

## I GOT THE POST-*MCKEIVER* BLUES

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### I. INTRODUCTION

I have been involved in the training of lawyers at the Legal Aid Society's Juvenile Rights Practice for more than twenty years. I like to think that I have an answer, at least a suggested line of research or investigation, for any question that may come my way. Yet, there is one question asked repeatedly by idealistic young lawyers that continues to plague me. It goes something like this:

"You mean that a judge presides at a juvenile delinquency trial even after she has suppressed crucial evidence of guilt at a suppression hearing?"

"Yes," I tell them, "that *is* true."

"But how can that be," they say. "How can a judge put a full confession out of her mind and decide the case impartially?"

"Because," I say—borrowing a graphic image from a former colleague—"there are two compartments in the judge's brain. There is the compartment with the admissible evidence the judge may consider, and the compartment with the inadmissible evidence the judge must disregard. It is widely believed that judges have the unique capacity to keep the two compartments separate."

"But how can the judge do that?" they respond. "How can anybody really do that?"

Recalling the answer my mother used to give me when, as a child, I asked her why I had to do what she said—"Because I'm your mother, that's why"—I say, "Because they just can. And, what's more"—now I'm reaching for solid ground so they won't think me mad—"the United States Supreme Court, the New York State Court of Appeals, and every other court in the universe, has said they can."

"So," the dubious young lawyers say, "you're telling us that appellate courts are so naive as to believe that a judge who has suppressed a confession is capable of conducting a trial with an open mind?" I hesitate, and they continue: "Or are you saying that they're pretending to believe that, because they want cases to proceed expeditiously, and want to err on the side of precluding forum-shopping altogether, rather than encourage any litigation regarding

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these issues?" I hesitate again, and they shift tactics: "Okay, how about this. If a group of family court judges is working together, and could strike an agreement to handle each other's pretrial proceedings, why wouldn't they want to do that? Appellate courts certainly have not said that judges should not, or cannot, do that. Why would they choose to employ an ethically compromised system when it would be simple to change it?"

Wishing to close the discussion, I say, "Because the law says they can. Wake up everyone and welcome to the real world. We've spent enough time on this. Let's talk about something else. Please."

I should not have to speak to these young lawyers the way I do, and I should not be demoralized, but I have my reasons. Before they can move beyond the seductive but flawed assumptions regarding the justice system that have been fostered by, or have survived, their law school education, and function with uncluttered minds, they have to understand just how bad things are.

## II. THE JUDGE WITH THE AMAZING DIVIDED BRAIN

Still weighed down by the Supreme Court's decision thirty-seven years ago in *McKeiver v. Pennsylvania*,<sup>1</sup> defense attorneys have failed to convince appellate courts that jury trials are constitutionally required in juvenile delinquency proceedings.<sup>2</sup> This has left juveniles at the mercy of a fundamentally defective trial process.

Practices vary from jurisdiction to jurisdiction and from time to time. Sometimes the judge presides over a juvenile delinquency proceeding from arraignment through disposition. Other times a judge handles only the arraignment and then immediately passes the case on to another judge. Some judges preside over the trial of separate juvenile delinquency proceedings involving the same juvenile, while other judges avoid doing so if there is another judge available. But in no jurisdiction in New York State with which I am familiar do trial judges routinely recuse themselves from handling

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1. 403 U.S. 528 (1971).

2. The principal reason for this is the courts' perception that juvenile delinquents still face sanctions far less severe than those faced by criminal defendants. *See State ex rel. D.J.*, 817 So. 2d 26, 33 (La. 2002) (jury trial not required where, "notwithstanding the changes in the juvenile justice system . . . there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult charged with same crime"); *In re L.C.*, 548 S.E.2d 335, 337 (Ga. 2001) (jury trial not required where juveniles were subject only to confinement in youth development center); *In re J.F.*, 714 A.2d 467, 473 (Pa. Super. Ct. 1998) (juveniles did not face "the grave consequences of criminal conviction and incarceration").

In contrast, courts have held that statutes authorizing incarceration of juvenile delinquents in adult facilities cannot constitutionally be applied when there has been no jury trial. *In re Jeffrey C.*, 781 A.2d 4, 6 (N.H. 2001); *In re C.B.*, 708 So. 2d 391, 400 (La. 1998); *In re Hezzie R.*, 580 N.W.2d 660, 678 (Wis. 1998).

pretrial proceedings. Moreover, trial judges frequently make pretrial inquiries regarding the juvenile's progress at home, in school, in detention, in substance abuse treatment, or in therapy. Written reports addressing these issues often are presented to the judge. In sum, there are hardly any cases in which the judge will *not* become familiar with highly unfavorable, or even incriminating, evidence that will be inadmissible at trial.

The "family court's broad and expansive access to information about a juvenile's past may move the justice system dangerously close to a breach of due process."<sup>3</sup> Yet appellate courts have consistently held that, while jurors' knowledge of inadmissible evidence may violate a criminal defendant's right to a fair trial, it is presumed that judges conducting bench trials are capable of putting aside inadmissible evidence and rendering a fair decision.<sup>4</sup> In other words, judges are, as a matter of law, presumed to possess abilities that no reasonable person I know would claim to possess.

The leading case in New York is *People v. Moreno*.<sup>5</sup> In that case, the defendant waived a jury trial and agreed to have the case tried before a judge who had conducted a pretrial *Sandoval* hearing.<sup>6</sup> During an allocution conducted in connection with the jury trial waiver, the judge informed the defendant that, because he had conducted the *Sandoval* hearing, he knew more than a jury would regarding the defendant's criminal history.<sup>7</sup> The judge also was aware of suppressed photo array evidence.<sup>8</sup> Subsequently, defense counsel asked the judge to recuse himself, arguing that the knowledge acquired by the judge would undermine the planned defense of misidentification.<sup>9</sup> The judge refused, but offered to allow the defendant to withdraw his jury trial waiver.<sup>10</sup> The defendant

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3. Gloria Danzinger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 395 (2003).

4. Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1255-56 (2005).

5. 516 N.E.2d 200 (N.Y. 1987).

6. *Id.* at 201. Under the New York Court of Appeals's ruling in *People v. Sandoval*, a New York criminal defendant has a right to a pretrial ruling regarding what, if any, prior convictions or bad acts the prosecutor may ask the defendant about on cross-examination if the defendant should testify. 314 N.E.2d 413, 416 (N.Y. 1974). This right was extended to nonjury juvenile delinquency proceedings in *In re Joshua P.*, 704 N.Y.S.2d 853 (App. Div. 2000).

7. *Moreno*, 516 N.E.2d at 201.

8. *Id.*

9. *Id.*

10. *Id.*

declined.<sup>11</sup> After trial, the defendant was convicted of, *inter alia*, murder in the second degree.<sup>12</sup> The appellate division affirmed.<sup>13</sup>

Before the Court of Appeals of New York, the defendant argued “that his right to a fair trial was violated because recusal is required to avoid the appearance of impropriety based on the bench Trial Judge’s pretrial acquired knowledge of defendant’s record and of inadmissible evidence of his involvement in the crimes charged.”<sup>14</sup> But the court affirmed, using broad language that continues to haunt criminal and civil litigants arguing for recusal:

Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of “nonjuridical data.” When the alleged impropriety arises from information derived during the performance of the court’s adjudicatory function, then recusal could surely not be directed as a matter of law. A court’s decision in this respect may not be overturned unless it was an abuse of discretion.

Unlike a lay jury, a Judge “by reasons of . . . learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination” based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision. Recognizing this key premise, “it suffices to say that there is no prohibition against the same Judge conducting a pretrial hearing as well as the trial itself.”<sup>15</sup>

The United States Supreme Court, in addressing recusal applications brought pursuant to 28 U.S.C. § 455(a),<sup>16</sup> has drawn the same distinction between extrajudicial and judicial sources of bias. In *Liteky v. United States*,<sup>17</sup> Justice Scalia, writing for the majority, asserted:

[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.<sup>18</sup>

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 201-02 (citations omitted).

16. 28 U.S.C. § 455(a) (2006).

17. 510 U.S. 540 (1994).

18. *Id.* at 555. Four concurring Justices, in an opinion by Justice Kennedy, would have employed a less demanding standard for disqualification:

## III. DO JUDGES REALLY BUY INTO THIS “DIVIDED-BRAIN” STUFF?

It is tempting to think that judges are plagued with doubts regarding this practice. What most of them believe is impossible to know for certain. What we do know is that to discourage the use of recusal motions as a forum-shopping tactic, and to preserve the orderly process followed when one judge conducts the entire proceeding, courts are deeply invested in fostering the assumption that judges have this extraordinary capacity.<sup>19</sup> Thus, it should come as no surprise that the case law on recusal sometimes takes the low road. But while a ruling upholding a judge’s refusal to step down may reflect an appellate court’s determination that there was no abuse of discretion, it does not necessarily constitute an endorsement of the practice. Indeed, appellate courts have in no way discouraged trial courts from choosing the high road of recusal when there is a legitimate reason to do so.

In *In re Leon RR*,<sup>20</sup> the New York Court of Appeals found reversible error where the judge at a termination of parental rights proceeding admitted an agency’s case file with a caveat that he would disregard all inadmissible hearsay. The court asserted that this “facile practice . . . raises a substantial probability of irreparable prejudice to a party’s case for there is simply no way of gauging the subtle impact of inadmissible hearsay on even the most objective trier of fact.”<sup>21</sup>

In *In re Justin DD*,<sup>22</sup> the New York State Appellate Division, Third Department, affirmed a juvenile delinquency adjudication even though the trial judge also was presiding over two other cases brought against the juvenile. But the court noted that the “Family Court would have been well advised to assign the instant matter to another judge . . . .”<sup>23</sup>

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Disqualification is required if an objective observer would entertain reasonable questions about the judge’s impartiality. If a judge’s attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.

*Id.* at 564 (Kennedy, J., concurring).

19. “Appellate courts generally indulge in a fiction that a trial judge is capable of putting inadmissible information out of her mind and deciding a case solely on the basis of the evidence adduced at trial.” Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 572 (1998).

20. 397 N.E.2d 374 (N.Y. 1979).

21. *Id.* at 377.

22. 748 N.Y.S.2d 289 (App. Div. 2002).

23. *Id.*

In *In re James H.*,<sup>24</sup> the New York State Appellate Division, Second Department, while finding that a probation officer violated a statutory prohibition against disclosing probation reports prior to the completion of a fact-finding hearing, observed: “Any practice tending to weaken that policy should not be encouraged. Even though the court may not in fact be influenced by what it hears, it is the appearance of prejudice against which the policy is directed. . . .”<sup>25</sup>

Perhaps the true inclinations of appellate judges also are reflected in their not-infrequent rulings directing that further proceedings be conducted before a different judge.<sup>26</sup> In distinguishing between such rulings, and appellate rulings regarding a trial judge’s denial of a recusal motion, the New York Court of Appeals has noted, with respect to the latter: “Here, however, we deal not with what procedures might be preferred in light of particular circumstances, but rather with what is constitutionally required.”<sup>27</sup>

In New York, there is nothing in the juvenile delinquency statutes that limits the judge’s pretrial recusal authority. “The judge who presides at the commencement of the fact-finding hearing shall continue to preside until such hearing is concluded and an order entered [finding guilt or dismissing the charge] unless a mistrial is declared.”<sup>28</sup> “The judge who presides at the fact-finding hearing or

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24. 341 N.Y.S.2d 92 (App. Div. 1973), *remanded for further proceedings*, 316 N.E.2d 334 (N.Y. 1974).

