STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 162615
Plaintiff-Appellee,	Court of Appeals No. 345699
v	Ingham County Circuit Court No. 17-000526-FC
LAWRENCE GERRARD NASSAR,	
Defendant-Appellant. /	

PEOPLE OF THE STATE OF MICHIGAN'S BRIEF IN OPPOSITION TO LAWRENCE NASSAR'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

COUNTER-STATEMENT OF JURISDICTION

The People agree that this Court has jurisdiction over Nassar's application for leave to appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. At sentencing, a judge may express the moral outrage of the community, though consistent with due process guarantees she may not act on an extrajudicial bias. With Nassar's express agreement, Judge Aquilina listened to over 150 women and girls describe their sexual abuse by Nassar, appropriately expressed the moral outrage of the community, and imposed a 40-year minimum sentence, which is within the range Nassar agreed to. Is Nassar entitled to resentencing on this unpreserved claim?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

2. A judge may be disqualified for showing an appearance of impropriety where the judge's conduct would create a reasonable perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired; claims of disqualification are subject to forfeiture and may not be supported by non-record evidence. Nassar's challenge to the sentencing judge's post-sentencing conduct is largely unpreserved and supported by non-record evidence. Is Nassar entitled to a rehearing of his motion for disqualification?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. Imposing an individualized sentence involves considering the relevant sentencing factors and fashioning a sentence to fit the offense and the offender. Judge Aquilina sentenced Nassar to a 40-year minimum sentence for sexually abusing seven children, including a family friend and several of his medical patients, which was a sentence within the range Nassar agreed to. Is Nassar entitled to resentencing?

Appellant's answer:	Yes.
Appellee's answer:	No.
Court of Appeals' answer:	Did not answer.

RULES INVOLVED

MCR 2.003(A)(1) provides:

> 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.

INTRODUCTION

After listening to the victim impacts statements of over 150 women subject to Defendant Larry Nassar's sexual abuse, Judge Rosemarie Aquilina voiced the community's moral outrage. Nassar is arguably the most destructive serial sexual predator in the history of the State, having for decades exploited his position as a former sports medicine doctor at Michigan State University and as the team doctor for the USA Olympic gymnastics team.

Those numerous survivors came to speak not because of Judge Aquilina's conduct, but because of Nassar's. In exchange for the Attorney General not pursuing dozens and dozens of additional charges for criminal sexual assault, Nassar agreed that all of his victims, charged and uncharged, could speak at sentencing. While the judge offered affirming words for the numerous survivors, she sometimes responded to those emotional victim impact statements with intemperance and inappropriate language. Ultimately, the judge sentenced Nassar within the sentencing range *he agreed to*.

Nassar challenges the judge's conduct both at and after sentencing, contending that she was biased or showed an appearance of impropriety. But his appeal is largely unpreserved and premised on non-record evidence. Importantly, Nassar did not object at sentencing to the challenged statements, which now means that they are reviewed only for plain error. He also failed to timely move to disqualify the judge, his motion coming nearly six months after the court rules require such a motion. The vast majority of proofs he offers to support his argument that her post-sentencing statements required her disqualification from

hearing his motion for resentencing are either untimely or are non-record "evidence," attached only upon appeal. And those that were properly presented did not warrant disqualification.

That being said, the sentencing judge has, at times, made inappropriate comments. But given the deficiencies throughout Nassar's application, proper scrutiny of those statements should rest not in this Court's adjudicatory role, but in its distinct constitutional role in the oversight of this State's judges. See Const 1963, art 6, § 30; MCR 9.200 *et seq*. Nassar's application suggests as much—it is replete with discussion of the Code of Judicial Conduct. The Canons are as important to the public confidence in the judiciary as they are to the judiciary itself. But the Canons are the purview of this Court in a distinct constitutional role. The volume of Judge Aquilina's non-record social media activity included in Nassar's brief since the sentencing—and therefore both outside the appellate record and irrelevant to the legal questions—only highlights that this Court's judicial function is not the right destination for Nassar's allegations.

Another aspect of Nassar's appeal is not properly addressed here, though it may well implicate this Court's administrative capacity. Nassar claims that the court rule governing timely motions for disqualification for sentencing are "impracticable under Michigan's appellate system" and "not feasible." (Def Br, p 19.) This may or may not be true—it is most certainly not a complaint regularly entertained by our appellate courts—but in any event that complaint is best addressed to this Court in its administrative function. See Const 1963, art 6, § 5.

What's more, this case has no practical significance for Nassar—*he will never serve the sentence he challenges in this appeal.* The sentence will not begin for nearly *60 years* while he serves his antecedent federal sentence, long after his natural life is likely to expire. Moreover, Nassar has an identical, concurrent minimum sentence of 40 years in another county for sexual misconduct. That sentence is final, as this Court has denied leave to appeal. *People v Nassar*, 503 Mich 1003 (2019). No matter the outcome of this case, Nassar will never set foot in a Michigan prison. For him, this case is an academic exercise.

Also, the exceptional nature of this sentencing hearing—the sheer volume of survivors, the harsh words of the judge, the interest of the media—will not occur again, for Nassar is among the most prolific serial sexual predators in Michigan's history. This fact ensures that hearings like this will not recur in the next hundred, let alone the next thousand, cases. And while the court below rightly chastised the judge for some "wholly inappropriate" comments, it decided the case on the law.

Finally, the only relief that this Court could provide would be a remand for a different judge to hear Nassar's motion for resentencing. But as described, his underlying (and unpreserved) claims regarding sentencing lack merit; a remand would only extend Nassar's road that leads to a dead-end, wasting judicial resources and prolonging the much-needed closure for hundreds of sexual assault survivors who have already waited far too long. This Court should deny leave.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Nassar is accused of criminal sexual assault by his female child patient.

On August 29, 2016, the Michigan State University Police Department (MSU PD) began a criminal sexual conduct investigation involving a former gymnast, R.D., who reported being sexually assaulted by Defendant Larry Nassar. Nassar is a former license physician[1] whose practice focused predominantly on the treatment of young female gymnasts. With that supposed expertise, he served as associate professor at Michigan State University College of Osteopathic Medicine and as the lead doctor for the USA women's gymnastics team during four Olympic Games.

R.D. participated in an interview with the Indianapolis Star newspaper after reading an article they published about the cover up by USA Gymnastics of coaches that sexually abuse gymnasts. On September 12, 2016, the Indianapolis Star and Lansing State Journal published an article which included R.D.'s story as well as information provided by two additional survivors that chose to remain anonymous.

After dozens of women come forward with similar stories of abuse, Nassar pleads guilty to seven counts of first-degree criminal sexual assault.

Shortly after the article published, MSU PD began receiving phone calls from additional victims reporting Nassar had sexually assaulted them. In Ingham County, the Attorney General brought two separate cases which were bound over and consolidated in the Ingham Circuit Court. Nassar faced numerous counts of first- and third-degree criminal sexual conduct for the sexual abuse he committed

[1] Nassar has not been licensed to practice medicine since April 2017.

against seven girls between 1998 and 2015, including a minor family friend and six gymnast-patients. Nassar was also charged in neighboring Eaton County with several counts of criminal sexual conduct. (Eaton Cir Ct No. 17-20217; Mich Ct App No. 345808.)

