

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Circuit Court No. 17-526 FC

-vs-

Honorable Rosemarie E. Aquilina

LAWRENCE GERRARD NASSAR

Defendant-Appellant.

NOTICE OF HEARING

TO:

ANGELA M. POVILAITIS (P58430)
Department of Attorney General
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Criminal Appellate Division
Attorney General
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PLEASE TAKE NOTICE that on **Wednesday, August 8, 2018**, at **10:30 AM**, the undersigned will move this Honorable Court to grant the within

MOTION FOR DISQUALIFICATION OF JUDGE

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:

 **JACQUELINE J. MCCANN (P58774)**
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Date: July 24, 2018

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PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

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-vs-

Honorable Rosemarie E. Aquilina

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Defendant-Appellant.

ATTORNEY GENERAL
Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant

MOTION FOR DISQUALIFICATION OF JUDGE

ATTACHMENT: BRIEF ISSUE I

AFFIDAVIT OF COUNSEL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

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FILED

STATE OF MICHIGAN
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PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Circuit Court No. 17-526-FC

-vs-

Honorable Rosemarie E. Aquilina

LAWRENCE GERRARD NASSAR

Defendant-Appellant.

MOTION FOR DISQUALIFICATION OF JUDGE

Defendant-Appellant **LAWRENCE GERRARD NASSAR**, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by Jacqueline J. McCann and Malaika D. Ramsey-Heath, moves for disqualification of the Honorable Judge Aquilina from any further proceedings in this matter, including the pending motion for resentencing/to correct an invalid sentence, and states in support that:

1. Defendant Nassar was convicted by guilty plea of seven counts of first-degree criminal sexual conduct on November 22, 2017, before the Honorable Rosemarie E. Aquilina, in the Ingham County Circuit Court. (Plea Tr, generally).¹ The terms of the plea agreement were memorialized in a written agreement dated, November 22, 2017, and included in pertinent part a sentence agreement for a minimum term of sentence within the range of 25 to 40 years at the judge's discretion and to allow all the known victims (of charged and uncharged conduct) to give

¹ "Plea Tr" refers to the transcript of the plea hearing held on November 22, 2017.

victim impact statements. (Plea Agreement, 11/22/17). At sentencing, the judge indicated that the victim impact component of the plea agreement was included at her request. (Sent 11/22/17, 74).²

2. The court held a seven day sentencing hearing in January 2018, during which at least 169 people spoke as either victims or family-members or supporters of victims. (Sent 11/24/17, 4-5). On January 24, 2018, Judge Aquilina sentenced Dr. Nassar to concurrent prison terms of 480 months to 2100 months, consecutive to the sentences imposed for his federal convictions. (Judgment of Sentence, 1/24/18).

3. Judge Aquilina made numerous statements throughout the proceedings indicating that she had already decided to impose the maximum allowed by the sentence agreement even before the sentencing hearing began. Thus, from the defendant's perspective the sentencing hearing was just a ritual. (See e.g. Sent 1/16/18, 226; Sent 1/19/18, 68, 187, 235-236; Sent 1/22/18, 65).

4. Instead of a proceeding to assist the judge in reaching a fair and just sentencing decision, the judge used the nationally-televised proceeding as an opportunity to advance her own agenda, including to advocate for policy initiatives within the state as well as the federal legislatures, to push for broader cultural change regarding gender equity and sexual discrimination issues, and, seemingly as a type of group therapy for the victims.^{3, 4} (See e.g. Sent 1/19/18, 9, 26;

² The sentencing transcripts will be referenced as "Sent" followed by date of the proceeding.

³ Some or all of these things may be laudable goals, but they are not the purpose of a criminal defendant's sentencing hearing.

The objectives generally relevant to sentencing were first articulated by the Michigan Supreme Court in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), and have been often reiterated by our Courts. In *Snow*, the Court explained that in imposing sentence, the court should "balance" the following objectives: "(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses." *Id.* (citation omitted). [People v Wines, __ Mich App __ (3/8/18; # 336550)]

38, 47, 52, 58, 91-92, 127-128, 143-144, 182, 186; Sent 1/22/18, 22, 50-51; Sent 1/23/18, 54, 60-61, 77-78, 131, 162, 178, 190-191).

