IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICAH J. BESHAW, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-11657 & A-11658 Trial Court Nos. 3GL-07-132 CR & 3PA-02-82 CR MEMORANDUM OPINION No. 6549 — November 29, 2017

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, and Kari Kristiansen, Judges.

Appearances: Christine Schleuss, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK, writing for the Court.
Judge MANNHEIMER, concurring.

Micah J. Beshaw was charged with attempted first-degree sexual assault, kidnapping or attempted kidnapping, third-degree assault, and fourth-degree assault

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

based on an assault committed against a woman, A.K. (Beshaw was also charged with a separate third-degree assault for nearly hitting a bicyclist with his vehicle as he was leaving the scene.)

Following a jury trial at which Superior Court Judge Eric Smith presided, Beshaw was convicted of all these charges. Beshaw appealed, and this Court reversed all but one of Beshaw's convictions (his third-degree assault conviction for nearly hitting the cyclist). [1]

The State elected to retry Beshaw, and the case was again assigned to Judge Smith. Prior to the retrial, while Judge Smith was in court on other matters, he made comments describing his reaction to A.K's testimony at Beshaw's trial and her victim-impact statement at Beshaw's sentencing. It is unclear who was in the courtroom when the judge made these comments, or to whom the judge addressed his comments. But the judge's comments were heard by an assistant public defender who then reported these comments to Beshaw's attorney.

Learning of the judge's comments, Beshaw's attorney filed a motion asking Judge Smith to recuse himself, both on the ground that he was actually biased against Beshaw and also on the ground that his comments created a reasonable appearance of bias. Judge Smith denied this motion. Pursuant to AS 22.20.020(c), Superior Court Judge Kari Kristiansen was assigned to review Judge Smith's decision, and she upheld Judge Smith's rulings.

After Beshaw's challenge to Judge Smith was denied, Beshaw waived his right to jury trial and consented to a bench trial in front of Judge Smith. At the conclusion of this bench trial, the judge found Beshaw guilty of attempted first-degree sexual assault, third-degree assault, and fourth-degree assault. Beshaw now appeals

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[1] *Beshaw v. State*, unpublished, 2012 WL 1594210 (Alaska App. 2012).

these convictions. Beshaw also appeals the revocation of his probation from an earlier felony case, based on his convictions in this case.

For the reasons we explain here, we conclude that Judge Smith did not abuse his discretion when he ruled that he was free of actual bias in this case. We also conclude that Judge Smith's comments about Beshaw's case did not create a reasonable appearance of bias that required the judge's recusal.

Beshaw additionally argues that Judge Smith committed error at the bench trial, by allowing the State to introduce two charging documents (the complaint and the indictment) relating to an earlier case where Beshaw was prosecuted for sexually assaulting a different victim, R.W.

Under Alaska law, neither a criminal complaint nor an indictment is admissible to prove the truth of the factual allegations contained in the complaint or indictment. But the State did not rely on these documents to prove the truth of the matters asserted in them. The alleged victim of this earlier sexual assault, R.W., personally testified at Beshaw's trial and described the assault. The trial judge admitted the complaint and the indictment only for the limited purpose of showing that the police and the prosecutor's office pursued the charge, after Beshaw's attorney elicited testimony suggesting that the police did not consider R.W. to be a credible witness.

We therefore uphold Beshaw's convictions in this case, and the revocation of his probation from the earlier case.

Background facts and proceedings

While Beshaw was awaiting retrial, his defense attorney filed a motion seeking Judge Smith's disqualification. In that motion, the defense attorney alleged that another attorney in his office had been present in court for a hearing in an unrelated case.

After that hearing concluded and the court went off-record, Judge Smith began discussing an aspect of Beshaw's case. According to the attorney, Judge Smith commented on how significantly A.K. had been affected by Beshaw's conduct, and how A.K. had been able to "hold things together" at Beshaw's trial, testifying without displaying very much emotion. The attorney then concluded:

> It appeared to the undersigned that, due to either the evidence introduced at the first trial, or the sentencing which followed, that an opinion has been formed [by Judge Smith] regarding the circumstances and the conduct alleged against Mr. Beshaw.

