



South Carolina Bar

Continuing Legal Education Division

2019 SC BAR CONVENTION

Criminal Law Section (Part 2)

“Where Are We and
What Are We Doing?”

Friday, January 18

SC Supreme Court Commission on CLE Course No. 190398

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Friday, January 18

State of South Carolina v. Michael Vernon
Beaty: A Case Study

David M. Stumbo

No Materials Available



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2019 SC BAR CONVENTION

Criminal Law Section (Part 2)

Friday, January 18

Closing Arguments: Every Judge is an Island

C. Rauch Wise

Closing Argument - Every Judge is an Island

South Carolina Bar Annual Meeting

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In South Carolina, prior to *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), the state was only required to open on the law. They were permitted to sandbag and give their theory of the case only after the defendant has given a closing.¹ This is not only unfair but a denial of due process. What follows in the major portion of the brief in *Beaty* on the correct order of closing arguments. In every case the defendant should make the argument that the state should be required to open fully on the law and the facts and then reply only to matter that were brought up in the defendant's closing.

In South Carolina no Rule of Criminal Procedure addresses the question of the order of argument to the jury. The practice of the State opening only on the law and then closing fully on the facts after the defendant has given the closing argument is long on tradition but short on law to support that tradition. The early practice in South Carolina was for the state to open fully on the law and the facts. In *State v. Atterberry*, 129 S.C. 464, 124 S.C. 648 (1924) the Supreme Court held that the failure to require the state to open fully on the law and facts was reversible

¹ An interesting oral argument on sandbagging in closing arguments is found in *United States v. Maloney*. It can be viewed on YouTube <https://www.youtube.com/watch?v=HgafGnA4Eow>

error. At that time Circuit Court Rule 59 provided “The party having the opening in argument shall disclose his entire case and on his closing shall be confined strictly to a reply to the points made, and authorities cited by the opposite party.”² In reversing the conviction of the defendant the Court said “The defendant moved the court to require the solicitor to make the opening speech to the jury before the defendant’s attorney’s were required to make their arguments. This was refused. This was error.” *Atterberry*, 129 S.C. at ___, 124 S.E. at 651. In his concurring opinion Acting Associate Justice Aycock stated the principle best when he said “It is but fair that the party who has the advantage of the last address to a jury should be required to open and apprise the opposing party of his views as to his entire case.” *Id.* at ___, 124 S.E. at 651. As a matter of legal history, the State in South Carolina was required to open fully on the law and the facts.

The more recent practice developed when the Circuit Court Rules were changed. This change was noted in *State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971). Again the defense counsel requested that the state be required to open fully on the law and the facts. This request was denied by the trial judge. The Court noted that since the decision in *Atterberry*, Rule 59 of the Circuit Court Rules had been changed to Rule 58 and the rule then read “The party having the opening in an argument shall disclose fully the law upon which he relies if demanded by the opposite party.” The Court in *Lee* concluded that “It follows that the trial judge, under the changed rule, was correct in holding that a solicitor is no longer required to make an opening

² Rule 59 in 1924 was part of the Code of Civil Procedure. The concurring opinion by Acting Associate Justice Aycock makes reference to the fact that nothing in the Code of Civil Procedure limits the application to civil cases. Rule 1 of the South Carolina Rules of Civil Procedure today does limit their application to civil cases.

argument to the jury on issues of fact.”³ *Lee*, 255 S.C. at 318, 178 S.E.2d at 656. Thus began the more recent practice of requiring the state to open only on the law and not the facts.

Today Rule 43 (j) of the South Carolina Rules of Civil Procedure controls the order of argument in civil cases. This rule now provides that the plaintiff shall have the right to open and close at the trial of the case. The rule then concludes “The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter.” With Rule 43(j) of the South Carolina Rules of Civil Procedure, the long practice in civil cases of plaintiff’s lawyers “sandbagging” and saving their real argument for their last argument, came to an end. But the practice, without any support in the law, continues in the general sessions courts not based upon the law or logic, but upon misapplication of the civil rules.

The practice of “sandbagging” in a closing argument was a basis for reversal of a criminal conviction in Delaware. In *Bailey v. State*, 440 A.2d 997 (Del. 1982) the court noted that “Closing argument is ‘an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment.’” *Id.* at 1004 (internal citations omitted). The court further held “Application of these authorities to the facts at hand compels us to reverse and remand the case for a new trial on the ground that the Trial Court abused its discretion in permitting the State to utilize the inherently prejudicial “sandbagging” trial strategy.” *Id.*

The majority of states and the federal courts require the prosecutor to open fully on the law and the facts. *See, e.g.* Fed. Rul Cr. Proc. 29.1; ARK. CODE ANN. 16-89-123; GA. CODE ANN. § 17-8-71; NEV. REV. STAT. ANN 175.141; TENN. RULES OF CRIM. PROC. Rule 29.1; In Re

³ Again this was a change in the Code of Civil Procedure which the court had no problem applying to a criminal case.

AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE-FINAL ARGUMENTS, 957 So.2d 1164 (Fla. 2007) *but see*, *Degadillo v. State*, 262 S.W.3d 371 (Tex. Ct. App. (2008)). The treatise writers also support the requirement that the state open fully on the law and evidence. *See*, JACOB STEIN, CLOSING ARGUMENTS 2d, § 1:6 (2010) and 75A AM. JUR. 2D *Trial* § 448 (2010). In revising its rules as to closing argument the Florida Supreme Court noted “The statute provides that in accord with the common law, the prosecuting attorney shall open the closing arguments, defendant or his or her attorney may reply, and the prosecuting attorney may reply in rebuttal.” *In re AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE- FINAL ARGUMENTS*, 957 So.2d at 1166.⁴

South Carolina should break with a practice that has no support in logic or the law and require that the State be required to open fully on the law and the facts. The current procedure in South Carolina simply permits the State to legally “sandbag” its argument and not afford the defense the opportunity to reply to new arguments that the State used in its closing.

