

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Court of Appeals No. 345699

-vs-

Lower Court No. 17-526 FC

LAWRENCE GERRARD NASSAR

Defendant-Appellant.

/

ATTORNEY GENERAL

Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE

Attorney for Defendant-Appellant

/

**DEFENDANT-APPELLANT'S
BRIEF ON APPEAL**

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

This Honorable Court granted leave to appeal on December 13, 2018, “as to Issues I and II only” from Defendant-Appellant’s application. Appendix S, COA Order, 12/13/18. His conviction was by plea. This Court has jurisdiction pursuant to Mich Const 1963, art 1, § 20 and as implemented by MCL 600.308(2)(b); MCL 770.3(1)(d); MCR 7.203(B); and MCR 7.205(E)(3).

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STATEMENT OF QUESTIONS PRESENTED

I. **Did Dr. Nassar have a due process right to a judge free from even the appearance of bias to decide his motion for resentencing/to correct an invalid sentence? Was Judge Aquilina admittedly not unbiased and impartial in regard to Dr. Nassar, and did she violate judicial canons in regard to this case including by her post-sentencing conduct? Should Judge Aquilina have been disqualified from hearing the post-conviction motion?**

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

II. **Did Dr. Nassar have a due process right to be sentenced by a judge free from even the appearance of bias? Was Judge Aquilina not an unbiased and impartial judge? Is resentencing before a different judge required?**

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant Lawrence 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 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

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. Nassar³ 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).

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 1/17/18, 12-13, 30-31, 65-66, 83; Sent 1/19/18, 68, 187, 235-236; Sent 1/22/18, 65).

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

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

³ There has been some controversy during the proceedings about whether it is proper to refer to defendant as doctor. To undersigned counsel's knowledge, the defendant still has his medical degree though he may no longer be licensed to practice medicine in the State of Michigan, just as a disbarred attorney still holds a juris doctor degree, so in this brief his counsel will refer to him as Dr. Nassar.

Judge Aquilina used the nationally-televised proceeding as an opportunity to advance an agenda, including to advocate for policy initiatives within the state and 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.⁴ (See e.g. Sent 1/17/18, 16-17, 22-33, 56, 61, 166 187-188; Sent 1/18/18 70, 79; Sent 1/19/18, 9, 26; 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).

Further, the judge allowed the proceeding to devolve into a free-for-all, in which speakers were given free rein 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 1/17/18, 14, 41, 52; Sent 1/18/18, 38-40, 103-104; 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).

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).

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 1/17/18 47, 62; Sent 1/22/18, 64; Sent, 1/23/18, 192; Sent 1/24/18, 90, 102, 105).

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

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).

During the sentencing hearings, Dr. Nassar’s attorneys were harassed and subject to death threats. (Sent 11/24/17, 74, 90). Only occasionally did the judge state 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 as they did so. (Sent 11/24/17, 73-74, 94).

At one point, one of the victims used part of her victim impact statement to chastise one of Nassar’s attorneys in regard to her cross-examination during an earlier preliminary examination and “wondered what possessed you to defend this man? What made you waste your hard work in law school on this despicable case?” When defense counsel objected, the prosecutor complained about the objection and the judge admonished defense counsel that the victim was allowed to comment on counsel’s job and to let it go. (Sent 1/22/18, 17-19). Later, at the hearing on the motion for disqualification, Judge Aquilina remarked of that defense attorney who had dared to object: “...and counsel is lucky I did not hold them in contempt for interrupting a victim of sexual assault.” (MH 8/3/18, 28).

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). SADO was appointed to represent Dr. Nassar on appeal on February 22, 2018. (Order of Appointment, 2/22/18, within Appendix A).

Despite the judge's claim that she would not grant press interviews, it came to SADO's attention shortly before the due date for the motion for resentencing that Judge Aquilina had apparently spoken to the Detroit News about this case since the sentencing. (*Aquilina: 'I support the girls' in Nassar, MSU case*, by Francis X. Donnelly, The Detroit News, 4/24/18, Appendix I;⁵ see also *Judge in Nassar case says John Engler should step down from MSU*, by Violet Ikonomova, The Detroit Metro Times, 5/23/18, Appendix J).⁶

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." (Appendix I, Donnelly-Detroit News article, *supra*.)

Additionally, the judge had speaking engagements since sentencing in which she has commented on this case and posted to her Facebook page about it. (Ikonomova-Metro-Times article, *supra*.) Most recently, it was reported that Judge Aquilina, as well as the former 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, 7/18/18.⁷

Dr. Nassar timely filed a motion for resentencing/to correct an invalid sentence. He also filed a motion to disqualify Judge Aquilina from hearing that motion for resentencing/to correct an invalid sentence. (See docket entries attached within Appendix A).