In Ingham County, the parties entered into a plea agreement in which Nassar pled guilty to seven counts of criminal sexual conduct in the first degree (CSC-I). He agreed that the circuit court would set his minimum sentence between 25 and 40 years, within which the court "has final determination as to the minimum sentence imposed within that agreed upon sentence range for each count." (11/22/17 Ingham Plea Agreement, ¶ 2, attached as Ex A.) Nassar also expressly agreed to allow all his victims, charged and uncharged, to give victim impact statements at sentencing. (*Id.*, ¶ 4.) The Attorney General agreed not to issue further charges against Nassar for all survivors who had reported to MSU PD at the time of the plea, which included 125 individuals. (*Id.*, ¶ 6.) That number rose dramatically during and after the sentencing hearing at the center of this appeal.

Judge Aquilina presided over the case, and accepted defendant's plea at a late November hearing at which he admitted that he not only abused underaged girls, but did so for his sexual purpose and not for a medical purpose. (11/22/17 Plea Hr'g at 35–37.)

A week later in Eaton County, Nassar pled guilty to three counts of CSC-I pursuant to a substantially similar plea agreement. (11/29/17 Eaton Plea Agreement, attached as Ex B.)

In federal court proceedings, Nassar pleads guilty and is sentenced to 60 years' imprisonment, to be served before his state sentences.

As the state cases premised on his criminal sexual conduct proceeded, the federal government was also prosecuting Nassar in the Western District of Michigan for crimes related to his possession of reams of child sexually abusive material, or child pornography.

In a signed plea agreement with the United States Attorney, Nassar pled guilty to one count of receipt of child pornography, 18 USC § 2252A(a)(2)(A), possession of child pornography, 18 USC § 2252A(a)(5)(B), and destruction and concealment of records and tangible objects, 18 USC § 1519, for attempting to destroy the child pornography as the police were investigating him. (Federal Plea, attached as Ex C.)[2]

On December 7, 2017, the federal district court sentenced Nassar to 60 years' imprisonment. (Judgment in a Criminal Case, WDMI Docket No. 1:16-cr-242 [Federal Judgment], attached as Ex D.) The court ordered Nassar's federal sentences to be served prior to and consecutively to any state court sentences. (Federal Judgment, at 2.) The U.S. Court of Appeals for the Sixth Circuit unanimously affirmed the sentence. (8/22/18 6th Cir Order, attached as Ex E.)

[2] The factual admissions underlying the federal plea are: knowingly downloading images and videos of child pornography; from 2003 to 2016; knowingly possessing "thousands of images and videos of child pornography"; knowingly possessing child pornography including images involving 11-year-old minors; acting to impede a criminal investigation by deleting or altering information on his computer; and possessing images and videos of minors "subject to sadistic or masochistic conduct." (Federal Plea at 5–7.)

After an unprecedented sentencing hearing, Nassar is sentenced to 40-to-175 years' imprisonment, within the range he agreed to.

The Ingham County sentencing hearing lasted seven days in January 2018; pursuant to the plea agreement, 156 direct survivors of Nassar's abuse confronted him with their impact statements. A snippet of just one story from each day of the seven-day hearing illustrates the severity of Nassar's conduct:

- The complex feelings of shame, disgust, and self-hatred brought me bouts of depression, anxiety, eating disorders, and other compulsive conditions. Sometimes I think it's hard for people to translate these generic terms into reality. For me, it was a girl crying on the floor for hours trying not to rip out too much of her hair. For me, it was a girl wanting the pain to stop so badly that she woke up for months to the thought, I want to die. For me, it was a girl getting out her gun and laying it on the bed just to remind herself that she has control over her own life. [1/16/18 Tr at 20.]

- As a mother I understand how gravely heinous Larry's treatments – treatments – were. I am disgusted that anyone, let alone a father himself, could carry out such grotesque acts. I absolutely blame Larry for what he did to me and how his affects – and how this affects and impacts my life daily. It makes it hard for me to trust people and negatively impacts my relationship with others. [1/17/18 Tr at 19.]

- Today I will say to you all that this man has broken my world along [with] my parents['']. This assault has affected me physically, emotionally, and mentally, while tarnishing relationships I have now and many that I will never be able to create in the future. This sexual assault and molestation has affected my job, my dreams, my trust in people and doctors. I hate the color green and white and despise anything that is associated with MSU. I wake up in pools of sweat screaming in nightmares. I have horrible anxiety attacks at work and in public that make me want to rip out of my own skin. [1/18/18 Tr at 84–85.]

- I thought I knew Nassar. We all thought we did. When I was 16 I job shadowed him in high school. He was the reason I was so interested in the medical field and specializing in sports medicine. He was the reason I wanted to help gymnasts in the future. . . . I had a complete moment of clarity and understanding who Nassar

> really is and what he's done and I ran into my parents' room sobbing out of control. I remember grabbing my head and banging it on the bed trying to get the thoughts out. I also remember vaguely hearing my parents in the background trying to calm me down. It took a while but I managed to calm down with their help and sleeping in their bed for the rest of the night. That is something a 25 year old shouldn't have to do, sleep in their parents' bed because they're afraid of the monster, but it's happened more than once now, and, to be honest, I'm not sure when it will stop. [1/19/18 Tr at 71, 76.]

- No one had ever touched me like this before. I thought to myself, aren't my parents supposed to give you consent first? This is the gymnastics world, though, things aren't by the book. Plus, they wouldn't understand. But isn't it weird that he's not wearing gloves? I wonder if he does this to the other girls? And why is he closing his eyes? He's a doctor, though, so I'm sure it's fine. Plus, he's been so nice to me, and someone with his name I can obviously trust, right? [1/22/18 Tr at 11.]

- I will never forget the smell of the lotion he always carried with him in his training bag and the feeling of the scratchy, ding[e]y, generic towels he used in the treatments to hide whatever was going on underneath. [1/23/18 Tr at 153.]

- While I still struggle to trust myself and I still struggle to accept this reality that is mine, and, unfortunately, so many others, I have also come to understand that these decisions were his, not mine. I cannot blame myself for trusting my physician to do his job, and I cannot hold myself responsible for his criminal actions. So today I am trusting and encouraging that this court hold him accountable for the many scars he has left us with. [1/24/18 Tr at 9.]

Almost 150 other survivors shared similar stories. About a dozen more indirect victims—mostly family members—also spoke, including parents who struggled to forgive themselves for taking their children to see Nassar. (See generally 1/16/17–1/24/18 Sentencing Trs.)

After hearing the victim impact statements and allocution, considering the seven crimes to which he pled (which she considered "first and foremost"),

evaluating the *Snow* factors,[3] and judging Nassar's level of remorse and the effect of his conduct on the survivors, Judge Aquilina sentenced Nassar to 40-to-175 years' imprisonment, consistent with the plea agreement. (1/24/18 Tr at 95–109.)

A similar sentencing hearing occurred for his Eaton County convictions in the weeks following the Ingham County sentencing. The Eaton County Circuit Court heard from several dozen women and girls and received numerous written impact statements. Nassar was sentenced to 40-to-125 years' imprisonment, which will run concurrent with this Ingham County sentence.

Just as in the Ingham County case, Nassar filed a motion for resentencing in Eaton County, which the circuit court denied. Nassar also filed a delayed application for leave to appeal that sentence, which the Court of Appeals denied. (Mich Ct App Docket No. 345808.) This Court denied his application for leave. *People v Nassar*, 503 Mich 1003 (2019). Thus, his concurrent Eaton County sentence is final.