In the *Beaty* case, our Supreme Court concluded “In cases in which a defendant introduces evidence, trial judges clearly have the authority to require the State to open in full on the facts and the law and have the authority to restrict the State's reply argument to matters raised by the defense in closing. This authority remains in keeping with the trial judge's authority to ensure that a defendant's due process rights are not violated during a criminal trial.” *Beaty*, at 46, 813 S.E.2d at 513 (2018), reh'g denied (May 25, 2018), cert. denied, No. 18-298, 2018 WL 4283153 (U.S.S.C. Oct. 29, 2018). This phrase could mean that we have as many rules for closing argument as we do trial judges, including magistrate’s courts. In reality it means we

⁴ The Florida Supreme Court also noted that forty-seven states follow the common law.

have an infinite number of rules for no trial judge is required to consistently apply the same rule to different cases. The only rule we know for certain is if the defendant is permitted to have the last argument under all circumstances, there will never be a due process violation against the defendant. Admittedly, giving a defendant a reply to the last argument of the state under all circumstances could be unfair to the state, the due process rights of the state will not be violated. The due process clause only protects the defendant and not the state. Until the Supreme Court clarifies the order and content of the closing arguments, these are the principles by which closing arguments should be conducted.



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Continuing Legal Education Division

2019 SC BAR CONVENTION

Criminal Law Section (Part 2)

Friday, January 18

Handling Difficult Cases Involving Victims: The
State, the Defense, and the Bench

S.R. Hubbard, III

Marion M. Moses

The Honorable Thomas W. Cooper, Jr.

Handling Difficult Cases:

A Case Study

South Carolina Bar Association

January 18, 2019

The Role of Judicial Discretion in Sentencing

Felony DUI Causing Death

Judgment Day !

The day of trial or plea and sentencing

- The victims come to this day, still devastated by their loss, exhausted by the process, many still angry at the Defendant, and looking for justice and closure.
- Closure will be delayed...probation, parole, or community service hearings will follow. "It ain't over 'til it's over." *Yogi Berra*
- Complete closure never comes..."We will never get over our loss; we just hope to work through it." *Anonymous victim.*

The Judge

JUDICIAL DISCRETION

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the ‘primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains.”

B. Cardozo, *The Nature of the Judicial Process* (1921)

Judicial Discretion, cont'd.

- “{w}hen applied to public officials ‘discretion’ is the power conferred upon them by law to act officially under certain circumstances according to the dictates of their own judgment and conscience and uncontrolled by the judgment or conscience of others.” *Schneider v. Hawkins*, 179 Md. 21, 16 A.2d 861 (1940)
- “Discretion in performing an act arises when it may be performed in one, two, or more ways, either of which would be lawful and where it is left to the will or judgment of the performer to determine in which way it will be performed.” *Texas Indem. Ins. Co. v. Arant*, 171 S.W.2d 915 (Tex. Civ. App. 1943)

Discretion

- “Wide enough in all conscience is the field of discretion that remains.”

- B. Cardozo, id.

In the exercise of discretion, what factors ‘in all conscience’ should a judge consider ?

Presentence Investigation Report

- US Probation Officer
 - History of person convicted of a crime before sentencing to determine if there are extenuating circumstances which should ameliorate the sentence or a history of criminal behavior to increase the harshness of the sentence.
- Fed. R. Crim. P. 32, U.S.S.G. §6A1.1 regulate PSIR's

The information included in a typical PSIR encompasses both legal and extralegal information about the Defendant such as:

- **Legal Information:**
- **Juvenile record**
- **Adult record**
- **Probation/parole history**
- **Official version of offense**
- **Plea bargain**
- **Custody status**
- **Pending cases**
- **Extralegal Information:**
- **Gang affiliation**
- **Substance abuse history**
- **Physical/Mental health**
- **Financial circumstances**
- **Employment history**
- **Education history**
- **Victim-impact statement**
- **Marital history**
- **Military record**

Offense Level

- 43 offense levels, calculated by finding offense in chapter 2 of sentencing guidelines and applying any applicable adjustments.
- Six criminal history categories, each with a range of criminal history points.
- There are four sentencing zones: A, B, C, and D. Zone A consists of sentencing ranges of 0–6 months. Zone B consists of sentencing ranges above Zone A but with a maximum penalty of no more than 12 months. Zone C consists of sentencing ranges above Zone B but whose minimum penalty is less than 12 months. Zone D consists of sentencing ranges above Zone C.

SENTENCING TABLE

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

Federal Sentencing Guidelines

- 2D2.3 Operating a Common Carrier Under Influence Causing Death
 - Base Level Offense 26 (for multiple offenses arising from same event, use most serious offense)
 - Criminal History Points (Prior DUI Offense) + 1
 - Sentencing Range (in Months) 63-78

State Sentencing Guidelines

- One year (minimum mandatory)- 25 years and fine of \$10,100.00 - \$25,100.00
- Minimum sentence and fine cannot be suspended.
- No probation-no parole (85% sentence)

Sentencing Perspectives

Judge Kirby Benedict

Territory of New Mexico vs. Jose Manuel Miguel Xavier Gonzales

Judge Rosemarie Aquilina

State of Michigan vs. Larry Nassar

Chief Justice Logan E. Beckley, Supreme Court of Georgia

State of Georgia vs. Thomas Colbert

Territory of New Mexico vs. Gonzalez (1881)

Judge Kirby Benedict

Murder of a cowboy in a fight over a card game.