25. *Id.* at 93. *See also* *People v. Smith*, 70 Cal. Rptr. 591, 594 (Dist. Ct. App. 1968) (“This is not to say that, where a motion is properly made before trial, a pretrial hearing before another judge is not preferable to a determination by the trial judge . . .”).

26. *See* *People v. Velez*, 829 N.Y.S.2d 209, 214 (App. Div. 2007) (directing that new hearing be conducted before different judge because same officers who testified at first suppression hearing were likely to be called as witnesses at new hearing, and because the credibility of those officers had been and again would be in issue); *United States v. Kaba*, 480 F.3d 152, 159 (2d Cir. 2007) (holding that when judge appears to have based sentencing determination on defendant’s national origin, defendant should be resentenced by different judge even if there was no actual bias or perception of bias); *United States v. Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006) (holding that in determining whether to remand case to a different judge, court must consider, *inter alia*, whether original judge would reasonably be expected to have substantial difficulty in putting out of his or her mind previously-expressed views or findings that may not be considered); *People v. Schrader*, 806 N.Y.S.2d 613, 614 (App. Div. 2005) (matter remitted for resentencing before different judge where sentencing judge improperly considered crimes “of which defendant had been acquitted”); *People v. Mayer*, 768 N.Y.S.2d 222, 224-25 (App. Div. 2003) (remitting for trial before different judge where judge erred in dismissing indictment for, *inter alia*, lack of sufficient evidence); *People v. Bryce*, 685 N.Y.S.2d 808, 811 (App. Div. 1998) (remitted for new hearing before different judge on defendant’s motion to vacate judgment where judge denied defendant full and even-handed inquiry).

27. *People v. Alomar*, 711 N.E.2d 958, 962 (N.Y. 1999).

28. N.Y. FAM. CT. ACT § 340.2(1) (McKinney 1999).

accepts an admission . . . shall preside at any other subsequent hearing in the proceeding, including but not limited to the dispositional hearing.”<sup>29</sup> These requirements “shall not be waived.”<sup>30</sup> However, there are exceptions that provide for reassignment to another judge when the appropriate judge cannot preside “by reason of removal from the proceeding due to bias, prejudice or similar grounds.”<sup>31</sup> And, while recusal is narrowly circumscribed once trial begins, there is no statutory limitation on recusal from involvement in pretrial proceedings.

So, while it is true that an appellate court is virtually certain to uphold a trial judge’s denial of a recusal motion, there is no reason to eschew an appeal to an individual judge’s better angels. Regardless of the standard a litigant must meet to require a judge to recuse herself, a judge may always grant a recusal motion or disqualify herself *sua sponte* if she is exposed to prejudicial information. Juvenile court judges should take such options seriously, keeping in mind the importance of avoiding any “appearance of impropriety.”<sup>32</sup>

Notably, in *Commonwealth v. Goodman*,<sup>33</sup> the Pennsylvania Supreme Court departed from the path taken by the New York Court of Appeals, the United States Supreme Court, and other courts, by holding that “a judge should honor a request for recusation where prejudicial information is received in a pre-trial proceeding that would be otherwise inadmissible during the trial of the cause.”<sup>34</sup> The Pennsylvania Supreme Court’s reasoning is instructive for trial judges confronted with recusal motions:

We are impressed with the wisdom of the ABA § 1.7 Standards Relating to the Function of the Trial Judge which provides:

“The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can be reasonably questioned.” []

We have every confidence that the trial judges of this Commonwealth are sincere in their efforts to avoid consideration of incompetent inflammatory evidence in reaching their judgments but we also are acutely aware that the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements. We are equally

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29. *Id.* § 340.2(2).

30. *Id.* § 340.2(4).

31. *Id.* § 340.2(3)(b).

32. Guggenheim & Hertz, *supra* note 19, at 584.

33. 311 A.2d 652 (Pa. 1973).

34. *Id.* at 654.

anxious to avoid the curtailment of the defense in the presentation of testimony in support of pre-trial motions because of the fear that information disclosed therein may adversely affect the outcome of subsequent proceedings.<sup>35</sup>

With any luck, juvenile defenders will find that some judges think along the same lines as the judge in *In re Luis R.*<sup>36</sup> In that case, the judge refused to allow the petition to be marked as a designated felony petition prior to trial because it would signal the existence of previous felony findings,<sup>37</sup> and also directed the corporation counsel to replace the district attorney as prosecutor,<sup>38</sup> stating:

There is no legitimate interest of the state served by spreading a respondent's record before the court prior to a fact-finding hearing. Simply stated, it is immaterial to the fact-finding process and can only cause mischief by needlessly calling into question the impartiality and integrity of the court. As I have stated, as have the highest courts of this state and Nation, unquestionably a judge possesses the capacity to rule dispassionately notwithstanding knowledge of a respondent's prior record. However, since awareness of this respondent's prior record serves no utilitarian or productive purpose until the dispositional stage, does it not simply make better sense to exclude any reference to it so even the appearance of prejudice is avoided.<sup>39</sup>

Finally, when seeking recusal of a judge, juvenile defenders should refer the judge to the court's opinion in *People v. Ventura*,<sup>40</sup> which contains the most forceful and high-minded discussion of judicial bias and recusal the author has ever seen. In *Ventura*, the court, after hearing an ex parte search warrant application and signing the warrant, found that there was probable cause for the search.<sup>41</sup> The court concluded that it must, as a matter of law, recuse itself for the entire nonjury proceeding.<sup>42</sup>

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35. *Id.* (emphasis omitted).