Based on this other attorney's account of Judge Smith's remarks, Beshaw's defense attorney contended that Judge Smith had a disqualifying bias because of his expressed sympathy toward A.K. and his apparent belief that Beshaw was guilty. In the alternative, Beshaw contended that Judge Smith should be disqualified because his remarks gave rise to a reasonable appearance of bias.

Judge Smith denied Beshaw's motion in a written order. In that order, Judge Smith acknowledged that he "was indeed struck by the fact that [A.K.] was totally composed during the trial," even though she was clearly suffering emotional distress when she gave her statement at Beshaw's sentencing. Judge Smith stated, "No human being could listen to what she had to say and not be affected by it." But the judge concluded that his reaction to A.K.'s victim-impact statement "[had] no bearing on [his] ability to hear and decide [Beshaw's] case fairly and impartially" at the upcoming retrial.

After Judge Smith denied the disqualification motion, Superior Court Judge Kari Kristiansen was appointed to review Judge Smith's ruling.[2] Judge Kristiansen upheld Judge Smith's ruling because she found no evidence of actual bias. Judge Kristiansen noted that "any views expressed by Judge Smith … were confined to the nature and character of [the victim's] testimony"; in other words, they were based on what Judge Smith had heard in court when he presided over Beshaw's earlier trial and sentencing. Judge Kristiansen concluded that this did not constitute evidence of personal bias on the part of Judge Smith, nor did it constitute a reasonable appearance of bias.

Beshaw subsequently waived his right to jury trial and consented to be tried by Judge Smith at a bench trial.

Judge Smith found Beshaw guilty of all charges. This appeal followed.

Judge Smith's remarks did not prove that he was actually biased, nor did they create a reasonable appearance of bias

On appeal, Beshaw renews his arguments that Judge Smith's comments about A.K.'s emotional demeanor at the earlier trial and sentencing either demonstrate the judge's actual bias against Beshaw or, at least, give rise to a reasonable appearance of bias.

We review Judge Smith's finding that he was not actually biased against Beshaw under the "abuse of discretion" standard of review, and we decide the "appearance of bias" question *de novo*.[3]

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[2] *See* AS 22.20.020(c).

[3] *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979); *Phillips v. State*, 271 P.3d 457, 463-64 (Alaska App. 2012).

A judge is normally not disqualified from presiding over the retrial of a criminal case even though the judge may have formed opinions about the defendant, or about other people involved in the case, based on things that the judge heard or observed during earlier proceedings in the case. In order to establish a disqualifying bias, the defendant must establish that the judge's bias is based on extra-judicial sources or considerations.[4] Here, there is nothing in the record to support the conclusion that Judge Smith's views about Beshaw's case arose from an extra-judicial source.

Beshaw appears to argue that even though it would be proper for Judge Smith to privately harbor views about A.K. based on the earlier proceedings in Beshaw's case, the fact that Judge Smith expressed his views in front of other people somehow proved that the judge had a disqualifying bias against Beshaw. We reject this argument.

Beshaw also argues that when Judge Smith expressed sympathy for A.K.'s emotional distress at Beshaw's sentencing, the judge's remark amounted to a public declaration that the judge believed that Beshaw was guilty of all the crimes charged against him. This does not follow.

Finally, Beshaw argues that Judge Smith's evidentiary rulings at Beshaw's second trial prove that the judge was actually biased against him.

There are two problems with this reasoning. First, Beshaw never asked Judge Smith to recuse himself on this basis, and Beshaw is not entitled to raise this argument for the first time on appeal. Second, the fact that a judge's evidentiary rulings are debatable or even demonstrably wrong does not mean that the judge is biased against the party disadvantaged by those rulings.[5]

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[4] *Hanson v. Hanson*, 36 P.3d 1181, 1184 (Alaska 2001).

[5] *See Labrenz v. Burnett*, 218 P.3d 993, 1002 (Alaska 2009) ("[W]e have repeatedly cautioned [that] judicial bias should not be inferred merely from adverse rulings.") (quoting (continued...)