5. Further, the judge allowed the proceeding to devolve into a free-for-all, in which speakers were given free reign to denigrate the defendant, sometimes in profane terms; to wish physical harm upon the defendant; to disparage and ridicule his constitutional rights, including his right to counsel; to accuse entities and institutions of wrongdoing; and even to accuse uncharged individuals of wrongdoing and crimes, including calling for their incarceration or other punishment. (Sent 1/19/18, 68, 85-90, 111-114, 169-179, 185, 204-206, 225-227, 234-235; Sent 1/22/18, 5-6, 17-19, 19-20, 38-39, 46-50, 58, 62, 89, 92, 98, 108, 210-213, 221; Sent 1/23/18, 22-25, 47-48, 53, 72, 77, 79-80, 101-105, 123, 167, 178, 190; Sent 1/24/18, 54-55).

6. In passing sentence, the judge had noted: “I read some of the Twitters and Facebooks and all of what's going on in the media.” (Sent 1/24/18, 96).

7. During the sentencing hearings, unidentified speakers, presumably audience members, are noted in the transcripts calling out in support during the speakers’ remarks and during the court’s remarks, without rebuke or any attempt at controlling decorum by the judge. (E.g. Sent 1/22/18, 64; Sent, 1/23/18, 192; Sent 1/24/18, 90, 102, 105)

8. The judge herself openly lamented that she could not impose cruel and unusual punishment upon the defendant (Sent 1/16/18, 226), indicated her expectation that he would be harmed in prison, without condemning it (Sent 1/22/18, 65), and finally proclaimed, with apparent relish, that she was signing his “death warrant.” (Sent 1/24/18, 107).

⁴ The judge gave positive affirmation to virtually each presenter during the victim impact statements.

9. During the course of the sentencing hearing, Dr. Nassar's attorneys were harassed and subject to death threats. (Sent 11/24/17, 74, 90). Only occasionally did the judge pay lip service to the fact that the attorneys were performing their constitutional duties. The judge said nothing to stop speakers who were in the process of denigrating and disparaging Dr. Nassar's attorneys. (Sent 11/24/17, 73-74, 94).

10. At one point when one of Dr. Nassar's attorneys objected to the abuse, the prosecutor objected⁵ to that objection. In response, Judge Aquilina ruled that the speaker was allowed to comment on the defense attorneys and told the attorney she should have "thick enough skin to let it go". (Sent 1/22/18, 17-19).

11. It should have been no surprise that in a subsequent proceeding a few weeks later, Dr. Nassar was physically attacked in an Eaton County Circuit courtroom.⁶ (Eaton Sent, 2-2-18, 25-26). And, Dr. Nassar reports, that in late May he was physically attacked in federal prison within a few hours of being placed in general population. Unfortunately, Judge Aquilina's comments and conducting of the sentencing proceeding appeared to encourage this type of behavior.

12. At the end of sentencing in this matter, Judge Aquilina stated that she would not grant any press interviews until the appeal period had run. (Sent 1/24/18, 110).

⁵ "MS. POVILAITIS: Is she really objecting to this victim at this point?" (*Id.* at 18).

⁶ Another occurrence in Eaton County has relevance to this motion. As a victim's impact statement made clear: the victims perceived Judge Aquilina as part of their legal team. (Eaton Sent 1-31-18, 11).

13. Despite that claim, it has recently come to SADO's attention that Judge Aquilina has spoken to the press since sentencing about this case. (*Aquilina: 'I support the girls' in Nassar, MSU case*, by Francis X. Donnelly, The Detroit News, 4/24/18;⁷ *Judge in Nassar case says John Engler should step down from MSU*, by Violet Ikononova, The Detroit Metro Times, 5/23/18).⁸

14. The Detroit News quotes the judge as saying: "I'm not fair and impartial. The case is over," she said. "No judge is fair and impartial (after the verdict). That's for before the sentencing." (Donnelly-Detroit News article, *supra*.)

15. Additionally, the judge has had speaking engagements since sentencing in which she has commented on this case and apparently posted to her Facebook page about it. (Ikononova-Metro-Times article, *supra*.)