36. 414 N.Y.S.2d 997 (Fam. Ct. 1979).

37. Under New York law, a juvenile's second or third, felony finding becomes a designated felony finding that exposes the juvenile to more severe consequences. *See* N.Y. FAM. CT. ACT §§ 301.2(8), 353.5 (McKinney 1999 & Supp. 2007).

38. Prosecution of a case by the district attorney usually signals that there is a designated felony charge in the petition. *See id.* § 254-a(1) (McKinney 1999).

39. *In re Luis R.*, 414 N.Y.S.2d 997, 1000-01 (Fam. Ct. 1979); *see also In re Samuel P.*, 102 Misc.2d 875 (N.Y. Fam. Ct. 1980); Guggenheim & Hertz, *supra* note 19.

40. No. 5693, 2007 WL 4170847, at \*1 (N.Y. Just. Ct. Nov. 15, 2007).

41. *Id.* at \*1-2.

42. *Id.* at \*3. Here are merely a few of the court's cogent observations:

Even if the Court could intellectually separate its earlier determination from the suppression issues on trial itself, that Chinese Wall would come tumbling down by virtue of the appearance of impropriety that such mental gymnastics would create. This Court and all others are fallible. We should

## IV. THE GRASSROOTS REFORM OPTION

Despite the persuasive arguments for recusal in certain categories of cases, juvenile defenders cannot expect appellate courts to change their approach. Appealing to individual judges who operate with heightened ethical standards may yield some successes, but leaves the routine practice intact. Accordingly, when meeting with judges, prosecutors, and other institutional “players” to establish, discuss, and refine court procedures, defender organizations and individual defense lawyers should appeal to the other parties’ sense of fair play, and attempt to persuade them to adopt a case assignment system that is designed to steer pretrial proceedings away from the trial judge, and, in general, shield the trial judge from inadmissible and prejudicial information as much as possible.<sup>43</sup>

The argument for voluntary reform is compelling. Whether or not judges are, in particular circumstances, capable of effectively disregarding inadmissible facts *out of necessity*, there is no sound reason why the court system should *choose* to employ a procedure

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not be the least bit offended if attorneys dare to challenge our rulings. Indeed, it should be encouraged as the very embodiment of democracy and the adversarial system of jurisprudence.

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Attorneys should not have to give a second thought to whether an application for recusal will offend the Judge or in some way, hurt their client.

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The law . . . still requires that parties or attorneys seeking recusal must do so before the very judge before whom recusal is sought. This absurd requirement causes attorneys to have to second guess themselves and decide whether they wish to make an application thereby incurring the judge's wrath and possibly tainting the remainder of the proceedings with a judge who harbors animosity because an attorney or litigant dared to suggest even the potential of unfairness on the part of the judge.

Ideally, judges should search their consciences each day to determine their ability to be fair and impartial to all parties and their counsel. Where there is a potential for bias, prejudice or the appearance of impropriety, judges would be wise to seize the burden and, if possible, act before counsel is put into the uncomfortable position of having to make that application.

*Id.* at \*1-3.

43. Guggenheim and Hertz observe that some jurisdictions have taken steps to guard against a juvenile court judge's exposure to prejudicial information prior to conducting a bench trial, and that a model procedure “would provide a mechanism for the resolution of pretrial suppression issues and other potentially prejudicial matters by a judge other than the one who will preside over the trial.” Guggenheim & Hertz, *supra* note 19, at 583. Although “[i]t may seem impracticable to implement this [procedure] in jurisdictions that have only one juvenile court judge . . . there is at least one other judge who is fully qualified to decide pretrial motions to suppress evidence or pretrial or mid-trial motions on evidentiary matters: the criminal court judge.” *Id.* at 584.

that ensures that the trial judge will be the same judge who presided over pretrial hearings. Any concerns regarding inconvenience or expense are baseless. Indeed, if *all* trial judges withdraw from participation in pretrial litigation, the workload will be divided equitably, and there will be minimal disruption of orderly court processes. And any residual inconvenience would be far outweighed by the salutary impact on the fairness and integrity of the process.

Tactics-minded defense lawyers will notice one drawback to this approach. While the overall effect would be positive for juveniles as a class, there would be cases in which the client will lose out. Take, for example, a drug or weapon possession prosecution that will stand or fall according to the judge's suppression ruling. Assume the case has been assigned to a judge with a defense friendly track record. A courtwide practice resulting in recusal will undermine the juvenile's chances of prevailing. Indeed, in a recusal-oriented system, a juvenile is at risk of losing a benefit whenever the trial judge is defense-friendly. However, when advocating in a systemwide context, juvenile defenders may properly push for equitable practices that will benefit most future clients but not others. Moreover, if seeking recusal of prosecution-friendly judges in individual cases is not, in the end, a winning strategy—surely defense lawyers who appear on a regular basis before a set group of judges have no hope of disguising their forum-shopping tactics<sup>44</sup>—there is much to gain and little to lose.

#### V. WHEN TO SEEK RECUSAL IN INDIVIDUAL CASES

In the absence of a courthouse practice that provides for recusal of trial judges from pretrial proceedings, defense counsel can seek either before-the-fact reassignment to another judge for purposes of the pretrial proceedings, or after-the-fact reassignment to another judge for trial because the assigned judge already has participated in pretrial proceedings.