Turning to Beshaw's contention that Judge Smith's remarks about A.K. gave rise to a reasonable appearance of bias,[6] Beshaw claims that Judge Smith's remarks created an appearance of bias because the judge appeared to express sympathy for A.K., and because the public would reasonably interpret any expression of sympathy for A.K. as the judge's public declaration that he believed Beshaw was guilty. Again, Beshaw acknowledges that it might be proper for Judge Smith to feel sympathy for A.K., but he argues that it was improper for the judge to publicly express this sympathy.

But Judge Smith did not address his remarks to the public at large, nor did he make his remarks in what would be considered a public forum. Rather, he made his remarks to an unknown — but apparently small — number of people who were in his courtroom at the conclusion of a hearing in an unrelated case. In fact, the attorney's affidavit does not disclose whether there was anyone else in the courtroom besides Judge Smith and herself.

Nor does the attorney's affidavit establish the context of the judge's remarks. In particular, the attorney's affidavit does not reveal what prompted Judge Smith to speak about A.K., or whether the attorney actively participated in that conversation. Judge Smith apparently did not recall these remarks, and Beshaw's attorney did not call the other attorney to the stand, nor did he offer any further details of what actually occurred.

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[5] (...continued)
Tillmon v. Tillmon, 189 P.3d 1022, 1027 n. 13 (Alaska 2008)).

[6] There is some debate as to whether Alaska law allows a litigant to disqualify a judge, over the judge's objection, based solely on the appearance of bias. See our discussion of this issue in *Phillips v. State*, 271 P.3d 457, 463-67 (Alaska App. 2012). We are deciding Beshaw's case on the assumption that a judge's disqualification is required if the circumstances give rise to a reasonable appearance that the judge is biased.

As the litigant seeking Judge Smith's disqualification, it was Beshaw's burden to adduce sufficient information about the context and tenor of Judge Smith's remarks to demonstrate that reasonable members of the public would have perceived the judge to be biased against Beshaw for reasons apart from what the judge had learned during earlier proceedings in the case. On this record, Beshaw has failed to do so.

We emphasize that we are not condoning Judge Smith's comments about a pending case. Alaska Judicial Canon 3.B(9) declares that a judge shall not make any public comment about a pending or impending matter if the judge's comment "might reasonably be expected to affect [the] outcome or impair [the] fairness" of the litigation. Here, it is unclear exactly how public Judge Smith's comment was, and (as we have explained) Beshaw failed to establish that the judge's comment could reasonably be expected to impair the fairness of Beshaw's retrial. But the wiser course is for judges to refrain from commenting on pending matters unless the judge's comment is made in connection with the judge's performance of their duties.

The trial judge's ruling that the prosecutor could introduce the complaint and indictment from an earlier criminal case in which Beshaw was charged with sexually assaulting another woman

During Beshaw's retrial (which, as we have explained, was a bench trial), a woman named R.W. testified that Beshaw had sexually assaulted her some years earlier. When Beshaw's attorney cross-examined R.W., he asked her whether she recalled having a conversation with the police "where they had to explain to you that the reason they weren't pursuing your case was because they didn't believe you would be a credible witness?" R.W. acknowledged that she did recall having such a conversation.

Later, during redirect examination, the prosecutor rebutted the defense attorney's suggestion (that the authorities had declined to pursue R.W.'s case) by

introducing evidence that the State *did* pursue R.W.'s case. The prosecutor asked R.W. to confirm that she testified before the grand jury, and that the State did pursue the case. In reply, R.W. stated that she did not recall giving testimony to the grand jury, but that the police did pursue her case.

To corroborate this assertion, the prosecutor asked Judge Smith to take judicial notice that Beshaw had been indicted for a sexual assault against R.W. Beshaw's attorney objected that this was not an appropriate topic for judicial notice, but Judge Smith ruled that he could take judicial notice of the fact that an indictment had been issued, since the indictment was a public record.

Judge Smith was careful to clarify that he was *not* taking judicial notice of the indictment as proving the truth of the allegations set forth in the indictment — *i.e.*, not to prove that Beshaw had committed the sexual assault against R.W. for which he was indicted. Rather, the judge took judicial notice of the *fact* that an indictment had been *issued* — thus rebutting the defense attorney's implication that the authorities had not pursued the matter. On this same basis, Judge Smith also admitted the felony complaints in R.W.'s case.