16. Most recently, it was reported that Judge Aquilina, accompanied by counsel for the prosecution in this case, attended the nationally-televised ESPY awards on July 18, 2018 when the victims were presented with an award. *Portrait of Survival: Those abused by Nassar honored at ESPYs*, by Sarah Rahal, The Detroit News, 7/18/18.⁹

17. A fair tribunal is a basic requirement of due process. *In re Murchison*, 349 US 133, 136, 75 S Ct 623, 625, 99 L Ed 942 (1955); US Const, Am XIV; Const 1963, art 1, § 17. Recusal of a judge is required when "the probability of actual bias on the part of the judge or

⁷ <https://www.detroitnews.com/story/news/local/michigan/2018/04/24/aquilina-msu-nassar/34219805/>

⁸ <https://www.metrotimes.com/news-hits/archives/2018/05/23/judge-in-nassar-case-says-john-engler-should-step-down-from-msu>

⁹ <https://www.detroitnews.com/story/news/local/michigan/2018/07/18/abused-nassar-athletes-honored-espn/798612002/>.

decision maker is too high to be constitutionally tolerable.” *Withrow v Larkin*, 421 US 35, 47, 95 S Ct 1456, 43 L.Ed.2d 712 (1975).

18. MCR 2.003(C) also protects a defendant’s due process rights to a fair tribunal and a tribunal that provides the appearance of fairness. Under the court rule, a judge should disqualify herself when she is biased or prejudiced for or against a party. MCR 2.003(C)(1)(a). A judge should also disqualify herself when she has failed to adhere to the appearance of impropriety set forth in Canon 2 of the Michigan Code of Judicial Conduct. MCR 2.003(C)(1)(b).

19. Canon 2 provides an overall instruction that a judge must conduct herself both on and off the bench in a way that promotes public confidence in impartiality “[a]t all times.”

20. Canon 3 is also very relevant here, as it includes a specific reference to sentencing, and reminds judges that:

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, **public clamor**, or fear of criticism.

(6) A judge should **abstain from public comment about a pending or impending proceeding in any court**, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

(9) A judge should adopt the usual and accepted methods of doing justice; avoid the imposition of humiliating acts or discipline, not authorized by law in sentencing and endeavor to conform to a

reasonable standard of punishment and not seek popularity or publicity either by exceptional severity or undue leniency.

[Emphasis added.]

21. As the court is aware, in Michigan, a criminal defendant convicted by plea must return to the circuit court with a motion for plea withdrawal and/or a motion for resentencing to preserve issues for appeal. MCR 6.310(D); see MCR 6.429(C).

22. A conviction, including one obtained by plea, is not final until the time for taking a direct appeal is over without an appeal being filed or until the direct appeal is over if one is taken. *People v Hill*, 483 Mich 897 (2009); *People v Gomez*, 295 Mich App 411, 414 (2012).

23. Defendant-Appellant incorporates by reference herein Issue I from his brief in support of his motion for resentencing/to correct an invalid sentence, which also sets forth the applicable law in this area. (See Issue I, attached.)

24. This motion is accompanied by an affidavit of counsel. MCR 2.003(D)(2).

25. Where Judge Aquilina has not conducted herself in accordance with the judicial canons, MCR 2.003, and/or the defendant's state and federal constitutional rights to Due Process, she must be disqualified from further proceedings, in which the substantive sentencing relief he is seeking will be determined.

WHEREFORE, Defendant-Appellant **NASSAR** requests that the Honorable Judge Aquilina be disqualified from any further proceedings in this matter, including from his pending motion for resentencing/to correct an invalid sentence. Pursuant to MCR 2.003(D)(3)(a)(i), if Judge Aquilina denies this motion, Defendant-Appellant requests that it be referred for de novo review to the chief judge of this circuit.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY:  (P74878) *Signature*
JACQUELINE J. MCCANN (P58774)

BY:  (P74878)
MALAIKA D. RAMSEY-HEATH (P68114)

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Date: July 24, 2018

ATTACHMENT: BRIEF ISSUE I

ARGUMENTS

- I. **DR. NASSAR HAD A DUE PROCESS RIGHT TO BE SENTENCED BY A JUDGE FREE FROM EVEN THE APPEARANCE OF BIAS. JUDGE AQUILINA WAS ADMITTEDLY NOT AN UNBIASED AND IMPARTIAL JUDGE. RESENTENCING BEFORE A DIFFERENT JUDGE IS REQUIRED.**

Argument:

A. Due process, the state and federal constitutions, and MCR 2.003 all require recusal / disqualification where there is an unconstitutional potential for bias.