Six months later, Nassar moves to disqualify the sentencing judge and to be resentenced.

Nassar filed a motion for resentencing and a motion to disqualify Judge Aquilina from hearing the resentencing motion. For the motion to disqualify, Judge Aquilina held a hearing and denied it. (8/3/18 Judge Aquilina Order, Def App'x B.) The judge reiterated her thought process when imposing the 40-year sentence, calculating that, for the seven victims, Nassar would serve just under 6 years for

[3] *People v Snow*, 386 Mich 586, 592 (1972).

each act of CSC-I that he pled to, and considered it akin to a sentence that a repeat drunk driving offender might be given. (8/3/18 Hr'g Tr at 22.) In other words, the judge took issue with Nassar's argument that she, without thought, picked the top of the agreed-upon sentence range. The judge also pointed out the notebook of press inquiries her chambers received that was "three or four inches" thick, and that she had declined them because of the ongoing pendency of the post-conviction and appellate process. (8/3/18 Hr'g Tr at 25.) The judge acknowledged that she was not perfect—"Maybe I have not stated things perfectly, but I ask you to sit and listen for seven days to heartbroken children"—but that she listened to and addressed both sides "promptly, fairly, and impartially." (8/3/18 Hr'g Tr at 27–28.)

After referral to the chief judge of Ingham County pursuant to MCR 2.003, Ingham County Chief Judge Garcia reviewed de novo Nasser's motion to disqualify Judge Aquilina and denied it. (8/14/18 Chief Judge Garcia Order, Def App'x C.) Judge Garcia found that Judge Aquilina's "death warrant" comment at sentencing was simply one way of expressing the fact that because his Ingham sentence would run consecutive to his 60-year federal sentence, he would spend the rest of his life in prison. (*Id.* at 3.) He also disposed of Nassar's claim that Judge Aquilina should not have discussed what she might have ordered were she not bound by the constitution. Judge Garcia found Judge Aquilina's statement to be an "attempt[] to impress upon the Defendant his good fortune that he was protected by our Constitution," and to "communicate[] to the survivors that she understood the depth

of society's visceral natural desire for vengeance." (*Id.*) "Such passionate elocution is not the basis of disqualification." (*Id.*)

Judge Garcia also addressed Nassar's assertions about Judge Aquilina's post-sentencing conduct, finding that Nassar's "wish[] to be resentenced before a judge who is ambivalent about the suffering of victims" would "disqualify any judge with a pulse." (*Id.* at 6.) Defending Judge Aquilina's "advocacy for victims" and disputing Nassar's claim that Aquilina was "self-promoti[ng]," Judge Garcia found that Nassar "created this media event" and that "his crimes created this vortex of publicity." (*Id.*) In sum, Judge Garcia found "there is no picture, tweet, like, share television show, book signing or t-shirt that changes the dynamics of this case to the extent that it would affect the judge's future rulings." (*Id.* at 7.)

Nassar moved for reconsideration in front of Judge Garcia, which he also denied the morning of August 27, 2018. (8/27/18 Chief Judge Garcia Order, Def App'x D.) In the hours after Nassar's motion for reconsideration was denied, he sought interlocutory leave in the Court of Appeals; the People quickly responded. (Mich Ct App Docket No. 345204.) The same day, the Court of Appeals denied the application for failure to persuade the Court of the need for immediate appellate review. (8/27/18 Mich Ct App Order, Def App'x F.)

Later that afternoon, Judge Aquilina heard Nassar's motion for a new sentencing. (8/27/18 Hr'g Tr.) The court granted in part and denied in part the motion. (9/7/18 Order, Def App'x G.) The court denied his motion for resentencing for largely the same reasons it denied the motion to disqualify, but granted the

limited relief of removing from the Judgment of Sentence any reference to a related sentence imposed on him by the federal court. (*Id.*)

In an unpublished opinion, the Court of Appeals affirms.

The Court of Appeals affirmed over a dissent.[4] The majority found that Nassar's motion for disqualification was partly unpreserved and subject to plain error review. *People v Nassar*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 345699), unpub op at *2–4.

The majority first determined that Nassar's claims about the sentencing judge's conduct at sentencing, as well as most of the allegations after sentencing, were untimely and therefore unpreserved. *Id.* Nassar not only failed to timely object at the sentencing hearing, *id.* at *2–3, he moved for disqualification more than 14 days after those facts, contrary to MCR 2.003(D)(1)(a), *id.* Thus, for much of Nassar's appeal, the majority applied plain error review. *Id.* at *4.

First evaluating the judge's conduct for actual bias at the sentencing hearing, the Court of Appeals opined that the some of the judge's comments were "wholly inappropriate," *id.* at *6, that "inflammatory hyperbole has no place in a sentencing hearing," *id.* at *6, that "the judge should have exercised greater restraint in this

[4] Nassar sought leave to appeal in the Court of Appeals on three grounds; the Court of Appeals granted leave to appeal on two of them: a challenge that Judge Aquilina's conduct at sentencing revealed bias and that the Chief Judge erred in denying his motion to disqualify Aquilina from hearing his motion for resentencing because of her post-sentencing public statements. (12/13/18 Mich Ct App Order, Docket Nos 345699; 345808.) The third ground, though not granted by the Court of Appeals, is presented to this Court in Nassar's application for leave.

instance," *id.* at *7, and noting "instances in which the judge spoke in an imprudent, unwise, and inappropriate manner," *id.* at *8. But in looking at the "overall context" of the hearing, including the judge's conduct following the plea agreement and considering the proper factors for sentencing—including the potential for rehabilitation, protection of society, punishment, deterrence to others, the defendant's lack of remorse, and the effect on the victims, *id.* at *7–8—the court found there was no plain error affecting Nassar's substantial rights. *Id.* at *8.

The same goes for Nassar's claims of the appearance of impartiality. Although the court below properly held that violation of the judicial canons was not a cognizable legal basis for relief (outside of Canon 2, which is incorporated into MCR 2.003), *id.* at *9, it determined that, "when viewed in the context of the entire sentencing hearing, the judge's statements and conduct did not create a reasonable perception that her integrity, impartiality, or competence was impaired," and found no plain error. *Id.* at *10.

As for Nassar's contention that the judge's post-sentencing conduct required her disqualification from hearing his motion for resentencing, the court first rejected consideration of non-record evidence offered for the first time on appeal. *Id.* at *10. Regarding the preserved aspect of his claim, the court found no abuse of discretion for staying on the case on account of her attendance at an awards show honoring the victims, her posting about that awards show on a social media account, and her post referencing an upcoming documentary about the case. *Id.* at *10–11.

Nassar's unpreserved claims regarding her post-sentencing conduct largely concerned the judge's voicing of support for victims of sexual assault and were not improper. *Id.* at *11. The judge's statement in a press report that "I'm not fair and impartial. The case is over[.] No judge is fair and impartial (after the verdict). That's for before the sentencing," was an inartful recognition that her role as a judge is decidedly different at sentencing than it is at trial. *Id.* Finally, the Court of Appeals determined that the judge's use of a laughing emoji on another person's Facebook post "expressing disregard for whether the judge's sentencing of Nassar was within the judge's judicial right" risked "undermining public confidence in the integrity and impartiality of the judiciary" and was "ill-advised." *Id.* Nevertheless, the court appeared to credit the judge's explanation at the motion hearing that "the sentencing judge indicated that the laughing emoji was in response to a comment indicating that the judge should replace Justice Ruth Bader Ginsburg on the United States Supreme Court if Justice Ginsburg retired, rather than in response to the separate comment about Nassar." *Id.* at *11–12. And additionally, applying plain error review, the majority held that Nassar failed to establish that his substantial rights were affected by the judge's conduct. *Id.* at *12.