⁵ <https://www.detroitnews.com/story/news/local/michigan/2018/04/24/aquilina-msu-nassar/34219805/>

⁶ <https://www.metrotimes.com/news-hits/archives/2018/05/23/judge-in-nassar-case-says-john-engler-should-step-down-from-msu>

⁷ <https://www.detroitnews.com/story/news/local/michigan/2018/07/18/abused-nassar-athletes-honored-espn/798612002/>

SADO became aware of more of Judge Aquilina's post-sentencing social media activity in regard to Dr. Nassar's case after filing those motions. In Dr. Nassar's reply brief, amongst others, SADO cited the following Facebook post and response to a comment from Judge Aquilina. Judge Aquilina shared an article titled "Judge Rosemarie Aquilina's sentencing of Larry Nassar was within her judicial rights." The second commentator to the judge's post stated: "**I don't give a shit if it was or wasn't. Fuck him**" (Emphasis added.) Judge Aquilina reacted to that second comment flippantly, with a laughing emoji. (Appendix R, Facebook post and 2nd comment).

 **Rosemarie Aquilina** shared a link.
February 14 · 



THE-PEAK.CA
Judge Rosemarie Aquilina's sentencing of Larry Nassar was within her judicial rights | The Peak

 and 188 others 35 Comments 8 Shares

 Like  Comment  Share

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 [REDACTED] I actually just had a conversation about you today! I was talking with a coworker about Justice Ginsburg and my coworker said that she fears for the day she retires . I told her that the only person who could step in those big shoes is you!!!

Like · Reply · 23w  2

 [REDACTED] I don't give a shit if it was or wasn't.
Fuck him.

Like · Reply · 23w  1



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[REDACTED] I actually just had a conversation about you today! I was talking with a coworker about Justice Ginsburg and my coworker said that she fears for the day she retires . I told her that the only person who could step in those big shoes is you!!!

Like · Reply · 23w

[REDACTED] I don't give a shit if it was Fuck him.

Like · Reply · 23w

Rosemarie Aquilina

After hearing oral argument, Judge Aquilina denied the motion for disqualification. (MH 8/3/18, 20-32⁸; Appendix B, Aquilina's order denying motion for disqualification). She held that: "I have not crossed any boundaries", while acknowledging that she may have spoken unartfully or out of frustration at times during the sentencing hearing. (MH 8/3/18, 20). Judge Aquilina explained that she believed her complained of expressions in the courtroom were actually helpful:

I was afraid that something would happen and so when I got upset, in part it was my frustration, but it was also because you could feel the tension in here, and as soon as I got upset, it deflated, and I was worried that people would come after him, like they did in Eaton County,⁹ but they did not. As soon as I got upset, everyone released their tension. (MH 8/3/18, 25-26).

⁸ "MH 8/3/18" refers to the transcript of the motion hearing.

⁹ The Eaton County sentencing hearing took place after the Ingham County sentencing hearing.

Judge Aquilina stated that she did not hear or pick up on audience member's calling out comments during the sentencing though the court reporter did. (MH 8/3/18, 29).

Judge Aquilina denied speaking with the Detroit News. (MH 8/3/18, 7, 25). Likewise, as to the cited Facebook post, Judge Aquilina denied that the laughing emoji from her was made in response to the second comment, while she did not deny posting the article about operating within her rights at the sentencing hearing. (MH 8/3/18, 6).

In regard to her social media posts and other public statements regarding the case, Judge Aquilina alluded to her personal First Amendment rights. (MH 8/3/18, 25). She further explained: "I've always been an advocate for justice and for the right side." (MH 8/3/18, 31).

Pursuant to MCR 2.003(D)(3)(a)(i), the question of disqualification of Judge Aquilina was submitted for de novo review to Chief Judge Garcia. (See Appendix B, Judge Aquilina's 8/3/18 order denying motion for disqualification). On August 14, 2018, Chief Judge Garcia issued an opinion and order denying Dr. Nassar's motion for disqualification of Judge Aquilina. (Appendix C, Chief's 8/14/18 opinion/order denying disqualification). The chief judge held that Judge Aquilina's conduct during the sentencing hearing was proper and that she was "providing emotional restitution on behalf of our State by allowing the victims to place their anger and pain with her. Her sentencing relieved their suffering, in part, by delivering a clear message to the Defendant and the community that we must hear and support survivors of sexual assault." (Appendix C, Opinion/Order, p 5). Regarding Judge Aquilina's post-sentencing activities related to Dr. Nassar's case including her social media, the chief judge held that they were consistent with Canons 3 and 4 of Code of Judicial Conduct:

Canon 4 of the Code of Judicial Conduct allows for a judge to "speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." Canon 3(A)(6) specifically allows for a judge to make "public statements in the course of official duties" and to explain "for public information the procedures of the court or the judge's holdings

or actions." Canon 4(8) allows a judge to attend public events if the "activities do not detract from the dignity of the office or interfere with the performance of judicial duties." (Appendix C, Opinion/Order, p 6).

On August 24, 2018, Dr. Nassar moved for reconsideration of the chief judge's opinion/order denying disqualification of Judge Aquilina and moved for a stay to allow him to appeal any adverse decision before Judge Aquilina heard his motion for resentencing.¹⁰ He asserted that the chief had failed to consider two key pieces of evidence: the Detroit News article in which Judge Aquilina purportedly admitted that she is not unbiased and Judge Aquilina's Facebook post of an article asserting that she had acted within her authority at Dr. Nassar's sentencing hearing and where Judge Aquilina reacted to a commentator's assertion that the commentator did not give a shit whether the judge exceeded her judicial authority at sentencing, with a laughing emoji. Dr. Nassar also asserted that the chief judge's decision improperly focused only on a showing of actual bias (or lack thereof) and ignored the standard regarding the appearance of bias. Finally, Dr. Nassar asserted that the chief judge had erroneously held that adherence to the judicial standards regarding impartiality and bias are no longer applicable after sentencing, even though the defendant's conviction is not final nor the case concluded until the direct appeal is over.