- Eloquence diluted by hatred and racism.

DEATH SENTENCE (1881)

The following is a verbatim sentence imposed upon a defendant convicted of murder in the Federal District Court of the Territory of New Mexico many years ago by a United States Judge, sitting at Taos in an adobe stable used as a temporary courtroom.



"Jose Manuel Miguel Xavier Gonzales, in a few short weeks, it will be spring. The snows of winter will flee away, the ice will vanish, and the annual miracle of the years will awaken and come to pass, but you won't be there.

"The rivulet will run its course to the sea, the timid desert flowers will put forth their tender shoots, the glorious valleys of this imperial domain will blossom as the rose. Still, you won't be there to see.

"From every treetop some wild woods songster will carol his mating song, butterflies will sport in the sunshine, the busy bee will hum happy as it pursues its accustomed vocation. The gentle breeze will tease the tassels of the wild grasses, and all nature, Jose Manuel Miguel Xavier Gonzales, will be glad, but you.

"You won't be there to enjoy it because I command the sheriff, or some officers of the country, to lead you out to some remote spot, swing you by the neck from a knotting bough of a sturdy oak, and let you hang until you are dead.

"And then, Jose Manuel Miguel Xavier Gonzales, I further command that such officer or officers retire quickly from your dangling corpse, that vultures may descend from the heavens upon your filthy body until nothing shall remain but the bare bleached bones of a cold-blooded, copper-colored, blood-thirsty, throat-cutting, chili-eating, sheep-herding, murdering son-of-a-bitch."



United States of America v. Gonzales (1881)
United States District Court, New Mexico Territory sessions



The Law



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State of Michigan vs. Larry Nassar

Judge Rosemarie Aquilina

- Sometimes we say too much.
 - *“It is my honor and privilege to sentence you...Sir, I am giving you 175 years which is 2100 months. I have just signed your death warrant...”*

Colbert vs. State of Georgia

C.J. Beckley, State Supreme Court (1893)

“Within the limits of his legal discretion, the right and power of the trial judge to be more or less tender in every case, according to its facts and circumstances, cannot be doubted. But in no case can the dictates of mercy be overlooked or forgotten. Mercy has always been a judicial attribute. Its function is not to withdraw justice or withhold it, but to measure it. Certainty of punishment, rather than severity is the most potent factor in the repression of crime.

Whether tested by principle or practice, discreet moderation is better than extreme rigor. The temper of government, as manifested through the judiciary should always be firm, but never fierce...Society demands protection, but does not thirst for vengeance. The vicious are to be restrained, but suffering should never be inflicted beyond what is necessary for this purpose. If society could be safe and prosperous without chastising its unruly members, it would have no right to punish at all. Insofar as human punishment is without necessity, it is without justification, no matter who may be its author or its minister.”

What Should We Say ?

- The only thing that the Defendant remembers is the length of the sentence, but that doesn't stop us from saying more.
- Often our comments are not directed at the Defendant at all, but at the victims, or their families, or even at the Defendant's family.
- Most often the more lenient the sentence, the more we say.
- The State has the power and the right to take away one's liberty or even his life, but it does not have the right to belittle or abase or demean, or even chastise. Those things are beneath the dignity and power of the court and outside the purpose of sentencing. The sentence should be chastisement enough.

What Should We Convey?

That Judges Must Be:

Detached, but not completely removed from emotions;

Unbiased, but never uncaring;

Impartial, but not insensitive.

Does That Satisfy the Victim ?

- No. But we can and do comment on the senseless acts of violence, whether the result of intent or recklessness, and the human price paid for those acts in order to acknowledge that the Court is aware of the personal toll that crime inflicts on victims and their families, and that those things are taken into account in sentencing.
- We respond out of empathy AND of courtesy to let everyone know that their concerns have been heard, even though they may not all feel that those concerns have been addressed.
- We never ad lib or extemporize those remarks. Feelings are too raw and scars too fresh to be re-opened by insensitive remarks.

State vs Patrick Hutto

- Sentencing Remarks and Imposition
- Federal Sentencing Guidelines -63-78 Months
- State Sentencing Range- 1 year (minimum mandatory)- 25 years
- Actual Sentence-9 years (no parole) and \$15,000 fine

Billy Patrick Hutto

- But...the sentence could have been 1 year...or it could have been 25.
- The Difference is...Judicial Discretion
- “...Wide enough in all conscience is the field of discretion...”
- In the exercise of judicial discretion, always.....

- **TRUST YOUR CONSCIENCE.**

U.S. + Live TV Read Judge Rosemarie Aquilina's powerful statement to Larry Nassar

By **CNN Staff**

🕒 Updated 8:37 PM ET, Wed January 24, 2018



Judge to Nassar: I signed your death warrant 02:15

(CNN) — As she sentenced Larry Nassar up to 175 years in prison for sexual assault, Circuit Court Judge Rosemarie Aquilina ripped into the former USA Gymnastics doctor.

"I just signed your death warrant," Aquilina said Wednesday during an impassioned half-hour announcement of her decision.

During her powerful statement, Aquilina stopped to directly address Nassar about his guilt after reading from a letter he had written in court defending himself.