Seeking recusal in *all* cases creates a risk that defense counsel will not be taken seriously in those cases in which there is a compelling argument for recusal. Thus, whether participating in a negotiation aimed at developing a systemic approach, or determining whether or not to bring a recusal motion in individual cases before or after the trial judge has been involved in relevant pretrial litigation,

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44. Such transparent tactics also alert judges to defense counsel's perceptions regarding which judges are defense-friendly, and which judges are prosecution-friendly. While it is true that most prosecution-friendly judges already know who they are and how they are perceived, and—perhaps this is wishful thinking—some prosecution-friendly judges might be troubled by defense counsel's negative perception and reexamine their modus operandi, chances are that defense counsel's tactics will just further alienate the already prosecution-friendly judges.

defense counsel should consider concentrating on those cases in which the argument for recusal is most compelling, and avoid reliance on hollow boilerplate language. While judges certainly can be affected by knowledge of a juvenile's prior criminal behavior or other facts that do not go directly to the question of guilt, a compelling distinction may be drawn between a trial judge's pretrial knowledge of a juvenile's criminal history or a witness's suppressed identification, and evidence that conclusively establishes guilt.

Take, for instance, cases in which the judge possesses pretrial knowledge of the juvenile's proffered, but rejected or withdrawn, guilty plea. In New York, recusal in such cases is not required, but is encouraged.<sup>45</sup> In Maryland, a trial judge must, upon objection, recuse himself if he has heard a plea agreement withdrawn.<sup>46</sup>

Or, what about cases in which the trial judge has conducted a suppression hearing involving a full confession?<sup>47</sup> Although New York courts have not required recusal in such cases,<sup>48</sup> the premise underlying such rulings is persuasively challenged by Guggenheim and Hertz, who wonder: "[H]ow can [a judge] help but consider that

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45. *People v. Selikoff*, 318 N.E.2d 784, 792 (N.Y. 1974) ("Had defendant Selikoff exercised his option to withdraw the guilty plea, he could have requested that the trial be presided over by a Judge other than the one who had received the guilty plea[.]."). However, although the New York Court of Appeals implied in *Selikoff* that it would be a good idea for the plea judge to grant the recusal motion, case law addressing the denial of recusal hews close to *People v. Moreno*. See, e.g., *People v. Reid*, 529 N.Y.S.2d 9 (App. Div. 1988) (recusal not required after plea judge permitted defendant to withdraw plea).

46. *Brent v. State*, 492 A.2d 637 (Md. Ct. Spec. App. 1985) (rule applied where there was no formal agreement, but judge knew that defendant was prepared to plead guilty). See also *People v. Grier*, 709 N.Y.S.2d 607, 611-12 (App. Div. 2000) (trial judge, inter alia, had engaged in ex parte discussions with defense counsel regarding plea agreement) ("[I]t was impossible for the defendant to receive a fair trial. The result of the trial was a foregone conclusion. The presumption of innocence which is accorded to every defendant prior to trial did not attach to this defendant as a result of the proceedings that occurred prior to trial.") (McGinity, J., dissenting). Cf. *People v. Zappacosta*, 431 N.Y.S.2d 96, 98 (App. Div. 1980) (recusal should have been ordered where trial judge, during plea allocution of defendant's co-defendant wife, elicited "information on the ultimate issue of appellant's guilt which the court, as trier of fact, would not otherwise have had").

47. Recusal usually should be unnecessary when the trial judge does *not* suppress the confession. See *Commonwealth v. Reddix*, 513 A.2d 1041, 1044-45 (Pa. Super. Ct. 1986) (recusal not required where trial judge denied suppression at pretrial hearing, and, although he heard guilty pleas of co-defendants the same day defendant went to trial, co-defendants were to testify as prosecution witnesses and their pleas would be disclosed).

48. See, e.g., *People v. Prado*, 767 N.Y.S.2d 129, 130-31 (App. Div. 2003), *aff'd*, 823 N.E.2d 824 (N.Y. 2004). Cf. *People v. Moreno*, 516 N.E.2d 200, 202 (N.Y. 1987) (noting that, while there is "no prohibition against the same judge conducting pretrial hearing [and] trial," *People v. Brown*, 24 N.Y.2d 168 (1969), supports proposition that *Huntley* hearing judge is "not disqualified from presiding [at] nonjury trial").

the youth who is now presenting a reasonable-doubt defense made a detailed statement confessing to the crime?”<sup>49</sup>

Another example occurs in cases where the trial judge has previously tried an accomplice of the juvenile, and made findings of guilt that would be dispositive at the second trial. In *In re George G.*,<sup>50</sup> it was held that the trial judge should have recused himself where he had, three weeks earlier, found three co-respondents guilty while finding that the complainant had not consented to sexual intercourse, and had, while denying the recusal motion, stated to defense counsel, “You might be able to prove that he is innocent.”<sup>51</sup> The appellate court noted that the judge’s statement was a “manifestation of the subconscious that projects the *appearance* of bias.”<sup>52</sup>

Also consider cases in which the judge has determined the credibility of conflicting trial witnesses. Say, for instance, that the juvenile respondent and the arresting officer give conflicting testimony at a suppression hearing, and the judge, while denying suppression, stated that the officer was candid and credible while the juvenile was incredible. Say also that the juvenile and the arresting officer will be testifying at trial regarding the same events they described at the suppression hearing. In this scenario, the presumption underlying the traditional recusal rule—i.e., that judges can disregard inadmissible evidence—is beside the point. The judge’s determinations at the suppression hearing are not purely analytical, *legal* conclusions that the judge may be able to put aside; instead, they are likely to be multilayered, carefully considered, perhaps even intuitive determinations regarding witness credibility. It is unrealistic to think a judge will ever reverse course at trial and find that the juvenile is credible and the officer is not. “In the mindset of

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49. Guggenheim & Hertz, *supra* note 19, at 572. See also *Prado*, 767 N.Y.S.2d at 132 (McGinity, J., dissenting) (acknowledging that there is no prohibition against a judge presiding over both *Huntley* hearing and trial, but noting that judge took on role of prosecutor after “ma[king] up his mind as to the defendant’s guilt prior to the nonjury trial”).