On appeal, Beshaw renews his argument that the indictment and the complaint were not proper subjects of judicial notice. But as we just explained, these documents were introduced to prove that a prosecution was pursued, not to prove that the prosecution was well-founded. (To establish that the prosecution was well-founded, the State relied on R.W.'s testimony.)

It was proper for Judge Smith to take judicial notice of the charging documents for this limited purpose. As the Alaska Supreme Court explained in *F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993):

> Courts freely take [judicial] notice of court records ... [to prove] such facts as that a prior suit was filed, who the parties were, and so forth. These are indeed facts not subject to reasonable dispute.

We recognize that, had Beshaw's trial been a jury trial, Judge Smith would have faced a different problem. In a jury trial, there would be a danger that the jury might use the indictment for an improper purpose — as evidence that Beshaw was guilty of the earlier crime, and not merely evidence of the fact that the State had formally charged him with that earlier crime. But there was no such danger in a bench trial.

We therefore uphold the judge's decision to take judicial notice of the charging documents.

Conclusion

We AFFIRM the judgment of the superior court in the current case, and we accordingly affirm the superior court's revocation of Beshaw's probation from his earlier sexual assault case.

Judge MANNHEIMER, concurring.

I write separately to point out the discrepancy between the kind of judicial review that Alaska law affords (1) in circumstances where the defendant files an unsuccessful *peremptory* challenge of a judge versus (2) circumstances where the defendant unsuccessfully challenges a judge *for cause*.

Under Appellate Rule 216, a defendant must immediately appeal the denial of a peremptory challenge, and that interlocutory appeal is handled on an expedited basis. But there is no corresponding appellate rule for situations where a judge denies a challenge for cause.

Under AS 22.20.020(c), when a judge denies a challenge for cause, a litigant can ask the presiding justice or judge of the next higher level of court to appoint another judge to immediately review the challenged judge's decision. But the decision of this second judge does not constitute an appellate decision. It is simply one more trial court decision — and it can be attacked later, on appeal, in the event that the defendant is convicted.

Beshaw's case illustrates the kind of gamesmanship that is allowed under this statutory procedure.

Beshaw challenged Judge Smith on two grounds: he asserted that Judge Smith was actually biased against him, and he also asserted that, regardless of whether Judge Smith was actually biased, the judge's out-of-court remarks created a reasonable appearance of bias. Judge Smith rejected both of these assertions — and Judge Kristiansen, the judge who was appointed to review Judge Smith's decision, upheld Judge Smith's resolution of these two issues.

Normally, when a litigant challenges a judge both for actual bias and for the reasonable appearance of bias, the "appearance of bias" claim is treated as the litigant's

fall-back position — an alternative argument for the judge's disqualification in instances where the litigant suspects that the judge is actually biased, but where the litigant finds it impossible to prove actual bias.

But that is not true of Beshaw's case. Here, Beshaw challenged Judge Smith and then, having lost this challenge, Beshaw affirmatively waived his right to a jury and consented to a bench trial in front of Judge Smith. Obviously, Beshaw no longer thought that Judge Smith was actually biased against him. But Beshaw saved up his "appearance of bias" challenge: after Judge Smith found him guilty at the bench trial, Beshaw renewed this "appearance of bias" challenge as one of his claims on appeal.

As I am about to explain, I do not think that Alaska law should allow a defendant to challenge a judge for cause and then save up that challenge for later, as a potential point on appeal if the defendant is convicted. Instead, we should require defendants to pursue an immediate interlocutory appeal, similar to the immediate appeal that is required under Appellate Rule 216 when a peremptory challenge of a judge is denied.

Appellate review of unsuccessful peremptory challenges

Under Alaska Criminal Rule 25(d), parties have the right to peremptorily challenge the judge assigned to their case — and, in instances where the judge denies a defendant's peremptory challenge, Appellate Rule 216 authorizes the defendant to pursue an immediate interlocutory appeal of that ruling.