A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 US 133, 136, 75 S Ct 623, 625, 99 L Ed 942 (1955). A defendant has the right to a fair and impartial trial under both the United States and Michigan Constitutions. See US Const, Am VI, XIV; Const 1963, art 1, §§ 17, 20 . This right is violated when the trial court's conduct “pierces the veil of judicial impartiality.” *People v Conley*, 270 Mich App 301, 307–308; 715 NW2d 377 (2006). Recusal of a judge is required when “the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.” *Withrow v Larkin*, 421 US 35, 47, 95 S Ct 1456, 43 L.Ed.2d 712 (1975). Even if disqualification cannot be met under the precise language of the rule, parties may establish disqualification on the basis of the due process impartiality requirements. *Cain v Department of Corrections*, 451 Mich 470, 497 (1996).

The United States Supreme Court articulated a “stringent rule” in a criminal case arising out of Michigan: “Every procedure which would offer a **possible** temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.” Emphasis added. Internal quotation marks removed.

Murchison, supra, 349 US at 136, 75 S Ct at 625, 99 L Ed 942 (1955). The Court explained such a stringent rule is necessary, because justice and the appearance of justice are inexorably tied to each other: “Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice.” Internal quotation marks removed. *Id.* “The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional **potential** for bias.” Emphasis added. *Caperton v AT Massey Coal Co*, 556 US 868, 880–81, 129 S Ct 2252, 2261–62, 173 L Ed 2d 1208 (2009).

MCR 2.003(C) also protects a defendant’s due process right to a fair tribunal and a tribunal that provides the appearance of fairness:

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

- (a) The judge is biased or prejudiced for or against a party or attorney.
- (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

B. The Michigan Code of Judicial Conduct (specifically incorporated into MCR 2.003) is violated, and the potential for bias shown, where a judge engages in words or behavior, either on or off the bench, indicating her treatment of a defendant was influenced by publicity, popularity, or partisan interests.

Canon 2 provides an overall instruction that a judge must conduct herself both on and off the bench in a way that promotes public confidence in the impartiality of the court. Canon 3 provides more specific guiding principles to which a judge must adhere in administering justice, to guard against the appearance of impropriety. Canon 4 regulates judicial participation in extrajudicial activities, particularly those involving lobbying and legislation.

1. Canon 2 of the Michigan Code of Judicial Conduct (specifically referenced in MCR 2.003) instructs “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities[.]” and provides in relevant part:

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

2. Canon 3 of the Code of Judicial Conduct instructs “A Judge Should Perform the Duties of the Office Impartially and Diligently[.]” Multiple subsections of Canon 3, section A (Adjudicative Responsibilities) are implicated here:

(1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unswayed by partisan interests, public clamor, or fear of criticism.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.

(7) A judge should prohibit broadcasting, televising, recording, or taking of photographs in or out of the courtroom during sessions of court or recesses between sessions except as authorized by the Supreme Court.

(9) A judge should adopt the usual and accepted methods of doing justice; avoid the imposition of humiliating acts or discipline, not authorized by law in sentencing and endeavor to conform to a reasonable standard of punishment and not seek popularity or publicity either by exceptional severity or undue leniency.

3. Canon 4, limiting the ways in which “A Judge May Engage in Extrajudicial Activities” is also implicated, in part:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

A judge may engage in the following activities:

A. Law-Related Activities.

(1) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.

C. Here, the trial court violated numerous sections of the Code of Judicial Conduct designed to guarantee a defendant's right to a sentence based in Due Process and avoid the appearance of impropriety.