On August 27, 2018, in the morning, the chief judge denied the motion for reconsideration. (Appendix D, chief's 8/27/18 order denying reconsideration motion). The chief judge also denied Dr. Nassar's motion to stay his order denying the motion for disqualification of Judge Aquilina

¹⁰ During the 21-day period which MCR 2.119 provides to move for reconsideration, Judge Aquilina scheduled a hearing for August 27, 2018 on Dr. Nassar's motion for resentencing/to correct an invalid sentence, with little notice to the parties. This was despite SADO notifying her staff of Dr. Nassar's intention to file a motion for reconsideration of the order denying disqualification and, if necessary, his intention to seek leave to appeal in this Court with a motion for immediate consideration. (See COA No. 345204, interlocutory application for leave to appeal, Appendix F, defendant's motion to stay).

such that the motion for resentencing/to correct an invalid sentence would not be heard before Dr. Nassar had the opportunity to seek leave to appeal in this Court on the disqualification question. (Appendix E, chief's 8/27/18 order denying stay).

Dr. Nassar sought interlocutory leave to appeal the question of whether Judge Aquilina should be disqualified in this Honorable Court before she rendered a decision on his pending motion for resentencing/to correct an invalid sentence and moved for a stay of the lower court proceedings. (COA No. 345204). This Court granted immediate consideration, but denied the motion to stay and denied the application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." (Appendix F, COA No. 345204, 8/27/18 order).

Later in the afternoon of August 27th, Judge Aquilina heard argument on the motion for resentencing/to correct an invalid sentence. (MH 8/27/18, generally).¹¹ The judge reiterated her reasoning from the hearing on the motion for disqualification and denied the request for resentencing on the grounds raised in Issues I and II of the defendant's motion/brief in support.¹² (MH 8/27/18, 12-21; Appendix G, 9/7/18 order). The judge also held that she had properly applied the *Snow*¹³ factors. (MH 8/27/18, 20).

The parties agreed that the references to the federal sentence/consecutive sentencing be removed from the Judgment of Sentence, and Judge Aquilina agreed to do so but believed that it had no bearing on how the federal sentences and state sentences would run in relation to each other. (MH 8/27/18, 4, 13-14, 21-22). However, the People objected to the defense's request that

¹¹ "MH 8/27/18" refers to the transcript of the hearing on defendant's motion for resentencing/to correct an invalid sentence.

¹² Judge Aquilina also made references to law governing plea withdrawal, but the defendant was not seeking to withdraw his plea. (MH 8/28/18, 12-13, 22).

¹³ *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

the court order the Michigan Department of Corrections to start running Dr. Nassar's time and to credit him for time served including in federal custody and the judge denied the defense's request. (MH 8/27/18, 22; Appendix G, 9/7/18 order). The court entered an amended judgment of sentence. (Appendix H).

Dr. Nassar sought leave to appeal in this Honorable Court. On December 13, 2018, this Court issued a split decision on applications. In the Ingham County file, in a 2-1 decision, the Court granted leave to appeal in Issues I and II but denied leave to appeal in Issue III. In the Eaton County file, which raises an issue in the same vein as Issue III from the Ingham County file, the Court denied leave to appeal, in a different 2-1 configuration. The Honorable Stephen L. Borrello would have granted leave to appeal in full on both applications. The Honorable Peter M. Meter would have denied leave to appeal in full on both applications. (COA order, 12/13/18, Appendix S).

The post-conviction motions and pending appeal did not deter Judge Aquilina from continuing to publicly express her personal animus to Nassar. A few days before this Court ruled on Nassar's applications, which she had to have known would raise issues concerning her conduct at sentencing and her conduct post-sentencing, Judge Aquilina tweeted a cartoon with dehumanizing and violent imagery depicting Nassar as a live rat that she, while wearing her judicial robe, is preparing to execute in a garbage disposal. In doing so, Judge Aquilina stated in her tweet that she was "honored" by the artist's depiction. It is reproduced below.

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[Rosemarie Aquilina](#)
[@AquiRosemarie](#)

[Dec 11](#)

Thank you for honoring me with this! And, for keeping the discussion for meaningful change moving forward [pic.twitter.com/8oKLi24xdu](https://twitter.com/8oKLi24xdu)

See Appendix T.

Judge Aquilina has done some national television interviews recently. At least in one, on CBSSportsNet, she discussed her “death warrant” comment from sentencing. According to that interview, Judge Aquilina has no regrets about using that language and believes it to be accurate. She posted a clip of this interview to her twitter feed on December 13, 2018, the day that this Court issued its decision on the applications.