The judge strongly disagreed, saying: "It was not treatment. It was not treatment what you did. It was not medical."



Here are Judge Aquilina's full remarks:

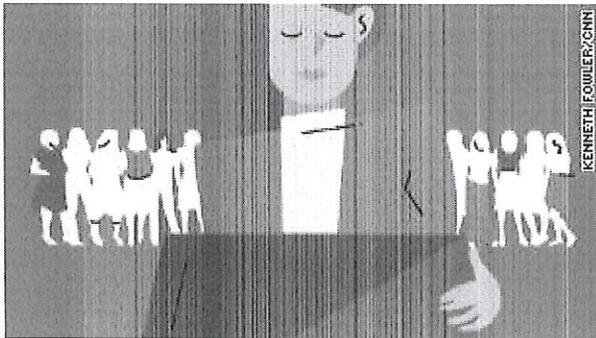


Related Article: Larry Nassar sentenced to up to 175 years

to counsel.

I also want to say that being said, we also have the First Amendment. So, you are all free to have your own opinion. It is always a balancing act between the First Amendment, the Sixth Amendment. All of the due process and all the other amendments to the constitution, they are all valuable in their own way. That's why we have an organized and just society. That's why we are here today. Because this defendant has been brought to justice. Do not make it worse, please. Before I get to sentencing, I want to talk about a couple of things and first, I have said what I need to say to the victims. I have a little more to say. You are no longer victims, you are survivors. You're very strong and I have addressed you individually.

'Become part of the army'



Related Article: How Nassar's abuse victims became a sisterhood of survivors

but in the United States, 400,000 babies born in the US will become victims of child sexual abuse. It stops now. Speak out like these survivors, become part of the army.

Sir, I hope that -- sir. I hope you are shaken to your core. Your victims are clearly shaken to their core. And I know there are still some who ask are you broken because you got caught. First let me address counsel. I agree with your words in regard to no one should blame defense counsel and vigilante crimes are not tolerated. So, I hope that no one will do anything untoward against counsel, their children, their families, their firms, their cars, whatever. Crime plus crime solves absolutely nothing. Please respect their job. (unintelligible) The Sixth Amendment does guarantee each defendant the right to counsel. It doesn't matter what the defendant has done. They have the right

Before I say anything further, I don't know if you all know this and I know that the world is watching, I know this because I am on the bench every day and this isn't the only heinous crime that appears in this court. The national crime victimization survey that's done by the (US) Justice Department annually reports that 310 out of every 1,000 assaults are reported to the police, which means that two out of three go unreported. To the voices of everyone that report, keep your voice up. Rachael's voice hopefully will raise these numbers of reports in all your voices. But that statistic does not include children 12 and under. One in 10 children will be sexually abused by their 18th birthday. One in seven girls and one in 25 boys by their 18th birthday. That means that in the United States, I am not talking about any other country,

I do one case at a time. And I really so very much appreciate all of your thank yous. I read some of the Twitters and Facebooks and all that's going on the media. I am not special, I am doing my job. If you come into my courtroom, any Wednesday and watch sentencing, I give everybody a voice. I give defendants a voice, their families when they're here. I give the victims a voice. I try to treat everybody like family because that's the justice system that I was raised to believe in.

Judge gets personal



Related Article: NCAA investigating Michigan State over Larry Nassar case

I came to this country stateless, unnaturalized. My father's Maltese, my mother's German. And I was raised on old country values. And my grandmother always told me and my parents always told me, my grandfather too, that America is the greatest country. I believe that. That's why I served in the military. That's why I have always done community service. I am not really well-liked because I speak out. I don't have many friends because I speak out. If you ask me a question, you better be ready for the answer. I speak out because I want change. Because I don't believe in hiding the truth. I am not saying I am always right. But I try.

Sentence fits all crimes, judge says

I also don't believe that one size fits all when it comes to sentencing, another reason I was (unintelligible). I know that there are some judges for every crime they give the same punishment. I don't think that's justice. I believe in individualized sentencing. I follow the Constitution and I believe our system works.

I also believe these survivors. Now there is case law about how I can consider what I can consider. And first and foremost, my sentence reflects the seven (victims) in regards to who the defendant pled to. What the remainder of you, the 161 others add to the credibility of those seven. So technically, I am considering everything. Everyone. Because your crime, all of your crimes, the depth of them have cut into the core of this community and many communities and all of the families and of all of the people that we don't even know.

Nassar's letter

And sir, the media has asked me to release your letter, I am not going to do that. Counsel may object, the media may object, but there is some information in here that troubles me in regards to the victims. I don't want them to be revictimized by the words that you have in here. But I do want to read some more of your letter. And the reason I want to do that is because I considered it as an extension of your apology and whether I believe it or not. So I want you to hear your words.

I have already read some and I am not reading every line. Let me begin. "The federal judge went ballistic at sentencing since I pled guilty to the state case and spent 10% on the federal case and 90% on the state cases and civil suits. She gave me 60 years instead of five to 20 years, in parentheses, three consecutive 20 years sentencing. I have pleaded guilty to possession of porn from 9/2004 to 12/2004. Four months. The prosecutor even admitted that I never belonged to any porn site or chat room, was not on the dark web. And also, they could not prove that I viewed it. It was all deleted, of course. I shared my electronics and I could not prove that. So for four months of porn possession from 2004, I was sentenced to 60 years, not proper, appropriate there. Going down a few lines, what I did in the state cases was medical, not sexual. But, because of a porn, I lost all support and thus another reason for this state's guilty plea."