Judge Shapiro dissented, noting the "unique" nature of the sentencing hearing on account of Nassar's agreement to permit all of his victims to speak, rather than only those for which he pled guilty. *Id.* at *12 (dissenting). Judge Shapiro also would have held that his motions were timely. *Id.* at *13 n 2. The dissent found several parts of the sentencing hearing objectionable, including the

judge's reference to defendant as a "monster," her "personal satisfaction in imposing the sentence," and her comment to Nassar upon imposing the sentence that, "I've just signed your death warrant." *Id.* at *15. Judge Shapiro also disapproved of the judge's "frequent references to extrajudicial matters" at the hearing, regarding generalized calls for societal change. *Id.*

For the post-sentencing conduct challenged by Nassar, Judge Shapiro opined that the judge "plainly violated Canon 3(A)(6)"—which concerns public comment on pending cases—and cited the American Bar Association's Opinion regarding social media use. *Id.* at *16. Judge Shapiro would have ordered resentencing by a different judge. *Id.*

ISSUE PRESERVATION AND STANDARD OF REVIEW

A. As the Court of Appeals held, Nassar did not lodge contemporaneous objections, nor did he timely file his motion for disqualification.

Nassar twice failed to timely raise the issue of disqualification regarding Judge Aquilina's conduct at sentencing. Claims of judicial bias may be forfeited—and thus subject to plain-error review, in the absence of a timely objection. See *People v Sardy*, 216 Mich App 111, 117–118 (1996); see also *People v Stevens*, 498 Mich 162, 180 (2015) ("[D]efense counsel objected on multiple occasions to the judicial questioning of defendant's expert witness. We therefore conclude that the issue [of judicial partiality] is preserved and harmless-error review is inapplicable."). Nassar did not object to any of the judge's comments at the sentencing hearing. See *Stevens*, 498 Mich at 164 ("*When the issue is preserved* and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, *the court may not apply harmless-error review*.") (emphasis added); see also *People v Chatman*, unpublished opinion of the Court of Appeals, issued Dec 6, 2016 (Docket No. 328246), 2016 WL 7130962, p *2 (citing *Stevens* regarding forfeiture in the context of a judicial partiality claim and applying plain-error review).

Moreover, Nassar filed his motion for disqualification and for a new sentencing on July 24, 2018, six months after the sentencing date. MCR 2.003(D)(1)(a) requires that "*all* motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification." While the court rule does have a preamble, "To avoid delaying trial and inconveniencing the witnesses," that

does not change the all-encompassing language that follows—that "all" motions regarding disqualification must be promptly filed. See also *Cain v Michigan Dept of Corr*, 451 Mich 470, 494 (1996). Nassar suggests that this is a significant issue and that "[t]here is no timing limitation in MCR 2.003(D) that is applicable to filing a motion to disqualify in the trial court in regard to post-judgment motions" (Def Br, pp 18–20), but the language of the court rule leaves no room for construction. While the preamble may be a strange fit—and recognizes that most motions are filed in advance of trial, when the defendant is still presumed innocent—the court rule plainly applies to "all" motions for disqualification.

The claimed impracticability of the 14-day time period for appellate counsel may be ripe for this Court's consideration—in its rulemaking role—of whether the wording of MCR 2.003 warrants revision. (Def Br, pp 19–20.) But as it reads today, the rule is clear and leaves little for this Court to do on this application.

Because Nassar did not timely comply with the preservation requirements—failing to object at the sentencing and failing to timely move for disqualification, this Court should review for plain error affecting his substantial rights. See *People v Jackson*, 292 Mich App 583, 597 (2011); *Kroll v Crest Plastics, Inc,* 142 Mich App 284, 291 (1985) (noting 14-day time limitation and enforcing forfeiture).

If preserved, the Chief Judge's factual findings regarding his decision on the motion for disqualification are reviewed for an abuse of discretion, and his application of the law to the facts is reviewed de novo. *Cain v Michigan Dept of Corr*, 451 Mich 470, 503 (1996).

B. Nassar's application for leave is replete with non-record evidence that is not before this Court.

It is no small matter that the vast majority of the judge's social media footprint on which Nassar relies is either untimely or not a part of the record.

As the Court of Appeals properly noted, the only timely pieces of evidence supporting his motion for disqualification were the judge's attendance at and posting about a televised awards ceremony where the victims were honored, and a social media post referring to an upcoming documentary on the case. *Nassar*, unpub op at *3. (See Def Appendix P.)[5] Appendices I, J, K, L, M, O, and R are all untimely as 14 days had passed prior to Nassar's disqualification motion; Appendix N is dated after the motion was filed.

Even more problematic is that Nassar's appeal has steadily accrued more non-record "evidence" as this case climbed the appellate ladder—his application hinges substantially on this non-record evidence. This documentation should not even factor into plain-error review because it is not part of the appellate record. See *People v Taylor*, 383 Mich 338, 362 (1970) ("Obviously, the record on appeal may not be enlarged Ex parte by affidavits filed for the first time in the appellate court brief, and the affidavit by Havens should have been stricken from the brief."); *Fruchter v Martin*, 350 Mich 12, 18 (1957) ("And in the case of appeals to the Supreme Court of cases tried in circuit court it is clearly the rule that no questions concerning the evidence will be considered where such evidence is not contained in the appellate

[5] The People will refer to the appendices as they appear in Nassar's appendix itself. It appears the index for the appendix is inaccurate.

record."). See also MCR 7.210(A)(1) ("in an appeal from a lower court, the record consists of the original papers file in that court" as well as the transcripts and exhibits); MCR 7.310(A) (referring the record on file with the Court of Appeals). Appendices T, W, X, and Y are all dated in or after December 2018—months after the Chief Judge denied the motion for disqualification, and were either first submitted to the Court of Appeals or to this Court. Nassar does not contest this on appeal, yet continues to prominently feature them in his application to this Court. (Def Br, pp 14–18.)

Again, these matters are not cognizable to this Court in its adjudicatory function. Whether it be the role in overseeing the judiciary, Const 1963, art 6, § 30; MCR 9.200 *et seq.*, or the role in governing the "practice and procedure," Const 1963, art 6, § 5, these "facts" are not before this Court on whether this Court should grant Nassar's application for leave to appeal.

ARGUMENT

I. Nassar has not established plain error affecting his substantial rights for the judge's conduct at sentencing, which included some harsh words that reflected the community's outrage, but resulted in a sentence within the range Nassar agreed to.

Nassar was sentenced after an unprecedented hearing that was the result of his actions in two respects. First, his decades-long spree of abuse created the sheer number of survivors that walked to the podium over those seven days in January of 2018. Second, through his plea agreement, Nassar personally agreed to permit those survivors to speak in exchange for the opportunity to plead guilty to seven charges, to have a defined range for his minimum sentence, and for the Attorney General to forgo charges for the scores of other girls he abused. Despite that plea agreement, Nassar fails to comprehend the consequences that came with admitting his guilt to criminal sexual conduct against young girls, and agreeing many others could come and apprise the Court of their abuse at his hand.