Rosemarie Aquilina

@AquiRosemarie

Follow



CBS Sports Network @CBSSportsNet

"They needed to know that they were safe."

Honorable Rosemarie Aquilina has no regrets in her statements during Larry Nassar's sentencing.

7:34 PM - 13 Dec 2018

See also: <https://twitter.com/CBSSportsNet/status/1072663067329220611>

On April 2, 2019, the Michigan Supreme Court denied Dr. Nassar's interlocutory application for leave to appeal concerning Issue III from this file and his application for leave to appeal in regard to the Eaton County file. (Appendices U & V – MSC orders, 4/2/19). Additional facts may be referred to in the argument section.

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ARGUMENTS

- I. Dr. Nassar had a due process right to a judge free from even the appearance of bias to decide his pending motion for resentencing/to correct an invalid sentence. Judge Aquilina was admittedly not unbiased and impartial in regard to Dr. Nassar, and she violated judicial canons in regard to this case including by her post-sentencing conduct. Judge Aquilina should have been disqualified from hearing the post-conviction motion.**

Issue Preservation

Judge Aquilina and the Chief Judge Garcia denied the defendant's motion to disqualify Judge Aquilina from hearing the motion for resentencing/to correct an invalid sentence and any further proceedings.¹⁴ (Appendices B & C). The chief judge denied the defendant's motions for reconsideration and to stay. (Appendices D & E). Dr. Nassar filed an interlocutory application for leave to appeal in this Court. This Court granted immediate consideration but denied the motion to stay and denied the application for leave to appeal "for failure to persuade the Court of the need for immediate appellate review." (Appendix F, COA No. 345204, 8/27/18 order).

Standard of Review

This Court reviews de novo questions of law including constitutional questions and the proper interpretation of court rules. *People v Comer*, 500 Mich 278, 557 (2017); *People v Lee*, 489 Mich 289, 295 (2011).

¹⁴ The timing limitation of MCR 2.003(D)(1)(a) for filing a motion to disqualify in the trial court by its plain language does not apply to post-conviction motions. MCR 2.003(D)(1)(a) Time for Filing in the Trial Courts provides: "To avoid delaying trial and inconveniencing the witnesses, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith." Additionally, counsel only became aware of the judge's public statements and social media activities shortly before filing the motions and then became aware of more after filing the motions.

Discussion

Dr. Nassar was entitled to a decision maker for his motion for resentencing/to correct an invalid sentence who was free from even the appearance of bias. Because Judge Aquilina had 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 was required to be disqualified. Judge Aquilina had demonstrated that she could not be an unbiased and impartial decision maker in regard to Dr. Nassar, including with her post-sentencing social media activity.

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). Circuit court judges know this as they decide such motions on a regular basis and have knowledge of the court rules.

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).

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 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).

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:

(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. 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).

Even if disqualification cannot be met under the precise language of the rule, parties may establish disqualification on the basis of 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).

A judge should 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). 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.” It 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.

Canon 3 is also very relevant here, as it includes a specific reference to sentencing, and reminds judges that the appearance of impartiality is required through the entire pendency of a case:

(A) Adjudicative Responsibilities.

- (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

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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.¹⁵

(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.]

After sentencing and until the time Dr. Nassar's motions for resentencing and disqualification were submitted for filing, Judge Aquilina engaged in social media activity, including self-promotion, founded almost entirely on this case and the positions she has taken in this case. This has included (among hundreds of her other Facebook posts and Twitter tweets): 1) sharing articles in which Dr. Nassar is referred to in derogatory terms and where the legal proceedings, including sentencing are specifically referenced, as well as expressing support for comments posted to her page referring to him in derogatory terms¹⁶, 2) posting numerous photographs of herself with "sister survivors" and thanking ESPN for including her in the ESPYS¹⁷, 3) sharing pictures of a photo of herself printed on a T-shirt accompanied by the hashtag #metoo, and a picture of an international celebrity wearing a shirt with her name on it on Saturday Night Live¹⁸, 4) liking a Tweet in which the poster criticized Michigan State University's litigation

¹⁵ The quoted language was in effect until after Appellant filed his application for leave to appeal. The new language of Canon 3(A)(6), effective October 25, 2018, provides: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court."

¹⁶ Appendix O

¹⁷ Appendix P

¹⁸ Appendix K

team for moving to quash a warrant related to Dr. Nassar¹⁹, 5) openly admitting that she even “allowed” people “to swear at [Dr. Nassar]” during the sentencing hearing²⁰, and 6) tweeting about an upcoming documentary about this case and liking a corresponding comment referring to Dr. Nassar in derogatory terms²¹. It is impossible for a judge who has become so enmeshed in the public adoration and celebrity resulting from the severity of her treatment of Dr. Nassar to be seen as neutral and unbiased.

Other states have held that a judge’s use of electronic social media can create the appearance of bias or partiality such that disqualification is warranted. *In re the Paternity of BJM: Miller v Carroll*, ___ NW2d ___ (Wisc, 2/20/19), slip opinion, 2019 WL 761649; *State v Thomas*, 376 P3d 184, 198-199 (NM; 2016).²² This appears to be a matter of first impression in Michigan. Michigan should join with those other states in holding that judges must still maintain the appearance of propriety and impartiality and otherwise adhere to the judicial canons in their use of electronic social media.