POOL

Let me move down further. "So I tried to avoid a trial to save the stress to this community and my family and victims, yet, look what is happening. It is wrong."

Let me move down further. "I was a good doctor because my treatments worked and those patients that are now speaking out were the same ones that praised and came back over and over and referred family and friends to see me. The media convinced them that everything I did was wrong and bad. They feel I broke their trust. Hell hath not fury like a woman scorned. It is just a complete nightmare. The stories that are being fabricated to sensationalize this than the AG would only accept my plea if I said what I did was not medical and was for my own pleasure. They forced me to say that or they were going to trial and not accepting

the plea. I wanted to plea no contest, but the AG refused that. I was so manipulated by the AG and now Aquilina. And all I wanted was to minimize the stress like I wrote earlier."

Going down a little bit further. "In addition, with the federal case, my medical treatments with the Olympics/national team gymnastics were discussed as part of the fleet. The FBI investigated them in 2015 and found nothing substantial because it was medical. Now, they are seeking the media attention and financial reward."

The judge addresses the former doctor

Would you like to withdraw your plea?

Larry Nassar: No your honor.

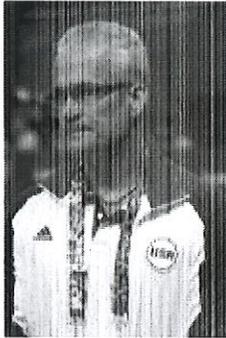
Judge Aquilina: Because you are guilty, aren't you? Are you guilty, sir?

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Nassar: I said my plea exactly.

Live TV

'You have not yet owned what you did'



MARC SEROTY/AP

Judge Aquilina: The new sign language has become treatment. These quotes, these air quotes, I will never see it again without thinking of you and your despicable acts. I don't care how they are used, it was not treatment. It was not treatment what you did. It was not medical. There is no medical evidence that was ever brought. When this case first came to me and I have told you this and I apologize to the Olympians and athletes but I have five children and two dogs, my parents live with me, I work four jobs, I don't have much time for television, I don't watch sports, although last year I was a soccer coach much to the laughter of my family. I didn't know anything about you, your name or anything that was going on. And so when I kept saying we are going to trial, here is the date.

Related Article: USA Gymnastics suspends coach with ties to Larry Nassar

Everyone wanted more time, but I said no that's the cutoff. The cases were merged and we delayed it and I still thought well maybe there is a defense of medical treatment. Why did I think that? Because it is my job to be fair and impartial but also because my two brothers and my father are very well-known respected doctors, real doctors with real treatments and research, dedicated to healing. I have not considered that in this case, but I have heard from your survivors now, that they trust doctors like I trust the doctors in my family and the doctors that I go to. But, I still thought, well, there is a defense of medical treatment and there are changes in the medical community every day for the betterment.

So up until the time you pled, I believed that maybe there is a defense here despite the felony information. I was ready for trial. Your counsel was ready for trial. The attorney general's office was ready for trial. You, sir, decided to plea because there was no medical treatment. You did this for your pleasure and your control. This letter which comes two months after your plea tells me that you have not yet owned what you did. That you still think that somehow you are right that you are a doctor and you are entitled and you don't have to listen and that you did treatment. I would not send my dogs to you, sir. There is no treatment here. You finally told the truth.



CARLOS OSORIO/AP

Inaction is inaction, silence is indifference. Justice requires action and a voice and that is what has happened here in this court. 168 buckets of water replaced on your so-called match that got out of control.

I, also like the attorney general, want to thank law enforcement for their investigation but I also want to be the voice on behalf of these survivors who

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Related Article: Read prosecutor's statement at Larry Nassar sentencing

the attorney general's office. I want to also applaud defense counsel.

You all have done fine work. You made me proud of our legal system. We all work together for the betterment for our community and that's law enforcement, prosecutors, defense counsel, investigators and there are countless of people. It is the only way our system works. We need this balance so all of you when I look at myself as lady justice, my arms are like this: they are balanced. Prosecution, defense are balanced.

It only starts to tip after there is a plea and after I take into consideration of everything that has happened. So I want everyone to understand, I have also done my homework, I always do. People vs. Waclawski. I'm sure I slaughtered the name but it is spelled w-a-c-l-a-w-s-k-i. And in it, I want you to clearly understand, it says, plainly the law does not limit victims impact statement to direct victims. It does not say and I have found nowhere that limits me from having you hear all of your victims.

As I said before, when counsel came to me and said we are not going to go to trial despite our court having already sent out 200 of the 800 juror requests and they told me their plea and would I consider it and move to trial. There was the agreement between us because I always, and they know it, they are familiar with me, let people speak. And I wanted all victims and we had a discussion about which victims. Of course, there was an objection to one of them but I let her come in anyway. That was part of the plea that you entered into to allow victim impact statement. Because after that discussion, I know your lawyers, as good as they are, sat down with you and said the judge is going to allow this. When it comes down to this, I know it also because this was signed by the attorney general, by the defendant and by defendant's counsel on November 22, 2017.

Judge rips into Nassar

Aside from the letter you wrote, a couple of months after your plea which tells me that you still don't get it, there is something I don't understand and I want to make clear. Sir, you knew you had a problem, that's clear to me. You knew you had a problem from a very young age before you were a doctor. You could have taken yourself away from temptation and you did not.

Worst yet, there is not a survivor who has not come in here and said how world renowned you were. I trust what they say. You could have gone anywhere in the world to be treated. You could have gone to any resort and any doctor or place where you can get treatment. In Europe they have all sorts of hidden places for things like this.



asked law enforcement to continue their fine work and also include the federal government.