Though Nassar was entitled to the all the protections inherent in a fair trial should he have exercised his right to have one, he instead *pled guilty*. Once he did so, "the presumption of innocence disappears," *Herrera v Collins*, 506 US 390, 399 (1993), and with it the trappings necessary to ensure a fair adjudication of guilt or innocence. The constitution, of course, still protects him, but those protections are not the same as a presumed innocent defendant—the primary role of the justice system in determining guilt was no longer at play. By signing the plea agreement and swearing, under oath, his guilt for these heinous offenses, the constitutional protections protecting that presumption of innocence were no longer applicable.

With this basic principle in mind, Nassar's unpreserved arguments about the judge's words at sentencing lack legal force.

A. At sentencing, with the defendant's guilt proven, a judge's words need not be tepid.

A sentencing judge is not limited to cold numerical calculations, weighing the severity of the crime and the offender like a mathematician crunching numbers. Strong words are sometimes necessary to effectuate society's condemnation. There are, of course, outer bounds to a judge's conduct, but critical or even "hostile" comments to a party are typically insufficient evidence to "pierce the veil of impartiality." *People v Jackson*, 292 Mich App 583, 598 (2011).

Even these broad limits typically apply in the *trial* context, where the jury is serving its role as factfinder and the judge should refrain from conduct that could unduly affect its judgment of the facts. See, e.g., *People v Stevens*, 498 Mich 162, 169 (2015); *People v Swilley*, 504 Mich 350, 370 (2019) ("In *Stevens*, this Court established the appropriate standard for determining when a trial judge's conduct in front of a jury has deprived a party of a fair and impartial trial."). In other words, the general limitations on a judge's conduct are to protect "a criminal defendant's right to a fair and impartial jury trial." *Stevens*, 498 Mich at 170.

Again, Nassar pled guilty and his presumption of innocence evaporated when the certainty of his guilt was self-proclaimed. Because his *trial* rights are no longer at play, the areas of inquiry for the question of judicial impropriety are narrow. This Court has recognized that, "[i]n reviewing claims of judicial partiality, a

reviewing court must first examine 'the nature or type of judicial conduct itself.' " *Swilley*, 504 Mich at 371, quoting *Stevens*, 498 Mich at 172. Indeed, in *Liteky v United States*, 510 US 540, 551 (1994), which this Court found "instructive" regarding the issue of actual bias, *Cain v Michigan Dept of Corr*, 451 Mich 470, 513 (1996), the U.S. Supreme Court made clear that "upon completion of the evidence," a judge may "be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person."

But even where the judge is "exceedingly ill disposed," she "is not thereby recusable for bias or prejudice, since [her] knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings." *Cain,* 451 Mich at 513; see also *Haynes v State*, 937 SW2d 199, 204 (Mo, 1996) ("It could be added that at sentencing, a judge's detached neutrality necessarily disappears."). Given the heavy "presumption of fairness and integrity" that judges enjoy in Michigan, a party challenging that presumption bears a heavy burden to prove otherwise. *Mahlen Land Corp v Kurtz,* 355 Mich 340, 351 (1959).

Once Nassar's guilt had been determined, the judge's role shifted from exclusively being an impartial arbiter to an entity carrying the voice of the community.[6] That is not to say that the constitution no longer protects him, but

[6] Judge Aquilina recognized this principle at sentencing:

> [I]n terms of fair and impartial, how can I be fair and impartial now, completely a blank slate, when I have a pre-sentence investigation report, I have your plea, I have all of these beautiful victims who have come forward? All of this has to be considered at sentencing. [1/17/18 Tr at 9.]

that the calculus is substantially different—in the eyes of the law, he is an admitted serial sexual predator who stands before the Court for the levy of consequences, not an innocent person awaiting the judgment of his peers.

B. The sentencing judge considered the proper factors in fashioning a sentence within the range Nassar agreed to.

Before addressing the instances that Nassar raises, this Court should review the sentencing judge's careful consideration and application of the sentencing factors set out in *People v Snow*, 386 Mich 586, 592 (1972), as evidence that she was not biased against Nassar, but was doing her job in rendering a sentence consistent with applicable law. The *Snow* factors are: "(a) the reformation of the offender, (b) protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses." *Id.*

Judge Aquilina considered the likelihood for Nassar's **reformation**, *id.*, finding it to be extremely low given his decades-long pattern of victimization. (1/24/18 Tr at 107) ("I have many defendants come back here and show me the great things they've done in their lives after probation, after parole. I don't find that's possible with you."). Relatedly, she considered the **protection of society**, *Snow*, 386 Mich at 592—Nassar demonstrated that he knew he had a problem for many

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The judge went on: "So all of you, when I look at myself as lady justice, my arms are like this. They are balanced. Prosecution, defense, they're balanced. It only starts to tip after there's a plea and after I take into consideration everything that's happened." (1/24/18 Tr at 103); (see also *id.* at 101) ("[S]o up until the time you pled I believed that maybe there was a defense here . . . ."). This recitation is consistent with *Liteky*, 510 US at 551.

years but failed to correct it. His risk of re-offense is extremely high. (1/24/18 Tr at 106.) ("You have done nothing to control those urges, and anywhere you walk destruction will occur to those most vulnerable."). She considered **retribution**, *Snow*, 386 Mich at 592, for his extensive and heinous crimes. (1/24/18 Tr at 106) ("[Y]ou do not deserve to walk outside of a prison ever again.").

The Court also evaluated Nassar's **lack of remorse**, as evidenced by a letter he authored while in jail in which he disparaged the sentencing proceedings, professed innocence, and said of the victims, "hell hath no fury like a woman scorned." (1/24/18 Tr at 97–102); *People v Wesley*, 428 Mich 708, 714 (1987) (noting "[t]he propriety of a sentencing court's consideration of a defendant's remorsefulness at sentencing"). Finally, the court reflected on the **impact on the victims** of Nassar's crimes, yet another valid sentencing consideration. See MCL 780.764, 765 (victim impact statements); *People v Jones*, 179 Mich App 339, 342 (1989).

Judge Aquilina did not pull Nassar's sentence out of a hat, nor did she prejudge him. See, e.g., (1/17/18 Tr at 9) ("All of this has to be considered at sentencing. *I haven't made up my mind.* I have ideas.") (emphasis added); (1/18/18 Tr at 95) ("It is also about advising me, helping me make the – a decision for sentencing. *As much as there's that plea agreement, I still have to decide a few things*, and all of your voices collectively help me as much as it's important for you to heal.") (emphasis added); (1/18/18 Tr at 115–116) ("I still haven't decided what I'm going to do."). She exercised her discretion, balanced the sentencing factors, and imposed a sentence within the range Nassar agreed to.

