NO. 27037-8-III

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION III

DARLENE TURNER and BILL H. TURNER,
individually and as husband and wife,

Respondents,

v.

NATHAN P. STIME, M.D. and RIVERSIDE MEDICAL CLINIC,
a Washington corporation,

Appellants.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, COLUMBIA LEGAL SERVICES, KOREAN AMERICAN BAR ASSOCIATION, LATINO/A BAR ASSOCIATION OF WASHINGTON, LOREN MILLER BAR ASSOCIATION, MIDDLE EASTERN LEGAL ASSOCIATION OF WASHINGTON, NORTHWEST INDIAN BAR ASSOCIATION, AND VIETNAMESE AMERICAN BAR ASSOCIATION OF WASHINGTON

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I. IDENTITY AND INTEREST OF AMICI

The American Civil Liberties Union of Washington (ACLU) is a statewide, nonprofit, nonpartisan organization with over 20,000 members dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws. It has long been dedicated to protecting the constitutional right to equal protection of the laws and the right to a fair trial by a jury that is free of discrimination or bias. It has submitted amicus briefs in numerous cases where those rights were at stake, including *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008).

Columbia Legal Services (CLS) is a nonprofit law firm that protects and defends the legal and human rights of low-income people. CLS represents people and organizations in Washington State with critical legal needs who have no other legal assistance available to them. Because low-income people are disproportionately people of color, CLS regularly represents people of color in judicial proceedings, including proceedings to protect clients from discrimination. CLS is committed to the fair treatment of litigants and access to effective legal representation regardless of race or ethnicity of the attorney or the client.

The Korean American Bar Association of Washington (KABA) was established with the objective of fostering the exchange of ideas and

information among and between KABA members and other members of the legal profession, the judiciary, and the community. One of KABA's goals is to provide service to the general and local community. KABA aims to develop and encourage cooperation with other organizations of minority attorneys and to provide a vehicle and forum for the unified expression of opinions and positions by KABA upon current social, political, economic, legal or other matters or events of concern to KABA members.

The Latino/a Bar Association of Washington (LBAW) represents the concerns and goals of Latino attorneys and Latino people of the State of Washington. LBAW's 250 members include judges, solo practitioners, prosecutors, defense attorneys, public sector attorneys, private sector attorneys, in-house legal counsel, and law students. It encourages and promotes the active participation of all Latino attorneys throughout Washington State and seeks the involvement of Latino political, governmental, educational, and business leaders.

The Loren Miller Bar Association (LMBA) is an affiliate chapter of the National Bar Association. LMBA is a nonprofit organization dedicated to defending the civil rights and constitutional freedoms consistent with the principles of a free democratic society. LMBA's 500 current and past members are primarily African-American judges, attorneys, law professors, and law students.

The Middle Eastern Legal Association of Washington (MELAW) is a non-profit legal organization for attorneys and law students of Middle Eastern descent, along with their friends and supporters. MELAW seeks to advance the goals of its members, provide a legal voice for the Middle Eastern community in Washington, address and educate the public on legal and political issues facing Middle Easterners, and offer resources as well as networking and mentorship opportunities for its members and the public.

The Northwest Indian Bar Association (NIBA) is an organization of Indian attorneys and judges in Alaska, Idaho, Oregon, Washington, British Columbia, and the Yukon Territory. NIBA aspires to improve the legal and political landscape for the Pacific Northwest Indian community.

The Vietnamese American Bar Association of Washington (VABAW) is a legal society that was formed in 2005 for Vietnamese American attorneys, law students and friends who share its common vision. VABAW strives for legal excellence by facilitating and cultivating both professional and personal relationships among its members, the community and the judiciary. VABAW's goal is to provide mutual support for attorneys in the advancement of their careers, to be a trusted guide and resource for students who aspire towards the legal profession, to

serve as a voice for the local Vietnamese American community, and to represent Vietnamese American attorneys within the State Bar.

A motion requesting leave to file this overlength brief has been filed simultaneously.