The reasons for allowing an immediate interlocutory appeal were explained by our supreme court in *Morgan v. State*, 635 P.2d 472, 480-81 (Alaska 1981):

> [G]iven the special nature of the disqualification right, designed to insure all litigants a fair trial before an impartial and unbiased judge, and the unnecessary expense of the trial which both the state and the defendant are put through when an erroneous denial of such a motion is made, we think that it is appropriate to allow a defendant to preserve this right by filing an [immediate] appeal from the denial of the change of judge motion.

Indeed, if a defendant wishes to obtain appellate review of the trial court's denial of a peremptory challenge, the defendant *must* pursue immediate interlocutory review of the trial court's ruling under Appellate Rule 216. The defendant is not allowed to wait until the trial court proceedings have been completed, and the defendant has been convicted and sentenced, to raise this issue in a normal appeal. *Washington v. State*, 755 P.2d 401, 403 (Alaska App. 1988).

As this Court explained in *Washington*, if Appellate Rule 216 were construed as simply giving defendants the *option* of seeking immediate appellate review, this would "frustrate the basic policies addressed … in *Morgan*", and it would "accomplish little more than to allow the accused the option of keeping the issue in reserve, in order to secure a new trial in the event of a conviction." *Washington*, 755 P.2d at 403.

Appellate review of unsuccessful challenges for cause

Alaska law provides a different procedure in cases where a defendant unsuccessfully challenges a trial judge for cause. The initial stages of this procedure are described in AS 22.20.020(c). Under this statute, when a trial judge denies a challenge for cause,

> the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts ... . The hearing may be ex parte and without notice to the parties or judge.

Because this statute says "the question *shall be determined* by another judge assigned for [this] purpose", I have always interpreted the statute to mean that whenever a judge denies a challenge for cause, the judge has a duty to notify the presiding judge of the next higher level of court, so that a reviewing judge can be appointed.

But the Alaska Supreme Court has twice held that the challenged judge need do nothing — that, instead, it is the burden of the unsuccessful litigant to ask for the appointment of a reviewing judge, and if the litigant fails to ask for the appointment of a reviewing judge, they waive this issue for purposes of any later appeal. *See Coffey v. State*, 585 P.2d 514, 525-26 (Alaska 1978), and *Kingery v. Barrett*, 249 P.3d 275, 286 n. 44 (Alaska 2011).

(I think this is a bad interpretation of the statute, and I urge the supreme court to adopt a rule changing this interpretation.)

Assuming that a reviewing judge is appointed, the decision of this reviewing judge is *not* an appellate decision. It is simply another trial court decision. If the reviewing judge upholds the initial judge's denial of the challenge for cause, the trial court proceedings go forward. If the defendant is later convicted, the defendant can file an appeal at that point and challenge the reviewing judge's decision. [1]

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[1] Technically, the appellate court reviews the *reviewing judge's* decision, not the original decision made by the judge who was challenged. *See Wright v. Anding*, 390 P.3d 1162, 1170-71 (Alaska 2017); *Patterson v. GEICO General Ins. Co.*, 347 P.3d 562, 570-71 (Alaska 2015). However, this makes no practical difference.

> In cases where the challenge is based on a reasonable appearance of bias, both the

(continued...)

Why I believe that Alaska should require criminal defendants to pursue an immediate interlocutory appeal when they challenge a judge for cause and the challenge is denied

Here, Beshaw attacks his conviction on the basis that reasonable people might doubt the ability of Judge Smith to be fair in his case.

As this Court explained in *Phillips v. State*, 271 P.3d 457, 463-67 (Alaska App. 2012), Alaska law clearly allows litigants to seek the disqualification of a judge who is *actually biased*, but it is unclear whether Alaska law allows litigants to seek the disqualification of a judge when the only impediment to the judge's participation is an *appearance of bias*.