In a purported²³ interview given to the Detroit News post-sentencing, Judge Aquilina admitted that she is not unbiased. The following is taken directly from the Detroit News article (published on April 24, 2018 and well before defendant’s time to appeal concluded):

¹⁹ Appendix L

²⁰ Appendix M

²¹ Appendix N and Appendix O

²² Some states have even held that a Facebook “friendship” standing alone between a judge and an attorney is enough to create an improper appearance of bias and partiality, but these states appear to be in the minority. See *Law Offices of Herssein and Herssein v United Services Automobile Association*, ___ So3d ___, slip 7 (Flor, 11/15/2018), 2018 WL 5994243.

²³ On the record at the hearing on the motion for disqualification, Judge Aquilina explicitly denied ever speaking to the Detroit News; yet, inexplicably the article is full of quotes directly attributed to her and explicitly states that she provided an interview to the Detroit News. When appellate counsel asserted at the motion hearing that her statements to the Detroit News were evidence that

Ingham County Circuit Judge Rosemarie Aquilina, during her first interview since the sentencing, also defended her fierce advocacy for the victims during and after the sentencing. “I support the girls,” she told The Detroit News on Tuesday. “I said that at the sentencing. Nothing has changed there.” The paper contacted Aquilina after she used her Facebook page to repost a TV news video of an MSU rally Friday calling for interim President John Engler and the trustee board to step down. She told The News that Engler should have allowed Nassar victim Kaylee Lorincz to speak longer at a school trustee meeting last week. Lorincz was limited to three minutes as she described how Engler allegedly offered her \$250,000 to settle her lawsuit against the school.... She said that, once a verdict is reached, it’s proper for a judge to take a stance. “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.”

[Appendix I, Detroit News article.]

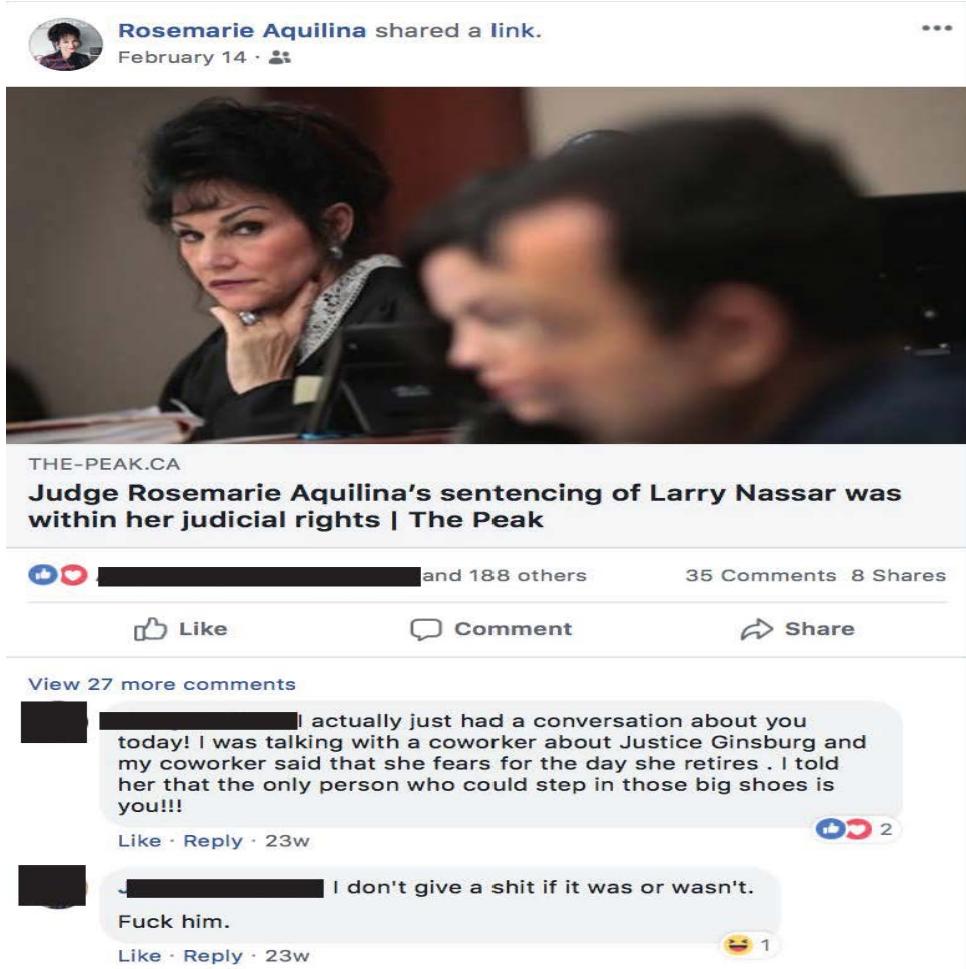
Particularly relevant to the motion for resentencing/to correct an invalid sentence is the following Facebook post and response to a comment from Judge Aquilina. Judge Aquilina shared an article titled “Judge Rosemarie Aquilina’s sentencing of Larry Nassar was within her judicial rights.” The second commentator to the judge’s post stated: **“I don’t give a shit if it was or**

the Court was not unbiased, and at the very least pierced the veil of impartiality, Judge Aquilina responded “I did not talk to the Detroit News.” MH 8/3/18, 7. In rendering her opinion denying her own recusal, Judge Aquilina again denied having spoken to any media:

Your brief talks about talking to the media. Me? Here's a notebook. I don't know if this is three or four inches. These are all the requests. They're waiting after the appeal period to pass because that's what I've told them. The media wants to talk to me. They have lots of questions. I won't answer. They're here. Go ask them yourself. I said wait. And here's the requests. I get more every day and I said, no. MH 8/3/18, 25.