C. Nassar has not shown that the sentencing judge had an unfair personal animus.

Nassar claims that MCR 2.003(C)(1)(a) applies, which warrants disqualification where "[t]he judge is biased or prejudiced for or against a party or attorney." This rule warrants disqualification only where a judge has *actual* bias or prejudice against the defendant. See *Cain v Dept of Corrections*, 451 Mich 470, 494–495 (1996). "A showing of prejudice usually requires that the source of the bias be in events or information outside the judicial proceeding." *In re MKK*, 286 Mich App 546, 566 (2009), citing *Cain*, 451 Mich at 495–496. In short, personal animus against a party is a ground for disqualification where it is derived from outside-the-record information. See *Ullmo ex rel Ullmo v Gilmour Acad*, 273 F3d 671, 681 (CA 6, 2001) (a bias sufficient to justify recusal must be "a personal bias as distinguished from a judicial one, arising out of the judge's background and association and not from the judge's view of the law"). Judicial conduct falling short of "model" behavior only calls for relief where the judge's "conduct falls demonstrably outside this range so as to constitute hostility or bias." *Stevens*, 498 Mich at 171, quoting *McMillan v Castro,* 405 F3d 405, 410 (CA 6, 2005).

Nassar relies extensively on the supposed "stringent" rule of *In re Murchison*, 349 US 133, 136 (1955). But that case concerned a very different scenario—a due process violation for a "trial before the judge who was at the same time the complainant, indictor, and prosecutor." *Id.* at 136–137. That type of structural problem—during a trial, not a sentencing, no less—is not at issue here.

1. Nassar points to nothing in the record prior to sentencing that supports his contention that the judge was biased against him; rather, the record shows that, until he pled, she pushed to ensure he receive a fair trial.

Nassar has not alleged facts supporting a personal bias or animus against him, let alone a bias sourced from events outside of his sentencing. Indeed, the judge represented that she was initially unaware of Nassar or the publicity surrounding the case, was preparing to hold a fair trial, and entertained the real possibility of his legal defense:

> *I've done everything I can to make sure you had a fair and impartial trial and to stay free of anything I knew about you, because I didn't know you.* I don't know anything about your family. [(1/18/18 Tr at 9) (emphasis added).]

Nassar points to no evidence *prior* to sentencing that would suggest a bias against him. Because there is none. Indeed, the judge's pre-sentencing conduct evinces a clear understanding of her role to adjudicate Nassar's case impartially and protect his right to a fair trial. Just two salient examples will suffice.

First, the judge denied the People's pre-trial motion to proffer evidence that Nassar had admitted to the possession of child pornography depicting girls of a similar age as his victims. Despite the strong basis for introduction of that evidence, MCL 768.27a; *People v Watkins*, 491 Mich 450 (2012), Judge Aquilina kept it out, worried that the evidence would be "highly" or "unfairly" "prejudicial" to Nassar. (11/3/17 Mot Hr'g at 30–31.)[7] A judge so irredeemably biased against a

[7] The People filed an application for leave to appeal Judge Aquilina's ruling, which they dismissed upon Nassar's guilty plea. (Mich Ct App Docket No. 341004.)

defendant would not keep out admissible evidence that the law deems "exceptionally probative." See *Watkins*, 491 Mich at 476. Her discretionary call reveals a fair-minded judge without external biases.

Second, early in the proceedings before her, the judge issued an order limiting public disclosure regarding the case. The order broadly barred public comment about the case by any witnesses or attorneys, including by the victims. The judge issued that order because, she stated, "We need a fair and impartial jury," and was firm that, "[j]ustice cannot be served if we can't get a clean jury." (3/29/17 Hr'g at 11–13.) The judge was concerned about tainting Nassar's presumption of innocence:

> In this America defendants are innocent until proven guilty beyond a reasonable doubt. I am frightened not just for defendant but also for the victims here with the – with what's been coined as the mob mentality. [(3/29/17 Hr'g at 11.)]

In response, a group of victims went to federal court to challenge the scope of the order, arguing it was so broad that it impugned the First Amendment. The federal district court entered a temporary restraining order halting enforcement of the judge's order. *Denhollander v Aquilina*, 1:17-cv-305 (WD Mich 2017). Judge Aquilina then entered a narrower revised order. (4/12/17 Order Limiting Public Disclosure by Covered Individuals, attached as Ex F.) The court lifted this order only after Nassar pled guilty seven months later. (11/22/17 Plea Hr'g at 42–43.)

So, to be clear: the judge issued an order that bound victims from speaking publicly during the pendency of Nassar's case, dialed it back only when a federal

action was filed against her, and lifted the bar only after Nassar pled guilty. These are not actions that demonstrate a personal animus against the defendant.

2. The judge's harsh language at sentencing was generally justified, and did not constitute plain error affecting Nassar's substantial rights.

Regarding the sentencing itself, over the seven days of sentencing and the hundreds of pages of transcript, Nassar points to a few instances where the judge's comments were intemperate. One of the more severe statements the judge made found her recognizing the limits of her judicial authority:

> I will decide at sentencing how long. The plea agreement, which, as I said, I will honor, but on the tail end I'll make that determination. How much is a young girl's life worth? Our constitution does not allow for cruel and unusual punishment. If it did, I have to say I might allow what he did to all of these beautiful souls, these young women in their childhood, I would allow someone or many people to do to him what he did to others.
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> Our country does not have an eye for an eye and Michigan doesn't have the death penalty so I don't know how to answer how much is a young girl's life worth, but I have children of my own and there's not enough gold in the planet that would satisfy that question, and I think all of you victims are gold. [1/16/18 Tr at 226–227.][8]

Again, the judge expressed a moral outrage at Nassar for the crimes he committed. And her ruminations about what she may wished to have ordered were tempered by her acknowledged limitations as a judge under the rule of law: the

[8] Judge Aquilina later made clear that an eye for an eye "solves nothing" and admonished all those in attendance that "vigilante crime is not tolerated, so I hope that no one will do anything untoward against counsel, their children, their families, their firms, their cars, whatever it is. That is crime. Crime plus crime solves absolutely nothing." (1/24/18 Tr at 94.)

Constitution's prohibition on cruel and unusual punishment, Michigan's prohibition on the death penalty, and the eschewing of justice defined as an eye for an eye. Judge Aquilina's comments recognize that *the law* dictates her discretion, not her own personal views or the views of some members of the community.

Here, the judge similarly expressed frustration with Nassar—with his conduct, his unabated pattern of abuse, the enormity of pain it caused the survivors, the ripples of hurt to the family of those he abused, and the lack of his sincere remorse—and expressed it in a manner that channeled the community's frustration and moral outrage. That her words edged toward brief wishes of physical retribution (1/16/18 Tr at 226), and that she described the ultimate sentence as a "death warrant" (1/24/18 Tr at 107), are the unfortunate result of the extent and severity of his crimes, crimes that the judge responded to in a graphic manner. See *People v Antoine*, 194 Mich App 189, 191 (1992) ("Sentencing is the time for comments against felonious, antisocial behavior recounted and unraveled before the eyes of the sentencer. At that critical stage of the proceeding when penalty is levied, the law vindicated, and the grievance of society and the victim redressed, the language of punishment need not be tepid."). But such statements, which arose from the crimes at issue, are not grounds to find personal bias.

D. Nassar's lengthy discussion of the Code of Judicial Conduct reinforces that this legal case is not the proper venue for his complaints about the judge's conduct.