1. Judge Aquilina was well aware of the public nature of the case.

First, as outlined in Section A of Canon 2, a judge must expect to be the subject of public scrutiny at all times. From the first day of sentencing, the record indicates Judge Aquilina was well aware of ongoing public scrutiny. Sentencing took place over the course of seven days and involved the statements of victims in seven charged counts and 161 other speakers. (1/24/18) 97. Allowing speeches from so many people who were not the subject of any charged offense is irregular, but Judge Aquilina stated on the record that she wanted this procedure to provide a "global resolution" in the case. (1/16/18) 79. In fact, Judge Aquilina stated on the record that these impact statements would allow the charging complainants and the others to appear not only in front of a judge, but in front of "the world." (1/16/18) 99. Other statements by the judge, just on the first day of sentencing, included "Your voice is important to the world and the world is watching." (1/16/18) 99. On the last day of sentencing, Judge Aquilina admitted that she "read some Twitters and Facebooks and all of what's going on in the media." (1/24/18) 96. Finally, speaking directly to the media representatives present in the courtroom, Judge Aquilina praised them for a job well-done, and she committed to refrain from making any statements about the case to the media "without a victim by [her] side[,] until after the appeal period." (1/24/18) 110-111. She was well aware of the publicity of this case, as the judicial canons required her to be.

Despite this awareness (or perhaps because of it), she violated numerous canons of the Code of Judicial Conduct both during and after the sentencing proceedings.

2. Judge Aquilina specifically violated subsection 1 of Canon 3 and violated Canon 4.

The record indicates, contrary to subsection 1 of Canon 3, Judge Aquilina was swayed by “public clamor” and “partisan interests.” And because of the public clamor and public interests, she used the bench as a stage from which to push her own agenda for particular legislation, contrary to Canon 4. On the first day of sentencing, Judge Aquilina informed a sentencing speaker that her statement would “change legislation.” (1/16/18) 23. She also told another sentencing speaker “the legislators are hearing you” in addition to telling her she was “moving mountains” by publicly speaking about the case. (1/16/18) 105. On the second day of sentencing, Judge Aquilina told a speaker, “making sure that your voice is heard through legislators around the country and the world will be the gold that we all seek for the safety of all of our children...” (1/17/18) 22-23. Judge Aquilina informed another speaker, “the world is watching and your message has not only been sent to this court but to others who feel they may not have a voice and to other predators and hopefully legislators. You may change some laws.” (1/17/18) 56. If the other statements made by Judge Aquilina left any doubt, a prolonged statement made on day 2 of sentencing leaves no doubt that the entire proceeding was geared not toward Michigan’s stated sentencing goals², but toward legislative and policy advocacy:

² The objectives generally relevant to sentencing were first articulated by the Michigan Supreme Court in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), and have been often reiterated by our Courts. In *Snow*, the Court explained that in imposing sentence, the court should “balance” the following objectives: “(1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses.” *Id.* (citation omitted). [*People v Wines*, ___ Mich App ___ (3/8/18; # 336550)]

There's also a common thread of regret and remorse, but that needs to be converted to change, public healing, new public policy, speaking out, and I agree, and that's why we're here, and that's why I let everybody who wants to speak out, because sexual assault needs to remain in the forefront, talked about, and fought against.

I am hopeful with Doctor Karageanes' words that he will continue the fight with the survivors and with important people collectively, speaking out, being one voice, working with legislators across the country, not just in Michigan. (1/17/18) 166-167.

Again, on Day 3 of sentencing, Judge Aquilina informed a speaker that the information she was providing was useful for “the world” and she was “hopeful that [she] will take [her] message to the state and federal government for change...” (1/18/18) 116.

Canon 4 makes clear that while a judge is permitted to participate in activities geared toward “improvement of the law[,]” it is only allowed as “time permits” “either independently or through a bar association, judicial conference, or other organization[.]” In fact, the very title of Canon 4, utilizing the words “extrajudicial activities” makes clear that this type of policy activity may only be undertaken by a judge under limited circumstances - off of the bench. Canon 4 allows a judge to appear before legislative bodies and make recommendations, but there is absolutely no provision that allows a judge to disregard sentencing goals and instead advocate for changes in the law, from the bench, before a national audience³.