The Detroit News has not retracted the article after Judge Aquilina denied its contents at the motion hearing, despite having had a reporter present who reported on the proceeding.

wasn't. Fuck him” (Emphasis added.) Judge Aquilina reacted to that second comment flippantly, with a laughing emoji.²⁴ (See Appendix R, Facebook post & 2nd comment)

A screenshot of a Facebook post by Judge Rosemarie Aquilina. The post shows a photo of her in a courtroom setting. The caption reads: "Rosemarie Aquilina shared a link. February 14 · · ·". Below the photo is a link to "THE-PEAK.CA" with the title "Judge Rosemarie Aquilina's sentencing of Larry Nassar was within her judicial rights | The Peak". The post has 188 likes and 35 comments. A comment from a user (redacted) reads: "I actually just had a conversation about you today! I was talking with a coworker about Justice Ginsburg and my coworker said that she fears for the day she retires . I told her that the only person who could step in those big shoes is you!!!". Another comment from the same user (redacted) reads: "I don't give a shit if it was or wasn't. Fuck him." The post has 2 likes and 1 emoji reaction.

THE-PEAK.CA
Judge Rosemarie Aquilina's sentencing of Larry Nassar was within her judicial rights | The Peak

and 188 others 35 Comments 8 Shares

Like Comment Share

View 27 more comments

[redacted] I actually just had a conversation about you today! I was talking with a coworker about Justice Ginsburg and my coworker said that she fears for the day she retires . I told her that the only person who could step in those big shoes is you!!! 2

[redacted] I don't give a shit if it was or wasn't. Fuck him. 1

²⁴ At the disqualification motion hearing, Judge Aquilina claimed that she was reacting to a separate comment from a different commenter, comparing her to Justice Ginsburg. MT 6. The post itself shows that this is not accurate. By her own admission, Judge Aquilina is extremely familiar with the working of social media and engages frequently in its use. Judge Aquilina did not deny that she shared the article titled “Judge Rosemarie Aquilina’s sentencing of Larry Nassar was within her judicial rights.” And, certainly, she did not express disapproval of the comment disparaging the rule of law and the defendant in profane terms on her Facebook page.


Rosemarie Aquilina shared a link.
 February 14 · ...

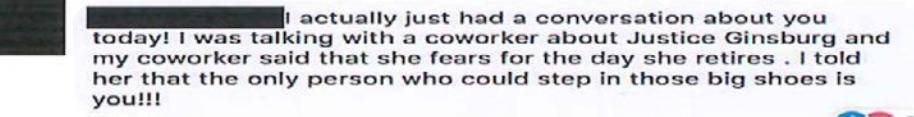


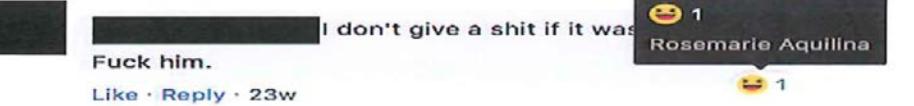
THE-PEAK.CA
Judge Rosemarie Aquilina's sentencing of Larry Nassar was within her judicial rights | The Peak

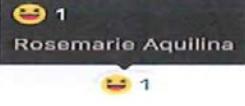

35 Comments 8 Shares

 Like  Comment  Share

[View 27 more comments](#)







See Appendix R.

These post-sentencing activities should also be evaluated in the context of Judge Aquilina's alarming conduct at the sentencing hearing in this matter. The judge allowed the sentencing proceeding to devolve into a free-for-all, in which speakers were given free rein 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). 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). Even in passing sentence, Judge Aquilina noted: "I read some of the Twitters and Facebooks and all of what's going on in the media." (Sent 1/24/18, 96).

During the sentencing proceedings, 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). At one point when one of Dr. Nassar's attorneys objected to the abuse, the prosecutor objected 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). At the hearing on the motion for disqualification, the judge still had no sympathy for the attorneys who did their constitutional duty in representing Dr. Nassar at sentencing, instead stating: "...and counsel is lucky I did not hold them in contempt for interrupting a victim of sexual assault." (MH 8/3/18, 28).

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 it²⁵ (Sent 1/22/18, 65), and finally proclaimed, with apparent relish, that she was signing his “death warrant.”²⁶ (Sent 1/24/18, 107).