There has to be a massive investigation as to why there is inaction and why there was silence.

Justice requires more than what I can do on this bench. I want to also applaud all of the counsels in

the attorney general's office. I want to also applaud defense counsel.

No one had to know and you could have found treatments, some help, taken some medicines. You would have done that if you had cancer. I know you would have. You are about self-preservation. But, you decided to not address what's inside you that causes this control urge that causes you to be



a sexual predator. So, your urges escalated and based on the numbers, that we all know go unreported. I cannot even guess how many vulnerable children and families you actually assaulted.

Related Article: Sending Larry Nassar to prison is just the beginning for survivors

Your decision to assault was precise, calculated, manipulated, devious, despicable, I don't have to add words because your survivors have said all of that, I don't want to repeat it. You cannot give them back their innocence, their youth, you can't give a

father back his life. One of your victims, her life and she took it. You can't return a daughter to a mother, a father to a daughter. You played on everyone's vulnerability.

I'm not vulnerable to you or to criminals. I swore to hold the Constitution and law and I am well-trained. I know exactly what to do. This time, I am going to cure it.

And I want you to know, as much as it was my honor and privilege to hear the survivors, it is my honor and privilege to sentence you. Because, sir, you do not deserve to walk outside of a prison ever again. You have done nothing to control those urges and anywhere you walk, destruction will occur to those most vulnerable.

Now, I am honoring the agreement and I'm also honoring of what is requested of me and I want you to know that I am not good at math -- I have a cheat sheet. I am only a lawyer. I know that you had a lot of education and physics and math but I have a cheat sheet. It is my privilege on counts one, two, five, eight, 10 and 18 and 24, to sentence you to 40 years. And when I look at my cheat sheet, 40 years just so you know and you can count it off your calendar is 480 months. The tail ends, because I need to send a message of parole board in the event somehow God is gracious and I know he is. If you survive the 60 years of federal court first and you start on my 40 years.

You have gone off the page here as to what I am doing. My page only goes to 100 years. Sir, I am giving you 175 years which is 2100 months. I have just signed your death warrant.

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Live TV

“Some people survive and talk about it. Some people survive and go silent. Some people survive and create. Everyone deals with unimaginable pain in their own way, and everyone is entitled to that, without judgement. So the next time you look at someone’s life covetously, remember...you may not want to endure what they are enduring right now, at this moment, whilst they sit so quietly before you, looking like a calm ocean on a sunny day. Remember how vast the ocean’s boundaries are. Whilst somewhere the water is calm, in another place in the very same ocean, there is a colossal storm.”

– *People Survive in Different Ways* | Nikita Gill



Jordyn Wieber

@jordyn_wieber

Thank you to Judge Aquilina. Thank you to EVERY SINGLE person that came forward and shared their story, both in and out of the courtroom. And thank you to everyone who has reached out in support. ❤️ justice was served today and now it’s time for CHANGE #timesup

11.8K 5:48 PM - Jan 24, 2018

1,725 people are talking about this

I need everyone to be quiet. I still have contempt powers, I told you I am not nice. I find that you don't get it, that you are a danger. You remain a danger and I am a judge who believes in life and rehabilitation when rehabilitation is possible. I have many defendants come back here and show me great things they have done in their lives after probation and after parole. I don't find that possible with you. So, you will receive jail credit and counts, 1, 2, 5, 8, 10, 18 of 369 days and count 24, you will have 370 days' jail credit. If you are ever out which is doubtful. You would be required to register at the Michigan sex offenders registration act complying with all requirements of that act in addition to global position monitoring system, you would wear a GPS. You will pay restitution in the amount to be determined based on whatever amounts are submitted and your attorneys can ask me for a restitution hearing so I can determine what a reasonable amount is for the victims. I am leaving restitution opened as long as those victims that have issues that can be medically documented. You will comply with DNA

testing and pay a \$60 fee for that. I suspect that's already done. You must submit to HIV testing and complete counseling associated with HIV and AIDS and you must weigh confidentiality of test results and medical information obtained from this test to be released to the court. You will pay \$476 in state pocket and crime victim assessments in the amount of \$130. If counsel wishes to address courts and fines, I don't know his financial state. I am not imposing any court costs and fines. And here's the reason, I don't know what he has or what he will get in the future.

The victims deserve the money, the county will survive one way or another. I am also going to make recommendations of the Michigan Department of Corrections for mental health treatments. I understand he has some medical conditions and he should be taking medication for that. He should have individual and group counseling. Treatment for sexual predators, whatever they allow. I am also going to send a message. I am not sure but I believe I read an article, sir, that you were treating people in prison that don't have a license, don't commit any more crimes. I know you don't have any more lives to give but you cannot be treating people. You are not a doctor. So, I am not sure how that's happening. But I want to extend that message. You have 21 days to appeal, 10 days to request court-appointed counsel to acknowledge receipt of your appellate rights.

Media availability

Let me just state to the media. Again, I am just doing my job. I know you all would like to talk to me. My secretary informed me that I have a growing stack of requests from print media, from television, from magazines, from around the world, literally.

This story is not about me. It never was about me. I hope I've opened some doors, because you see I am a little stupid because I thought everybody did what I did and if they didn't, maybe they ought to, but I do this and I am happy to do it. If you don't believe me, the keeper of my words is right by my side and lawyers who are hearing this and shaking their heads that yes, I have waited too long. Sometimes people are upset, I don't care, I get paid the same.