Nassar contends that the judge showed an "appearance of impropriety" at sentencing. MCR 2.003(C)(1)(b)(*ii*), citing Canon 2 of the Michigan Code of Judicial Conduct. Canon 2 concerns specific things a judge should refrain from, like:

- allowing family, social, or other relationships to influence conduct,
- appearing as a witness in a case absent subpoena,
- engaging in membership activities that discriminate based on race or gender, or
- accepting financial contributions for campaign deficits or expenses associated with judicial office. [Canon 2, Sections C, D, F, G; see also *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 599 (2001).]

Canon 2 also provides for more general, undefined *positive* requirements that judges act in a way that "promote[s] public confidence in the integrity and impartiality of the judiciary" and "treat every person fairly, with courtesy and respect." Canon 2, Section B. These positive mandates are largely incapable of specific application. Encapsulated, the test "is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Kern v Kern-Koskela*, 320 Mich App 212, 232 (2017).

Nassar's extensive reliance on the Code of Judicial Conduct (Def Br, pp 34–42), only confirms that his application is better addressed to a different forum. Aside from Canon 2, which is specifically incorporated into the court rules, MCR

2.003(C)(1)(b)(*ii*), the remainder are simply not properly before this Court, nor are they appropriate measures for whether Nassar is entitled to relief.

Nassar does not make an argument about why the Canons are dispositive of his legal claim before this Court. Though judges are expected to comply with the Canons, they are generally not independently cognizable before this Court. *Cf. United States v Sierra Pacific Indus, Inc*, 862 F3d 1157, 1175 (CA 9, 2017) ("[N]ot every violation of the Code of Conduct creates an appearance of bias requiring recusal."); see also *Nassar*, unpub op at *9 ("[T]his Court is not the appropriate venue to assert the violation of a judicial canon.").

The one Canon that is appropriate to consider is Canon 2, through its incorporation into the court rules. Canon 2.A simply reiterates that judges should avoid the appearance of impropriety, and Nassar claims that Judge Aquilina "allowing speeches from so many people" and permitting them to give emotional victim impact statements compromised her appearance. (Def Br, pp 36–37.) First, *Nassar agreed to let the victims speak*. (11/22/17 Ingham Plea Agreement, ¶ 4.) Second, Nassar did not object to the victims' statements; it is incumbent on the party, not the judge, to challenge the content of victim impact statements.

For similar reasons to those identified in Argument I.C, Judge Aquilina's conduct at sentencing did not exhibit the appearance of impropriety. She conducted a sentencing hearing (the length of which Nassar consented to), and offered affirming words to the numerous survivors who spoke before her. Without question, Judge Aquilina used strong and, on occasion, inappropriate, language. And she

admitted "[m]aybe I have not stated things perfectly" (8/3/18 Mot Hr'g at 28), but this imperfection is no surprise when her courtroom was overrun with women and girls day after day whose lives were shattered by Nassar's decisions, decisions that Nassar admitted to under oath. The judge's conduct did not "create in reasonable minds a perception that [her] ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Kern*, 320 Mich App at 232; (8/3/18 Mot Hr'g at 28 ("I ask you to sit and listen for seven days to heartbroken children.")).

People v Walker does not counsel differently. The defendant received relief because the trial judge gave an improper *Allen* charge to the jury to encourage its continued deliberation. 504 Mich 267, 284–285 (2019). So the substantive issue did not concern the judge's conduct at sentencing. Upon granting relief, the Court took the additional step of reassigning the case to a different judge given the court's "unprofessionalism and bias" at sentencing. *Id.* at 285. But the judge's animus not only arose from a *personal* hostility not linked to the defendant's crimes, it appears she *increased his sentence* based on that animus. See *id.* at 286 ("I was inclined to give you the middle of the road, but because you're so disrespectful and you just seem to want to go back to prison.") (cleaned up). The judge's harsh words for Nassar were because of his crimes; it was not interpersonal bickering stemming from a personal squabble. *Id.* at 286 ("After defendant indicated at least eight times during his allocution that he had nothing further to say, the trial judge continued to bait him, engaging in name-calling . . . ."). This Court should deny leave

II. Nassar's non-record evidence and largely unpreserved claims regarding Judge Aquilina's post-sentencing conduct do not entitle him to relief.

Nassar claims that his sentencing judge was not permitted to decide whether he was entitled to resentencing largely because she has become enmeshed in the public discussion of the case *after* sentencing. The judge and the chief judge of the county both determined that Nassar had not surmounted his burden to show that she ought to be disqualified from hearing Nassar's motion for resentencing. This Court should not disturb that finding.

First, the bulk of the allegations of the judge's statements and conduct are either unpreserved or, worse, not in the record at all. See *Taylor*, 383 Mich at 362 ("[T]he record on appeal may not be enlarged Ex parte by affidavits filed for the first time in the appellate court brief . . . ."); MCR 7.310(A); see also *Nassar*, unpub op at *10 ("In analyzing these arguments, we will not consider materials that Nassar has provided on appeal that are not part of the lower court record."). If Nassar intends to make a case that Aquilina's conduct was improper under the Canons, he should peruse MCR 9.200 *et seq.* and proceed under those rules. But *this* appeal is governed by the appellate record, which contains only an allegation or two that is preserved and part of the record.

On this ground alone, this Court should decline Nassar's implied invitation to waive the tried-and-true rules concerning the appellate record.

A. Judge Aquilina's post-sentencing conduct does not warrant Nassar's requested relief.

For the evidence that is properly before the Court, most of it supported an untimely motion and is therefore unpreserved. See Issue Preservation and Standard of Review.

First, the timely, preserved arguments are, as the Court of Appeals properly concluded, limited to "the judge's attendance at the ESPY awards, the judge's posting on social media an article relating to her attendance at the ESPY awards, and the judge's posting on social media an article concerning a documentary about Nassar." *Nassar*, unpub at *10. The Court of Appeals found that while these actions may have been "unwise," the ESPY-related conduct was simply in support of victims of sexual assault, including Nassar's victims. *Id.* For the posting about an upcoming documentary, the judge's inclusion of a link to an article about the documentary. *Id.* Nassar had not surmounted the strong presumption of impartiality through these actions.

Judge Aquilina apparently gave one press interview in which she stated—perhaps in an inartful manner—"I'm not fair and impartial. The case is over. No judge is fair and impartial (after the verdict). That's for before the sentencing." (See Def Br, pp 9, 26.) Although the judge's comment as reported may not be ideally phrased, this is, in essence, the law. See *Herrera*, 506 US at 399 ("The presumption of innocence disappears" after a finding of guilt); *Liteky*, 510 US at 551 ("[U]pon completion of the evidence," a judge may "be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person.").

And even if the judge was fully aware of the labyrinthian privacy settings of her social media accounts and was fully aware that her every move was public, supporting victims of sexual assault does not mean that the judge has shown impartiality in deciding Nassar's motion for resentencing. The predominant reason that this became the media event that Nassar now complains about is because of his decisions to sexually assault dozens and dozens of young girls, and his agreement to permit each and every one who wanted to speak a forum to do so. Affirming the survivors, during the sentencing hearings and publicly doing so afterward, constitutes the recognition that many of the survivors lacked until they stepped into that courtroom. Judge Aquilina's provision of "emotional restitution on behalf of our State," did not, as the Chief Judge determined, require disqualification. (8/14/18 Chief Judge Garcia Op and Order at 5.)