These post-sentencing, pre-motion for resentencing/to correct an invalid sentence, activities should also be evaluated in the context of Judge Aquilina’s alarming social media conduct since she denied the motions for disqualification and motion for resentencing. The post-conviction motions and pending appeal did not deter Judge Aquilina from continuing to publicly express her personal animus towards Nassar. This more recent conduct further evidences the animus, bias and partiality that she has long held.

A few days before this Court ruled on Nassar’s applications, which she knew would raise issues concerning her conduct at sentencing and her conduct post-sentencing, as these were raised in the motions before her, Judge Aquilina tweeted a cartoon with dehumanizing and violent imagery. The tweeted cartoon depicted Nassar as a live rat that she, while wearing her judicial robe, is preparing to execute in a garbage disposal. In doing so, Judge Aquilina stated in her tweet that she was “honored” by the artist’s depiction. It is reproduced below.

²⁵ In a subsequent proceeding a few weeks later, Dr. Nassar was physically attacked in an Eaton County Circuit courtroom. (Eaton Sent, 2-2-18, 25-26). And, Dr. Nassar reported, that in late May 2018 he was physically attacked in federal prison within a few hours of being placed in general population. And more recently, that he was physically attacked at the new federal prison to which he was transferred.

Counsel is not suggesting that Dr. Nassar would not have been in danger absent Judge Aquilina’s comments. However, Judge Aquilina’s comments and her failure to condemn or at least curtail similar comments made by others during the victim impact statements increases the danger and at least makes it appear that a judge actually condones this type of behavior.

²⁶ A “death warrant” is “an official order for the execution of a condemned person.” *Google dictionary*. Michigan does not have the death penalty. The defense is unaware of any state in the United States that still applies the death penalty as a punishment for criminal sexual conduct.



[Rosemarie Aquilina](#)
[@AquiRosemarie](#)

[Dec 11](#)

Thank you for honoring me with this! And, for keeping the discussion for meaningful change moving forward [pic.twitter.com/8oKLi24xdu](https://twitter.com/8oKLi24xdu)

See Appendix T.

Judge Aquilina has done some national television interviews recently. At least in one, on CBSSportsNet, she discussed her “death warrant” comment from sentencing. According to that interview, Judge Aquilina has no regrets about using that language and believes it to be accurate. She posted a clip of this interview to her twitter feed on December 13, 2018, the day that this Court issued its decision on the applications.



Rosemarie Aquilina
@AquiRosemarie

Follow



CBS Sports Network  @CBSSportsNet

"They needed to know that they were safe."

Honorable Rosemarie Aquilina has no regrets in her statements during Larry Nassar's sentencing.

7:34 PM - 13 Dec 2018

See also: <https://twitter.com/CBSSportsNet/status/1072663067329220611>

Finally, the Ingham County Circuit Court's decision not to disqualify Judge Aquilina from hearing the motion for resentencing, given all that has occurred including her social media conduct is in sharp contrast with a disqualification decision made in Eaton County. The district court judge first assigned in Eaton County granted the defense's motion to disqualify her based on a single Facebook "like" she had made of a post from a lawyer for a victim in a civil case related to Dr. Nassar. (Appendix Q - order for disqualification and motion to disqualify). That judge disqualified herself because if she continued on the case it created an appearance of impropriety. (Appendix Q).

Because Judge Aquilina did not conduct herself in accordance with the judicial canons, MCR 2.003, and/or the defendant's state and federal constitutional rights to Due Process, she should have been disqualified from hearing the motion for resentencing/correction of an invalid sentence and any further proceedings in this case.

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This case has been of significant public interest, and thus it is important that this Court demonstrate that Michigan's judicial system is governed by the rule of law. Additionally, this Court needs to give guidance to the trial bench about the proper use of social media. Ultimately, this Court should reverse the circuit court's orders denying disqualification and denying resentencing, and remand for another judge to hear the motion for resentencing/to correct an invalid sentence and conduct any further proceedings.

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II. 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.

Dr. Nassar, like every criminal defendant, was entitled to be a fair sentencing hearing conducted by a judge free from even the appearance of bias and partiality. Because Judge Aquilina did not provide that, he is entitled to resentencing before a different judge.

Issue Preservation

Judge Aquilina heard argument on the motion for resentencing/to correct an invalid sentence. (MH 8/27/18, generally). The judge reiterated her reasoning from the hearing on the motion for disqualification and denied the request for resentencing on the grounds raised in Issues I and II of the defendant's motion/brief in support.²⁷ (MH 8/27/18, 12-21; Appendix G, 9/7/18 order).

Standard of Review

This Court reviews de novo questions of law including constitutional questions and the proper interpretation of court rules. *People v Comer*, 500 Mich 278, 557 (2017); *People v Lee*, 489 Mich 289, 295 (2011).

²⁷ Judge Aquilina also made references to law governing plea withdrawal, but the defendant was not seeking to withdraw his plea. (MH 8/28/18, 12-13, 22). The defendant is allowed to seek resentencing without moving for plea withdrawal in this case because the sentence agreement portion of the plea agreement was for a minimum term somewhere within the range of 25 to 40 years rather than for a specific term, e.g. for a minimum prison term of 40 years. *People v Price*, 477 Mich 1, 3 n 1 (2006); contrast with *People v Blount*, 197 Mich App 174 (1992). Dr. Nassar did not bargain away his right to a fair determination of where within that range of 25 years to 40 years his minimum term of sentence should fall.