Guggenheim & Hertz also note that the trial judge could preside over the suppression hearing without ever hearing the confession. Guggenheim & Hertz, *supra* note 19, at 585. But that is no solution. The judge likely will be exposed to the confession through a review of motions and other documents. Even if that does not happen, in many instances the actual statement will be less damning than what the judge might assume the juvenile said. Thus, in the end, the only real solution is to ensure that the trial judge is not aware that the juvenile made a statement.

50. 494 A.2d 247 (Md. Ct. Spec. App. 1985).

51. *Id.* at 251.

52. *Id.* at 252. Of course, when the previous finding of an accomplice’s guilt was rendered at a jury trial, the recusal argument is far weaker. See *People v. Burch*, 530 N.Y.S.2d 241 (App. Div. 1988) (recusal not required where bench trial judge had presided at a joint *Huntley* hearing, and the jury trial of defendant’s accomplice).

the litigants, it may be impossible for a single jurist to purge her mind of previously formed impressions of the litigants, witnesses, and their families, especially if they have appeared before this same trier of fact in other proceedings.”<sup>53</sup> Similarly, it is far-fetched to think that a judge who has, in prior proceedings, repeatedly credited the testimony of a particular police officer the judge has come to know and respect, will suddenly decide that the officer is lying.<sup>54</sup>

In *Watson v. State*, a rape prosecution, the Delaware Supreme Court held that the trial judge should have granted the defendant’s recusal motion, because the trial in question immediately followed a robbery trial in which the court had found the same defendant guilty.<sup>55</sup> Although the trial judge subjectively believed she was capable of starting “fresh,” the defendant’s credibility was a critical issue and the judge had rejected the defendant’s testimony as incredible during the previous trial.<sup>56</sup> According to the Delaware Supreme Court, the appearance of bias raised sufficient doubt regarding the judge’s ability to weigh the truthfulness of the defendant and the plaintiff’s contending stories.<sup>57</sup> The court noted that, while it had reached a contrary conclusion in a case where the trial judge had presided over a defendant’s case several years earlier, in this case the judge had just heard the previous trial and was fully aware of her prior credibility determination.<sup>58</sup>

In *United States v. Arache*<sup>59</sup> the trial judge, while granting a new trial, disqualified himself from presiding over a second jury trial because he had made credibility determinations. The First Circuit found no error, noting that the issue is whether “the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge’s impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable man.”<sup>60</sup> In *Busch v. City of New York*,<sup>61</sup> the court, in what it described as an overwhelming abundance of caution—not so abundant, and certainly not “overwhelming,” as far as I am concerned—declined to conduct a

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53. Melissa L. Breger, *Introducing the Construct of the Jury Into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 23 (2006).

54. Guggenheim & Hertz, *supra* note 19, at 574 (“[J]udges who sit in a criminal or juvenile court for years come to know the police officers of the jurisdiction,” and “if [a] judge has found that the officer testified truthfully in previous cases, the natural tendency is to presume that the officer would not lie.”).

55. 934 A.2d 901, 903 (Del. 2007).

56. *Id.* at 906.

57. *Id.* at 907.

58. *Id.* at 906.

59. 946 F.2d 129, 140 (1st Cir. 1991).

60. *Id.* (quoting *United States v. Crowden*, 545 F.2d 257, 265 (1st Cir. 1976)).

61. No. 00CV521, 2005 WL 2219309, at \*7 (E.D.N.Y. Sept. 13, 2005).

second jury trial because, while granting the new trial, the court had previously concluded “that the testimony of several witnesses who [were] likely to testify . . . was incredible.”<sup>62</sup>

Finally, even when defense counsel does choose to focus on these types of cases, counsel still must decide whether to make selective, and inconsistent—i.e., tactical—use of recusal motions only when recusal would improve the chances of prevailing in the pretrial litigation. Obviously, if such a tactic might pay off for the client, it must be considered. However, making recusal motions only when the replacement judge is likely to be more defense friendly is a tactic that will soon become transparent to the judges before whom a lawyer practices. Thus, it is a tactic that might work once or twice, but will not work for long, and each lawyer will have to determine when the tactic has become counterproductive and is hurting clients. In any event, such a potentially provocative tactic should be avoided when there is little or nothing to gain. Admittedly, there *is* something to gain when counsel seeks before-the-fact recusal because another judge is far more likely than the trial judge to grant suppression of a critical piece of evidence, or after-the-fact recusal because another judge is more likely to dismiss the case at trial. But there is nothing to gain if the case appears to be a “dead loser” and it makes no difference which judge conducts the trial.

## VI. HOW TO SEEK RECUSAL

In the absence of a courtwide recusal policy, there are two procedural mechanisms for seeking recusal of a trial judge from

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62. There is some unfavorable case law on this issue. In New Jersey, “[n]o judge of any court shall sit on the trial of or argument of any matter in controversy in a cause pending in his court, when he . . . [h]as given his opinion upon a matter in question in such action.” N.J. STAT. ANN. § 2A:15-49(c) (West 2000). However, New Jersey courts have held that an opinion expressed in prior proceedings in the same action does not prevent the judge from sitting at trial. *See* *Hundred E. Credit Corp. v. Eric Schuster Corp.*, 515 A.2d 246, 250 (N.J. Super. Ct. App. Div. 1986) (recusal not required where judge made fraud findings at previous proceeding, before judgment was reversed on appeal and case remanded).