In *Amidon v. State*, 604 P.2d 575, 578 (Alaska 1979), our supreme court noted that the judicial disqualification statute, AS 22.20.020, did not list "appearance of

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[1] (...continued)
reviewing judge and the appellate court employ the *de novo* standard of review. *See Heber v. Heber*, 330 P.3d 926, 934 (Alaska 2014), and *Phillips v. State*, 271 P.3d 457, 459, 468 (Alaska App. 2012). In other words, the appellate court need not defer to the reviewing judge's assessment (or the original judge's assessment) of whether the facts give rise to a reasonable appearance of bias.

In cases where the challenge is based on actual bias, the reviewing judge uses the "abuse of discretion" standard of review to evaluate the original judge's decision. *Heber*, 330 P.3d at 934; *Phillips*, 271 P.3d at 468. But it is a question of law whether, under given facts, a judge's decision constitutes an abuse of discretion. (See *Young v. State*, 374 P.3d 395, 430-32 (Alaska 2016), where the supreme court independently reviewed this Court's ruling that a trial judge did not abuse his discretion when he refused to declare a mistrial, and *Douglas v. State*, 214 P.3d 312, 319-328 (Alaska 2009), where the supreme court independently reviewed this Court's ruling that a trial judge did not abuse his discretion when he removed a disruptive defendant from the courtroom and required the defendant to participate by speaker phone.) So, again, the appellate court owes no deference to the reviewing judge's assessment of whether the original judge abused their discretion.

bias" as a ground for seeking the disqualification of a judge, and the court openly asked the legislature to amend the statute to include "appearance of bias" as a ground for disqualification. Thirty-seven years later, the statute remains unchanged.

Perhaps the legislature failed to act because it envisioned cases like Beshaw's — cases where the "appearance of bias" claim appears to have little or nothing to do with a defendant's evaluation of whether the judge could actually be fair. Here, Beshaw consented to be tried by Judge Smith sitting as the finder of fact — thus implicitly endorsing the position that Judge Smith could *actually* be fair. But now Beshaw seeks reversal of his conviction based on the assertion that, even though Judge Smith actually decided Beshaw's case fairly, reasonable people would question the judge's ability to be fair.

Under Alaska Judicial Canon 3(E), a judge is not allowed to participate in litigation when reasonable people would question the judge's ability to be impartial, unless the litigants waive this issue. There are obvious policy reasons for enforcing this rule as a matter of professional discipline. To maintain society's trust in our judiciary, not only must the courts render fair decisions, but judges must also be *perceived* as acting fairly. But it is a separate question whether a criminal conviction should be overturned purely on the ground that reasonable people might question the judge's fairness, when the litigants themselves do not question the judge's fairness.

I leave the resolution of these issues for another day. For present purposes, I will assume that a defendant can attack a criminal conviction solely on the ground that reasonable people might question the judge's ability to be fair.

But even assuming that Alaska law allows a defendant to attack a criminal conviction on the theory that reasonable people would doubt the judge's ability to be fair, we should not allow criminal defendants to wait until the trial court proceedings are over before they seek appellate review of the trial judge's ruling on this matter. Instead, we

should provide for immediate interlocutory appellate review of the trial court's ruling — and we should require defendants to pursue this immediate interlocutory appellate review, rather than waiting to raise this issue on appeal after the trial court proceedings have concluded and judgement has been entered.

The reasons for requiring immediate interlocutory appeal when a judge is challenged for cause are essentially the same as the reasons given in *Morgan v. State* and *Washington v. State* for requiring immediate interlocutory review when a judge denies a defendant's peremptory challenge. Without interlocutory appellate review, there is a significant risk that the defendant, the State, and the crime victim will bear the financial and emotional costs of a trial and sentencing, only to see that trial and sentencing invalidated. And unless appellate review is immediate, a defendant can keep the issue in reserve as a way to secure a new trial in the event that the defendant is convicted.

I therefore suggest that the supreme court adopt a rule that changes existing law in two respects. First, when a judge denies a challenge for cause, it should be the judge's responsibility to refer the case to the presiding judge of the next higher level of court, so that another judge can be appointed to review the challenged judge's decision. And second, after this reviewing judge issues their decision, the Appellate Rules should require the challenging party to pursue immediate interlocutory review of this decision — so that this issue is resolved at an appellate level *before* the trial is held.