Discussion

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

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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.²⁸

(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.²⁹

²⁸ The quoted language was in effect until after Appellant filed his application for leave to appeal. The new language of Canon 3(A)(6), effective October 25, 2018, provides: “A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”

²⁹ As of October 25, 2018, old subsection 7 quoted here was moved to subsection 11. The new language of Canon 3(A)(7), effective October 25, 2018, provides: “A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of adjudicative duties of judicial office.”

(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.³⁰

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.

³⁰ As of October 25, 2018, old subsection 9 quoted here was moved to subsection 13.

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 goals³¹, but toward legislative and policy advocacy:

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

³¹ 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*, 323 Mich App 343 (2018)]

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 audience³².

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. The judge said nothing to stop speakers who were in the process of denigrating and disparaging Dr. Nassar's attorneys as they did so. (Sent 11/24/17, 73-74, 94). At one point, one of the victims used part of her victim impact statement to chastise one of Nassar's attorneys in regard to her cross-examination during an earlier preliminary examination and "wondered what possessed you to defend this man? What made you waste your hard work in law school on this despicable case?" When defense counsel

³² 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 NW2d 124, 125 (2003)

objected, the prosecutor complained about the objection and the judge admonished defense counsel that the victim was allowed to comment on counsel's job and to let it go. (Sent 1/22/18, 17-19). Only a few times did the judge pay mere lip service to the fact that the attorneys were performing their constitutional duties, and she 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."³³ (11/24/17) 107.

At the hearing on the motion for disqualification, Judge Aquilina sought to excuse some of her behavior at the sentencing hearing by explaining her belief that it helped relieve tension within the courtroom:

I was afraid that something would happen and so when I got upset, in part it was my frustration, but it was also because you could feel the tension in here, and as soon as I got upset, it deflated, and I was worried that people would come after him, like they did in Eaton County,³⁴ but they did not. As soon as I got upset, everyone released their tension. (MH 8/3/18, 25-26).

However, judges throughout Michigan prove every day that retaining safety in the courtroom does not need to come at the expense of abandoning the maintenance of decorum and respect for all participants and the constitution.

³³ A "death warrant" is "an official order for the execution of a condemned person." *Google dictionary*. Michigan does not have the death penalty. The defense is unaware of any state in the United States that still applies the death penalty as a punishment for criminal sexual conduct.

³⁴ The Eaton County sentencing hearing took place after the Ingham County sentencing hearing.

4. Judge Aquilina's post-sentencing conduct specifically violated subsections 6, 7 (now 11), and 9 (now 13) of Canon 3, and reflects her long held bias.

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;³⁵ *Judge in Nassar case says John*

³⁵ On the record at the hearing on the motion for disqualification, Judge Aquilina explicitly denied ever speaking to the Detroit News; yet, inexplicably the article is full of quotes directly attributed to her and explicitly states that she provided an interview to the Detroit News. When appellate counsel asserted at the motion hearing that her statements to the Detroit News were evidence that the Court was not unbiased, and at the very least pierced the veil of impartiality, Judge Aquilina responded "I did not talk to the Detroit News." MH 8/3/18, 7. In rendering her opinion denying her own recusal, Judge Aquilina again denied having spoken to any media:

Your brief talks about talking to the media. Me? Here's a notebook. I don't know if this is three or four inches. These are all the requests. They're waiting after the appeal period to pass because that's what I've told them. The media wants to talk to me. They have lots of questions. I won't answer. They're here. Go ask them yourself. I said wait. And here's the requests. I get more every day and I said, no. MH 8/3/18, 25.

Engler should step down from MSU, by Violet Ikonomova, 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). And her social media activity, including her February 14, 2018 Facebook post and reaction to a profane comment to it (Appendix R), and her December 11, 2018 retweet of a dehumanizing cartoon with violent imagery (Appendix T), saying she was honored by it, reflect her long held bias and personal animus.

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

Canon 3, then section 9 (now 13) 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 NW2d 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 NW2d 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 NW2d 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

The Detroit News has not retracted the article after Judge Aquilina denied its contents at the motion hearing, despite having had a reporter present who reported on the proceeding.

reasonably possible.”); *In re Simpson*, 500 Mich 533, 543 n. 6, 902 NW2d 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 NW2d 469 (1987). See also *In re Disqualification of Winkler*, 135 Ohio St 3d 1271, 1276, 986 NE2d 996 (2013); *United States v Navarro-Flores*, 628 F2d 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 that resentencing must be before a different judge. This case has been of significant public interest, and thus it is important that this Court demonstrate that Michigan’s judicial system is governed by the rule of law.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant **LAWRENCE GERARD NASSAR** asks that this Honorable Court reverse the circuit court's orders denying disqualification and denying resentencing, and remand for another judge to hear the motion for resentencing/to correct an invalid sentence and conduct any further proceedings (Issue I). Ultimately, he is entitled to resentencing (Issue II).

Respectfully submitted,

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