³ Notably, in apparently the only case to mention Canon 4, the Michigan Supreme Court denied a request from the state legislature for an advisory opinion on legislation, even where that legislation was specifically related to the power of the state courts. Justice Corrigan, concurring explained, “... this Court takes very seriously its duty to work for the improvement of the administration of justice. To fulfill this duty, this Court must advise the other branches of government regarding the Court's unique experience with successes, problems, and possible solutions. Further than this the Court cannot, and does not, go. Although it is this Court's responsibility to actively work toward the improvement of our legal system, it is ultimately the Legislature's responsibility to enact solutions.” *In re Request for Advisory Opinion*, 468 Mich 1213, 1214, 658 N.W.2d 124, 125 (2003)

3. Judge Aquilina specifically violated subsection 3 of Canon 3.

Under subsection 3 of Canon 3, the judge must conduct herself in a dignified and courteous manner and require dignified and courteous conduct of those subject to the judge's direction and control. That standard was not met when repeatedly during the proceedings, speakers, presumably audience members, are noted in the transcripts calling out in support during speakers' remarks and during the court's remarks, without rebuke from the judge. (1/24/18) 90, 102, 105. Judge Aquilina further abrogated her duties under this subsection when during the course of the sentencing hearing, Dr. Nassar's attorneys were harassed and received death threats. (11/24/17) 90. Only a few times did the court pay mere lip service to the fact that the attorneys were performing their constitutional duties, and did not do so when speakers were in the process of disparaging them. Judge Aquilina further failed to meet the standards set forth above when she herself proclaimed she wished she could impose cruel and unusual punishment upon Dr. Nassar, expressed her expectation that he would be physically harmed in prison, and finally stated that she was signing his "death warrant." (11/24/17) 107.

4. Judge Aquilina specifically violated subsections 6 , 7, and 9 of Canon 3.

Well aware of the high amount of publicity in this case, and presumably well-aware that almost all issues for appeal would first have to be decided by her under MCR 6.310(D) and MCR 6.429(C), Judge Aquilina stated that she would not grant any press interviews until the appeals period had been exhausted. (1/24/18) 110. Yet, in addition to the numerous comments over the course of seven days of sentencing indicating her personal disdain for Dr. Nassar and a desire to

see him punished outside of the bounds of the criminal justice system, Judge Aquilina has made numerous public appearances and given statements to the press before Dr. Nassar's time to seek appeal has expired. Judge Aquilina has made professional appearances at bar functions where she spoke about the case and expressed her feelings about it, spoken to the Detroit News and The Detroit Metro Times, posted to her own Facebook page about this case, and even traveled to attend the nationally televised ESPY awards in the company of the prosecutor of the current case – where she had to have known she would be photographed. (*Aquilina: 'I support the girls' in Nassar, MSU case*, by Francis X. Donnelly, The Detroit News, 4/24/18;⁴ *Judge in Nassar case says John Engler should step down from MSU*, by Violet Ikononova, The Detroit Metro Times, 5/23/18; *Portrait of Survival: Those abused by Nassar honored at ESPYs*, by Sarah Rahal, The Detroit News, 7/18/18).

D. Dr. Nassar is entitled to resentencing before a fair and impartial judge.

Section 9 of Canon 3 makes clear that a judge must be fair and preserve the appearance of impropriety, even at sentencing. Indeed defendants have the due process and constitutional right to be treated with fairness in all judicial proceedings. In *People v Mitchell*, 911 NW 2d 458, Justice McCormick dissenting (joined by Justice Bernstein) explained that where this standard is not met, resentencing before a different judge is a readily available remedy. Further, a trial court's comments both on and off the bench should be examined, and a defendant's constitutional right to a fair tribunal must take precedence over judicial economy:

The first principle of our justice system is that judges are impartial and independent. *In re Bennett*, 403 Mich 178, 199, 267 N.W.2d 914 (1978) (“[A] judge, whether on or off the bench, is

bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions.”); *In re Haley*, 476 Mich. 180, 196, 720 N.W.2d 246 (2006) (stating that the court is “an institution that the people of this state must be able to hold in the highest regard”). When a judge expresses his personal wish that the defendant had suffered a violent death instead of being arrested and convicted, the public’s confidence in the rule of law is undermined. *In re Hocking*, 451 Mich. 1, 13, 546 N.W.2d 234 (1996) (“A judge’s mode of articulating a basis for decision may exhibit such a degree of antagonism or other offensive conduct that a single incident would indicate that impartial judgment is not reasonably possible.”); *In re Simpson*, 500 Mich. 533, 543 n. 6, 902 N.W.2d 383 (2017) (“Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges.”), quoting Michigan Code of Judicial Conduct Canon 2(A). This is not to say that there is no role for emotion (including anger, and even vengeance) at a sentencing hearing. But that is for the people personally affected by the defendant’s crime and their representatives (such as the prosecutor) to express, not the person in the courtroom charged with ensuring the proceeding’s evenhandedness.

I would remand the defendant’s case for a sentencing hearing before a different judge, because “the importance of preserving the appearance of justice and fairness outweigh[s] considerations of waste and duplication.” *People v. Garvin*, 159 Mich. App. 38, 47, 406 N.W.2d 469 (1987). See also *In re Disqualification of Winkler*, 135 Ohio St. 3d 1271, 1276, 986 N.E.2d 996 (2013); *United States v. Navarro-Flores*, 628 F.2d 1178, 1185 (C.A. 9, 1980).

People v. Mitchell, 911 NW2d 458, (Mem)–459 (Mich. 2018), Justice McCormick dissenting, joined by Justice Bernstein, from the denial of leave.

In *In re Haley*, *supra*, the Michigan Supreme Court held the trial court judge violated a specific canon of judicial conduct barring a judge from accepting “a gift, bequest, favor, or loan from anyone[.]” Given the violation of specific canons, an inquiry into the *appearance* of impropriety was not even necessary. Instead, the showing a specific violation of a specific canon was sufficient.

Here, Judge Aquilina violated specific canons, MCR 2.003, and due process, Dr. Nassar is entitled to resentencing on that basis, and resentencing must be before a different judge.

STATE OF MICHIGAN
IN THE INGHAM COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

Circuit Court No. 17-526 FC

LAWRENCE GERRARD NASSAR

Defendant-Appellant.

AFFIDAVIT OF COUNSEL
REGARDING THE MOTION FOR DISQUALIFICATION

STATE OF MICHIGAN)
) SS:
COUNTY OF WAYNE)

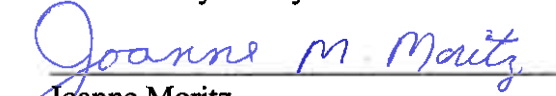
Jacqueline J. McCann, hereby swears, affirms and states:

1. I am an assistant defender at the State Appellate Defender Office (SADO).
2. SADO has been appointed to represent the defendant in the above captioned case.
3. The assertions of fact in the accompanying motion for disqualification of Judge Aquilina are true to the best of my knowledge, information and belief.
4. The grounds for disqualification included in the accompanying motion are all that are known to me at the time of filing.



Jacqueline J. McCann

Subscribed and sworn to before me
this 23rd day of July 2018.



Joanne Moritz
Notary Public, Wayne County, Michigan
My commission expires: 9-2-2019

STATE OF MICHIGAN

IN THE INGHAM COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Circuit Court No. 17-526 FC

-vs-

Honorable Rosemarie E. Aquilina

LAWRENCE GERRARD NASSAR

Defendant-Appellant.

PROOF OF SERVICE

Jean Downey says that on **July 24, 2018**, she mailed one copy of:

-NOTICE OF HEARING (8/8/18, 10:30 am)

-MOTION FOR DISQUALIFICATION OF JUDGE

-ATTACHMENT: ISSUE I, BRIEF IN SUPPORT OF MOTION FOR
RESENTENCING/TO CORRECT AN INVALID SENTENCE

- AFFIDAVIT OF COUNSEL

-PROOF OF SERVICE

TO:

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Department of Attorney General
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Detroit MI 48202

CRIMINAL APPELLATE DIVISION
Attorney General
P.O. Box 30217
Lansing, MI 48909



Jean Downey

31087P-G/JJM

2018 JUL 24 P 3:32

FILED