In *Commonwealth v. Ciampa*, 828 N.E.2d 956 (Mass. App. Ct. 2005), the defendant argued that the motion judge, whose order denying the defendant’s motion to vacate his plea was reversed in a previous appeal, should have recused herself because she had already made credibility determinations respecting the defendant’s affidavits. The court rejected the defendant’s argument, noting that the motion for recusal was based on an assertion of bias resulting from the judge’s prior judicial determination, rather than emanating from an extrajudicial source. *Id.* *See also* *People v. Allen*, 800 N.Y.S.2d 896, 898 (Sup. Ct. 2005) (while court presided over domestic violence defendant’s divorce trial and found that he engaged in behavior constituting cruel and inhuman treatment, that information was acquired in context of court’s adjudicatory function, and, in any event, cannot be relied upon in deciding narrow issue in aggravated harassment trial).

pretrial proceedings: filing a motion for pretrial relief before another judge, and filing a recusal motion before the trial judge. The former method is, for obvious reasons, the better course by far.

In New York City, a substantial number of judges sit in family court in each of the four large counties (only two sit in Richmond County).<sup>63</sup> Each county's family court has an administrative judge.<sup>64</sup> A number of years ago, while supervising a lawyer in Bronx County, I advised the lawyer to make a pretrial *Sandoval*<sup>65</sup> motion before the administrative judge rather than the trial judge. The administrative judge agreed to hear the application, and, after argument by counsel, adopted our position and precluded cross-examination of the respondent, should he testify, regarding an unrelated juvenile delinquency charge. In theory, this was an excellent way to raise the issue. If we had brought the *Sandoval* application or moved for recusal before the trial judge, we would have been compelled to reveal to the judge at least some of the information from which we needed to shield him. But, a word to the wise: It was not until much later that I realized we had forgotten one important step—we never ensured that the motion papers, and court records reflecting the filing of the motion and the administrative judge's ruling, would be kept from the trial judge.<sup>66</sup> To sanitize the process, we should have asked the administrative judge to arrange for preparation of a "dummy" file to be maintained apart from the main case file, and to redact from the main file any reference to the motion. Of course, there may be no way to ensure that the trial judge will not hear about pretrial litigation through "the grapevine," and that is something counsel needs to consider when deciding whether to seek recusal.

Particularly when arguing for recusal before the trial judge, defense counsel should employ language that is high-minded and respectful. For instance:

The respondent has no doubts regarding Your Honor's good faith and desire to be fair. That is not the issue. The evidence that will be (or has been) elicited at pretrial proceedings is highly prejudicial and may be (or has been) ruled inadmissible. While Your Honor undoubtedly would make her best effort to put aside inadmissible facts and deliberate as if all she knows

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63. The Family Court Act stipulates that the family court "shall consist of forty-seven judges" within New York City. N.Y. FAM. CT. ACT § 121 (McKinney 1999).

64. See N.Y. JUD. CT. ACTS § 212 (McKinney 2005).

65. 34 N.Y.2d 371 (1974) (holding that a judge can limit a prosecutor's ability to refer to a defendant's prior crimes).

66. See, e.g., *People v. Smith*, 70 Cal. Rptr. 591, 594 (Ct. App. 1968) ("As a practical matter, it is next to impossible for a judge to try a case and not know when a defendant has made a statement that has been ruled inadmissible, since such a proceeding before another judge would be reflected by the file.").

are the facts presented at trial, there is no assurance that you, or *any judge*, could *effectively* do so in a manner that completely removes those inadmissible facts from conscious, or subconscious, consideration. That is too much to ask of a judge.

#### VII. THE JUDGE IS THE "DEVIL YOU KNOW," SO MAKE SURE YOU KNOW THE JUDGE

Juvenile defenders and their clients crave a jury of citizen fact-finders who are shielded from inadmissible evidence, and who, as an added bonus, are willing to question the accuracy of civilian witnesses' testimony and the credibility of police testimony. Instead, they must practice before judges who, on occasion, reach conclusions of guilt that are fueled less by solid evidence than by intuition or an unwillingness to let the guilty go free, and who, while paying lip service to the reasonable doubt standard, apply something much closer to a preponderance of the evidence standard.<sup>67</sup>

Still, the news is not all bad. While jury trial lawyers can learn something about jurors' thought processes and predilections during voir dire and perhaps even at trial, juvenile defenders who practice regularly before the same judge or judges have a unique opportunity to learn far more about the fact-finder than a jury trial lawyer will ever know. This will assist the lawyer not only in making a bottom-line prediction as to the chances of acquittal, but also in designing an overall advocacy style that will appeal to the judge, and in fashioning legal and factual defenses the judge will find credible, fresh, and appealing.<sup>68</sup>

Among the things lawyers should know about a judge are:

- Does the judge always, or almost always, believe police officers, or is the judge more suspicious of police testimony?
- Does the judge always, or almost always, disbelieve a testifying juvenile respondent, and/or the respondent's friends and family?
- How many juvenile delinquency or criminal trials has the judge participated in or presided over, and how likely is it that the judge has heard the same things over and over again from police officers and juveniles?<sup>69</sup>
- When the judge gets involved and questions witnesses, is it usually for the purpose of adding to or clarifying the record,

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67. There is evidence suggesting that the advantages of a jury trial have not been overstated. See Guggenheim & Hertz, *supra* note 19, at 562-64.

68. *Id.* at 589-92.

69. *Id.* at 574.

or does it usually mean that the judge does not believe the witness?