So I ask the media who want to talk with me, I'm not going to be making any statements, I know that my office and I even don't know, it is been a long couple of weeks that after this is over, it is just not my story. After the appellate period runs with victims by my side to tell their stories, I may answer some questions than what I said on the record. I don't know what more I can possibly say.

I am not going to talk with any media person until after the appeal period, and even then if you talk to me about this case, I will have a survivor with me because it is their story.

So I wanted everybody to hear that from me. I respect all of the media outlets, you've done just a fabulous job here. There has not been any commotion or upset by this. I do believe in the First Amendment and I thank you all for being here because it is an important story for the survivors. As to today, I know there are a lot of survivors and family members and husbands and friends, a lot of people in the courtroom, you have voices. I am going to leave the courtroom, the defendant will leave the courtroom. The attorneys may stay. Victims, family members, survivors -- you may stay in the courtroom and talk with the media, you can have your own press conference right here. Spur of the moment sometimes works out the best, doesn't it?

Again, I won't make a statement until after the appeal period. And again, if there's any survivor then who at that point, if somebody wants to talk to me, I am sure you will be moved onto another story but if

you're not, please give your names to the victims' advocate so that I can contact you. Because please, media, do not contact me on this story without a survivor. It is their story. I thank everybody in this case.

Sir, I hope somewhere you have heard everybody's words and it really does resonate with you.

1 For nearly four hours this afternoon I have
2 heard emotions, I've heard sorrow, I've heard grief,
3 I've heard loss, I have heard remorse, all
4 heartfelt, all of it genuine, all of it very
5 articulate. And all of it designed, at least in
6 some part, to have an impact on what numbers I write
7 down on these two sheets in front of me.

8 I realize that's not the sole purpose of it but
9 perhaps more positive purposes are served by much of
10 what was said here today. I appreciate what was
11 said today by both sides because as has been said
12 already today, there's a wide range of discretion
13 which is vested in the trial judge in cases of this
14 sort.

15 Our General Assembly has decided in it's wisdom
16 that when someone plead guilty to felony DUI causing
17 death, there are some cases in which that individual
18 should receive 25 years in jail. There are some
19 cases in which that individual should receive one
20 year in jail. Keep in mind that in every one of
21 those cases, in every case of felony DUI there is
22 always a drunk driver who causes a wreck and kills
23 somebody.

24 That is the constant that runs throughout every
25 single felony DUI causing death. Still, the General

1 Assembly has said that in some of those cases the
2 sentence should be one year and in some cases 25
3 years or anywhere in between.

4 And so the General Assembly did not intend by
5 that wide range of discretion, and no one should
6 conclude by the sentence this Court or any Court
7 passes, that whatever that sentence is, is an
8 indication of an attempt by the Court or the law to
9 place a value on the life of the person who was
10 lost. There is no value to be placed on a lost
11 life. They are all priceless, and especially in
12 this case, an innocent young, priceless life.

13 There is no way the sentence imposed by the
14 Court could adequately address the concerns of both
15 sides. There is no way this sentence can replace
16 the loss in this particular case. There is no way
17 that the sentence can fill the hole in the hearts
18 and the lives of the family of that poor, sweet,
19 innocent girl, whose picture I'm looking at -- or
20 was looking at, looking at right now, as a matter of
21 fact.

22 If my sentence could address that loss in a
23 positive light, if it could fill that hole in the
24 lives of the ██████████ family, then I would have no
25 compunction at all about sentencing to the maximum.

1 But unfortunately that loss will be the same today
2 after sentence is passed as it was before, as it has
3 been since January 1, 2012. The law simply does not
4 have the power to compensate or to replace that type
5 of loss.

6 At the same time, the laws have the power to
7 make the use perhaps of the time that is spent in
8 jail that the [REDACTED] family would like to have made
9 of Billy's time in jail. It would be a good thing
10 perhaps if the time spent in jail could be better
11 spent to do some of the good things he wants to do
12 with that period of incarceration but necessarily
13 whatever that good is, and it seems to be there, it
14 is necessarily going to have to wait until he is
15 out.

16 There are programs within the Department of
17 Corrections that allow inmates to do certain
18 therapeutic visits and conduct workshops, Scared
19 Straight used to be one of them. But those things
20 seems to fail when money runs short. So I can't
21 assure the [REDACTED] family that whatever time Billy has
22 to serve is going to be meaningful time. The
23 sentence, in the final analysis, it should serve
24 some purpose, it should serve some useful purpose.

25 Criminologists tell us that there are three

1 main reasons sentences are passed, three
2 considerations trial judges should take into account
3 when they are trying to decide what sentence to
4 impose, whether to give the maximum or the minimum
5 or somewhere in between.

6 One of those is rehabilitation. Is the
7 sentence in jail going to make the prisoner a better
8 person? When he gets out is he going to be better
9 than he was when he went in?

10 Deterrence. Is the sentence going to keep
11 other folks from committing a similar crime when
12 they hear about the sentence imposed in this
13 particular case?

14 Finally, one that's called retribution, which
15 is another word for revenge. Which of course is the
16 worse reason to pass a sentence. Although every
17 sentence should address the loss in some way, it has
18 to, that's the reason we're all here today because
19 of the extent of the loss. We cannot ignore that
20 loss. And we can address it without being
21 vindictive. We can address it without seeking a
22 pound of flesh. And so we try to do that.

23 Well, how do we do that? What do we take into
24 account when we try to decide what sort of sentence
25 to pass? Not just in this case but in every case.