While use of a laughing emoji in a public response to a strongly worded condemnation of Nassar was not model (Def Br, pp 26–27), it does not establish plain error or rebut the heavy presumption of impartiality. See *Kurtz,* 355 Mich at 351. The Chief Judge found that no social media conduct in the record would affect Judge Aquilina's future rulings (8/14/18 Chief Judge Garcia Order at 7; Chief Judge Garcia Denial of Motion for Reconsideration, Def App'x D), and the Court of Appeals credited the judge's explanation—that she intended the emoji to respond to an entirely different Facebook post, *Nassar*, unpub op at 11. Nassar has not identified plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763–764 (1999).

Second, even if Nassar had shown plain error, the unpreserved arguments do not establish that the outcome was affected. A perfect comparator is the sentence levied in the similar case in Eaton County, where the sentencing judge also sentenced Nassar to a 40-year minimum (with the plea agreement) after dozens of victim impact statements. (Eaton Cir Ct No. 17-20217; Mich Ct App No. 345808.)

Third, this Court should reject Nassar's attempt to taint the well by including *non-record evidence* as additional grounds showing the judge's bias or appearance thereof—evidence of conduct *after* the judge's ruling under review, no less. MCR 7.210(A)(1); *People v Shively*, 230 Mich App 626, 628 n 1 (1998) ("The affidavit attached to defendant's appellate brief will not be considered by this panel to resolve this issue because it was not part of the lower court record."). Appendices T, W, X, and Y were either first submitted to the Court of Appeals or to this Court, often in blow-up color images in the body of his brief. This is non-record evidence; the Court of Appeals did not consider them for that reason, *Nassar*, unpub op at *10, and neither should this Court. *Fruchter*, 350 Mich at 18; MCR 7.310(A). Again, this evidence may be ripe for consideration in another forum, but not in this Court given its role as an appellate court.

B. Even if the judge's post-sentencing conduct had entitled Nassar to preliminary relief, the ultimate relief sought—a resentencing—is not warranted, yet another point counseling against granting leave.

Even if Judge Aquilina's post-sentencing conduct raised the specter of impropriety such that she should not have heard his post-conviction motion for

resentencing, for the reasons discussed in Argument I, this Court should deny leave. The record about what happened at sentencing is static and incapable of further development. Any hearing by another judge in Ingham Circuit Court on a remand about whether Nassar is entitled to a new sentencing hearing would not only be the only permissible form of relief in this case, it is also unnecessary and would only delay the inevitable. Because Nassar is not entitled to resentencing, even if the judge should have disqualified herself from reviewing the motion for resentencing or that Chief Judge Garcia should have disqualified her after the fact, this Court should deny leave. The Court of Appeals' opinion made clear that several of her comments did not reflect the high standards we hold for our judiciary. Between the plea agreement and the fact that Nassar will not benefit from any decision of this Court, any further action regarding the judge's conduct is not fit for this adjudicatory forum; Nassar's complaints are better addressed elsewhere.

III. The sentencing court considered the relevant *Snow* factors and other permissible reasons when imposing an individualized sentence that Nassar agreed to.

Nassar's third argument—that the judge "departed from the principles of individualized sentencing" (Def Br, p v)—was not addressed by the Court of Appeals and therefore not properly before this Court. (See also Def Br, p 45.)

On the merits, Nassar argues that his sentence was not properly individualized and cites extensively to a single, inapplicable case from this Court, discussed below. The legal rubric Nassar asks this Court to apply is not clear, though *it is* clear that Nassar waived his right to a review of the reasonableness of

his sentence because he was sentenced pursuant to a sentence agreement. *People v Ward*, 206 Mich App 38, 44 (1994). If Nassar's claim had not been waived, and assuming it is a proper claim to raise, his factual premise fails. The sentencing judge considered the *Snow* factors and other appropriate considerations before rendering a sentence within a range to which Nassar agreed.

A. The sentencing judge considered the proper factors in fashioning a sentence within the agreed-upon parameters.

As explained above, Argument I.B, after the victim impact statements, during which Judge Aquilina consistently offered affirming words, and allocution, the judge properly considered the *Snow* factors. *People v Snow*, 386 Mich 586, 592 (1972). Judge Aquilina did not pull Nassar's sentence out of thin air. She exercised her discretion, balanced the *Snow* factors, considered various other valid sentencing considerations, and imposed her sentence *within the range Nassar agreed to*.

Nassar's lodestar, *People v Schnepp*, 185 Mich App 767, 771 (1990) (see Def Br, pp 46–48), concerns only whether the trial court gave the defendant a proportional sentence when it "exceed[ed] the guidelines minimum range by a factor of four" in a case involving a lone count of possession with intent to deliver marijuana. *Schnepp*, 185 Mich App at 771. Nassar has waived his right to a review of the proportionality of his sentence because he entered into a sentence agreement, the trial court abided by that agreement, and defendant has not moved to withdraw his plea. *Ward*, 206 Mich App at 44.

Even if the proportionality of his sentence was reviewable, Nassar's case did not involve a judge throwing the book at a first-time marijuana dealer, as in *Schnepp*. Rather, the judge sentenced a serial sexual assaulter to a term of imprisonment *that he agreed to*, in exchange for dismissal of several other counts of CSC-I and with a promise that the Attorney General's office would not charge him for the *hundreds* of other sexual assaults that were reported to the police.

B. Nassar received an individualized sentence within the range he agreed to, and received the benefits of his bargain—the dropping of several charges and the promise not to bring dozens more.

Nassar contends that "Judge Aquilina only ever considered the highest minimum sentence allowed under the agreement." (Def Br, p 48.) Not so. Multiple times throughout the sentencing hearing, the judge reiterated that she was still deciding his sentence and that she was considering the plea, the PSIR, and the victim impact statements. (See, e.g., 1/17/18 Sentencing Tr at 9 ("All of this has to be considered at sentencing. *I haven't made up my mind.* I have ideas.") (emphasis added); 1/18/18 Sentencing Tr at 95 ("It is also about advising me, helping me make the -- a decision for sentencing. *As much as there's that plea agreement, I still have to decide a few things*, and all of your voices collectively help me as much as it's important for you to heal.") (emphasis added); 1/18/18 Sentencing Tr at 115–116 ("I still haven't decided what I'm going to do.").

Nassar's argument leverages the severity of his own criminal conduct to suggest that the judge's imposition of the highest minimum sentence under the plea

agreement was improper. But a truly individualized sentence for Nassar unbound by the plea agreement may well exceed the 40-year minimum he currently faces. Insofar as Nassar is suggesting he did not receive the benefit of the bargain, that is simply untrue. But for the plea agreement, those 150-plus survivors giving impact statements could instead be 150-plus survivors giving *testimony* to support innumerable charges of sexual abuse, some that support consecutive sentences, MCL 750.520b(3), and all of which are life offenses, MCL 750.520b(2)(a). (See Plea Agreement, ¶¶ 5, 6 (detailing the dismissal of 13 charges and the non-prosecution agreement for 125 victims)).

* * *

The sentencing judge considered the factors she was required to, used harsh language as she was entitled to, and imposed a sentence that Nassar agreed to. In light of his repetitive criminal depravity over the course of decades, the judge's sometimes extreme comments at his sentencing were understandable, if not model. On this record and under binding standards of preservation, Nassar has not shown entitlement to relief.

CONCLUSION AND RELIEF REQUESTED

The People respectfully request this Court deny leave to appeal.

Respectfully submitted,

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