- What is the judge's attention span, particularly during cross-examination, and does the judge have the patience to allow wide-ranging cross-examination designed to trap a witness?
- Does the judge often like to reach compromise verdicts so "everyone gets something?"
- Is the judge willing to dismiss charges because of some perceived inequity or because of the taint of prosecutorial or police misconduct: that is, does the judge ever engage in the bench trial equivalent of jury nullification?
- Does the judge apply the beyond a reasonable doubt standard and dismiss some cases despite a firm belief that the juvenile committed the acts alleged, or does the judge simply try to figure out what happened and render a verdict accordingly?
- What type of legal practice or other career—for instance, politician, prosecutor or defense counsel—did the judge engage in prior to becoming a judge?
- Does the judge make up his/her mind early and before summations, so that an opening statement might be useful and subtle points made during cross-examination might have to be trumpeted at the time.<sup>70</sup>

The process of acquiring information, and using it to size up a judge, must be ongoing. Lawyers who work in public defender or Legal Aid settings have the advantages flowing from regular contact with the same judges, and from convenient and daily access to experienced lawyers who have practiced before particular judges for years, and are able to provide a tutorial on the judges' preferences, idiosyncrasies, prejudices, typical evidentiary rulings, etc. Sitting in the back of a courtroom and watching a judge handle other lawyers' cases is a terrific way to learn, since the observing lawyer can listen and process information without distraction. Other means by which to learn about a judge include: reading transcripts, checking the judge's biography at an official court website, and running a computer search to locate the judge's decisions and other published works.<sup>71</sup>

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70. *Id.* at 591-93.

71. *See* THOMAS MAUET, TRIAL TECHNIQUES § 12.3 (6th ed. 2002).

VIII. IF THE JUDGE WILL HEAR *ALL* THE BAD FACTS, MAKE SURE THE JUDGE HEARS THE GOOD FACTS TOO

While the negative information that surfaces during pretrial proceedings provides the prosecution with an opportunity to prejudice the judge *against* the juvenile, pretrial proceedings also can provide the defense with an opportunity to bring to the judge's attention evidence that will, let us say, prejudice the judge *in favor of* the juvenile.

The New York Family Court Act contains three types of motions that offer this opportunity: a motion for referral of the case to the probation service for diversion from court via "adjustment services,"<sup>72</sup> for an adjournment in contemplation of dismissal,<sup>73</sup> and for dismissal in furtherance of justice.<sup>74</sup> Among the items that can be submitted in support of the motion are affidavits or letters from teachers, the clergy, neighbors, athletic coaches, or employers; school report cards; and awards and certificates. Defense counsel also could provide this type of information more informally during colloquy at pretrial court appearances. Of course, like the defense lawyer who plays with fire when presenting character evidence that can be rebutted by the prosecution with a flood of damaging information, the lawyer must, before opening the door to evidence of the juvenile's legal, educational, or social background, determine whether there are any "killer" facts for the prosecution to find, and whether, in general, the favorable information outweighs the unfavorable.

IX. RECOMMENDATIONS AND CONCLUSION

In the end, there may not be anything juvenile defenders can do if family court judges, taking full advantage of the considerable discretion awarded to them by appellate courts, are content to conduct proceedings tainted by an appearance of impropriety. But there is no reason to give up without a fight, and certainly no reason to eschew means of improving lawyers' ability to practice effectively in such an environment.

Accordingly, institutional defense providers and groups of private practitioners should approach local family court judges and other necessary parties to discuss adoption of uniform practices that prohibit the trial judge from hearing any, or specified types of, pretrial applications, and attempt to shield the trial judge from

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72. N.Y. FAM. CT. ACT §320.6 (McKinney 1999).

73. *Id.* § 315.3.

74. *Id.* § 315.2. Among the factors to be considered by the judge are: "(d) the history, character and condition of the respondent; (e) the needs and best interest of the respondent; (f) the need for protection of the community; and (g) any other relevant fact indicating that a finding would serve no useful purpose." *Id.* § 315.2(1).

knowledge of inadmissible trial evidence. I must acknowledge the concerns of some juvenile defenders, who worry that pressing these issues will antagonize judges who see themselves as benign problem-solvers, inclined to treat the children with compassion and fairness, and believe that in order to be most effective, they require a free flow of information. Nothing that has been suggested here would prevent those judges from practicing as they prefer, as long as they recuse themselves from certain pretrial proceedings. And, of course, savvy juvenile defenders should do whatever is best for their clients, and if that means rejecting some or all of the recusal-related suggestions I have made, then so be it.

Public defender and Legal Aid offices, and, if possible, individual practitioners who meet to discuss practice issues, also should establish formal and informal means of tracking the behavior of individual judges, and sharing on an ongoing basis information regarding their practices and procedures, habits, idiosyncrasies, and legal rulings and philosophy. At least for public defender and Legal Aid offices, this may include: providing training for new and experienced lawyers regarding the judges before whom they practice; maintaining hard copy or electronic files containing, *inter alia*, an official judicial “bio,” written decisions and trial verdicts, and anecdotal information about each judge contributed by lawyers on a voluntary basis—e.g., the judge’s favorite and least favorite prosecutors and probation officers, or rulings regarding the credibility of police officers who testify frequently; and conducting statistical analyses of judges’ rulings for predictive use. A side benefit to these efforts is the fingertip availability of information for use when determining whether to support or oppose the reappointment of a judge, and when documenting specific complaints.

If judges choose to avoid participation in pretrial proceedings, recuse themselves from trial proceedings in some circumstances, and otherwise practice collectively in a manner that avoids the appearance of impropriety, no one loses and everyone wins. What is required is leadership. First, on the part of juvenile defenders who refuse to play along without challenging the flawed premise of the “split-brain” theory, and who work diligently to make the existing system work to their client’s advantage. More importantly, on the part of judges who are willing to refrain from doing what they can get away with, and instead do what is right.