including groping, in encounters dating back to 1981.

"I really think this case will come down to what prior bad acts the prosecution can use against Spacey," Citron predicts. "Because this is a he-said-he-said case, it's crucial they investigate other instances of similar conduct.

"The case may very well rest on being able to introduce similar acts to show this was not a mistake or an accident, that there was 'motive, intent, lack of mistake or a common scheme or plan.' "

Will the accuser take the stand?

He almost has to, Citron says.

"If the prosecution does not put the complainant on the stand, it could be detrimental to the case because the jury will say if this person can't tell his own story, why should we convict? And no one else can tell your story."

In fact, anyone else who wasn't a witness to the actual encounter could be considered hearsay testimony and could be barred from testifying, he said.

What key evidence will the defense want to include?

At the arraignment, Spacey's lawyer sought and obtained Judge Barrett's order to preserve the data from the accuser's cellphone covering six months from the date of the encounter with Spacey at The Club Car restaurant bar in July 2016.



Former Boston news anchor Heather Unruh at a press conference in November 2017 during which she accused Kevin Spacey of allegedly groping her teen son in July 2016 at a restaurant bar on Nantucket Island. (Photo: JOSEPH PREZIOSO/AFP/Getty Images)

The defense argues that texts, calls and Snapchats exchanged between the accuser and his girlfriend during his encounter with Spacey contain relevant information crucial to Spacey's defense.

"Although (the girlfriend) recounted in her statement that (the accuser) apprised her of nearly all of the interactions between the two men during the course of their encounter, (the accuser) never suggested that he had in any way been sexually assaulted," Spacey's lawyer said in his motion to preserve the data.

The "consent" issue: The defense argues that any text messages and Snapchats sent during and after the encounter are "relevant to the issue of consent and whether lack of consent was fairly communicated" to Spacey.

Hashemi believes the defense will focus heavily on this issue at trial. "Meaning, they won't deny the 'touching' occurred but that the alleged victim consented to the touching and invited it," he says.

What about the accuser's mom? According to the defense motion, the girlfriend told police the first time she heard of the allegation involving her boyfriend was in November 2017 when the accuser's mother, former <u>Boston TV news anchor Heather Unruh, called a press conference to accuse</u> <u>Spacey (/story/life/people/2017/11/08/kevin-spacey-sexual-abuse-assault-harassment-allegatations-news-updates/843288001/)</u>more than a year after the alleged crime.

"Text messages consistent with statements provided to law enforcement are likely to reveal that (the accuser) joked about the incident with friends for months after the incident and that his mother is the driving force behind these allegations," the defense motion argues.

What about the video? So far, the defense argues, the prosecution has produced only a video found on the accuser's cellphone, which he sent to his girlfriend via Snapchat while the alleged groping was supposed to be occurring. But it doesn't show an assault by Spacey or anyone else, the defense maintains.

"Notably, this video does not show anything that could be remotely described as assaultive behavior and it therefore does not support the prosecution's claim of indecent assault and battery," the defense motion argues.

Will the trial be moved to a different venue because of pretrial publicity? Cosby's trials were not moved (although the first trial got a jury from across the state). And where can they go where no one has heard of Spacey and his legal woes?

So far, Spacey's lawyers have not said anything in public to the media about the case, including whether they will seek a change of venue. Jackson has not returned multiple messages from USA TODAY.

Will the trial be televised? The arraignment was, showing Spacey, his lawyers, prosecutors and reporters jammed into a tiny courtroom at the diminutive courthouse on Nantucket. Either side can apply for a no-TV trial but so far no one is saying if that will happen.

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<u>Fullscreen</u>

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