1 But you are only concerned about this case today.
2 And frankly right this minute that's all I'm
3 concerned about as well.

4 How do we decide with what we have before us?
5 What is the appropriate sentence in this case? As
6 I've said, if I were to look only at the loss, if
7 that were all that I could consider in passing
8 sentence today, that would be easy. It would be 25
9 years and 25,000 dollars. Because that's the most
10 the Court could impose to match the greatest loss
11 that this family could suffer. But that's not what
12 we look at entirely, for reasons that I've already
13 told you.

14 So then what do we look at? We look at the
15 individual who is going to serve a sentence. We
16 look at his background, we look at the action and
17 the conduct that led to this particular tragic and
18 violent accident in and of itself. So we look at
19 Billy's  background.

20 There's a mark, a scar on his background
21 consisting of an 2009 driving under the influence.
22 Frankly, except for that, my job would be somewhat
23 easier today and my sentence could be somewhat more
24 lenient. But that has to be taken into account.

25 That has to be taken into account because the

1 young man that I see in these photographs, the
2 bright young man, the handsome young man, with his
3 family, and loving the young children, that young
4 man who has worked since he was 15 years old, that's
5 not the whole picture. He had a drinking problem of
6 some sort that lead him to a conviction three years
7 before this happened. And then this particular
8 event, both of them with high alcohol reads.

9 So if I just look at those two things -- and
10 once again it would indicate a rather severe
11 sentence to be imposed because of this background.
12 But I won't take just that into account. Because
13 those two events don't mark the whole of who Billy
14 ██████████ is either. There's another side to
15 him. His family told me what that other side was
16 today, and his friends, and his former teachers.

17 And so what do we want to do with Billy ██████████
18 ██████████.? He knows that he can't walk out of here
19 today and he can't walk out of the jail in the near
20 future. He knows that. I trust he knows that. I'm
21 sure he knows it now because he just heard me say
22 it.

23 Do we want to throw him into the -- into the
24 bowels of the Department of Corrections with other
25 inmates who are serving 20 and 25 years in jail

1 because they have committed more serious offenses,
2 violent offenses, offenses in which they
3 intentionally broke the law and tried to cause
4 somebody harm? Would that be fair? Would that be
5 necessary under the law? Would that truly be
6 justice?

7 Or do we want to try to provide some sort of a
8 sentence that Billy [REDACTED] will have to serve
9 a significant length of time? And significant is
10 according to who measures it, significant to the
11 person who is serving the sentence is one thing.
12 Significant to the victim's family is obviously
13 another.

14 But whatever sentence [REDACTED] receives on the
15 felony DUI death charge he has to serve 85 percent
16 of it, that's real time. The other sentence is a
17 parolable offense. So do we want to just throw him
18 away and say you made your own bed? You took a life
19 and we're going to put you up there in the same
20 place with those people who shot somebody while they
21 were holding up a bank or service station or Seven
22 Eleven or who killed somebody in a gang-land
23 shooting or killed the lady in the bakery a couple
24 of weeks ago. Does he deserve to be placed with
25 them for a similar length of time? I think the

1 answer to that is obvious.

2 But still it has to be a period of time that
3 addresses all the sides of Billy ██████████, the
4 good in his life, in his 28 years, and the two
5 terrible mistakes that he made that we know of. The
6 one which caused nobody any harm, and this one which
7 caused irreparable harm.

8 I tell you these things folks because you
9 deserve to understand that there is a thought
10 process which goes into this. It's not just
11 throwing a dart on a board. It's not just picking a
12 number out of a hat.

13 I don't expect you to agree with what I do
14 because I understand that that's impossible for you
15 to do. I just hope you understand that this is not
16 an arbitrary proceeding. It is something that we do
17 when we look at the whole picture and try to do the
18 best that we can.

19 Mr. ██████████, if you would stand, please and face
20 the Court.

21 (The defendant complied.)

22 SENTENCE OF THE COURT

23 Mr. ██████████, on Indictment Number 1803 charging
24 you with felony driving under the influence
25 resulting in great bodily injury, you are to be

1 committed to the State Department of Corrections for
2 a period of ten years and pay a fine of \$5,000.
3 That is a parolable offense. *

4 On Indictment Number 1804 charging you with
5 felony DUI resulting in death, which is a non-
6 parolable offense, the sentence of the Court is that
7 you be committed to the State Department of
8 Corrections for a period of nine years and pay a
9 fine of \$15,000.

10 These sentences will run concurrent to each
11 other with credit for time served.

12 Thank you, ladies and gentlemen.

13 Court will be in recess until 9:30
14 tomorrow morning.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF LEXINGTON)
3

4

COURT REPORTER'S CERTIFICATION

5 I, REMA K. GANTT THOMAS, OFFICIAL COURT
6 REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF
7 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING
8 IS A TRUE, ACCURATE AND COMPLETE PARTIAL TRANSCRIPT
9 OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE
10 INTRODUCED IN THE ABOVE-CAPTIONED CASE ON AUGUST 5,
11 2013, IN LEXINGTON, SOUTH CAROLINA.

12 I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL
13 NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF
14 ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS
15 OUTCOME.

16 IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND
17 AND SEAL AT CHAPIN, SOUTH CAROLINA, THIS THE
18 FOURTEENTH DAY OF SEPTEMBER, 2013.

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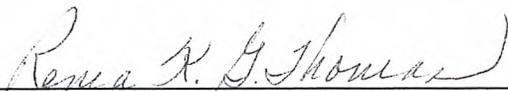
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REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013