II. STATEMENT OF FACTS

This case involved a claim of medical negligence brought by Respondents Darlene Turner and her husband, Bill Turner, against Appellants Nathan P. Stime, M.D and Riverside Medical Clinic. CP 1-6. Mrs. Turner alleged that Dr. Stime violated the standard of care by failing to perform an appropriate medical history and by failing to conduct an appropriate physical examination, which would have led to further tests and/or diagnostics and would have revealed she had pneumonia instead of terminal cancer. CP 37-38. This case was tried to a jury beginning on November 26, 2007. On December 7, 2007, the jury returned a verdict in favor of Dr. Stime. CP 33.

After the verdict, a juror, Mr. Jack Marchant, a Professor at Washington State University, expressed to counsel for Respondents, Mark Kamitomo, his belief that racial prejudice or bias played a role in the jury's deliberations. CP 48. Mr. Kamitomo filed a motion for new trial on December 14, 2007. CP 35; 37-46. Accompanying Mr. Kamitomo's motion was an affidavit from Professor Marchant that described how some of the

jurors referred to Mr. Kamitomo as "Mr. Kamikaze," "Mr. Miyashi," Mr. Miyagi," and "Mr. Havacoma." CP 50-551; 76-77. According to Professor Marchant, those comments "were conveyed in a manner that led [Professor Marchant] to conclude the comments were racially motivated with the jurors demonstrating a prejudice towards Mr. Kamitomo." *Id.* Professor Marchant further stated that he believed that the "jurors' bias toward Mr. Kamitomo influenced how they looked at the case." *Id.*

Mark Costigan, another juror, confirmed Professor Marchant's allegations and added in an affidavit that the comments occurred more than once and that some of the jurors chuckled or smirked at the comments. CP 109; 309. Mr. Costigan also stated that another juror described the verdict as "almost appropriate" because it was rendered on Pearl Harbor Day. *Id.* Mr. Costigan agreed with Professor Marchant's belief that the comments were racially derogatory, demonstrated a bias and prejudice towards Mr. Kamitomo, and that "the jurors' bias toward Mr. Kamitomo influenced how they looked at the case." CP 109-13.

Appellants submitted affidavits from eight jurors, all of whom denied that race or ethnicity affected the verdict. CP 114, 117, 120, 123, 126, 129, 133, 278. According to these jurors, they had trouble pronouncing Mr. Kamitomo's name. CP 133-14, 116-17, 120, 123, 126, 132-33, 136, 277-78, 545-58. One juror, Brenda Canfield, admitted that as a result she referred to

Mr. Kamitomo as "Mr. Miyashi." CP 123. Another juror, David Smith, admitted that he referred to Mr. Kamitomo as "Mr. Kamikaze." CP 133. None of the jurors set forth in their affidavits any kind of nickname for Appellants' attorney, even though they also claimed to have trouble pronouncing his name. Nor did any of the jurors admit to making comments regarding Pearl Harbor Day.

The trial court granted the motion for new trial on the ground of juror misconduct, holding that "the names that were used were uncontested, one-sided, and undeniably derogatory comments and references to the ethnicity of Mr. Kamitomo, a participant in the trial." *Id.* The court further found that the jurors' comments were "an expression of some prejudice to Mr. Kamitomo's ethnicity and adversely affected the verdict in some fashion." *Id.* Finally, the court found that "the comment that the verdict was 'almost appropriate' on December 7, 2007 to be a clear indication that racial bias against Mr. Kamitomo's Japanese ancestry was entertained . . . and that the use of names other than Mr. Kamitomo's were racially motivated reflecting a reasonable concern as to the objectivity of the jurors." *Id.*

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III. ARGUMENT

A. Standard of Review for a Motion for New Trial Due to Juror Misconduct.

"[T]he test to determine whether the verdict may be impeached and a new trial warranted [on the grounds of juror misconduct] is first whether the alleged information actually constituted misconduct and, second, if misconduct did occur whether it affected the verdict." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App. 266, 270, 796 P.2d 737 (1990) (citing *Halverson v. Anderson*, 82 Wn.2d 746, 750, 513 P.2d 827 (1973)). The determination "whether the alleged misconduct exists, whether it is prejudicial, and whether a mistrial is declared are all matters for the discretion of the trial court." *Richards*, 59 Wn.App. at 271. The trial court's decision "will be overturned on appeal only for an abuse of discretion." *Id.* (citing *State v. Rempel*, 53 Wn.App. 799, 801, 770 P.2d 1058 (1989), *rev'd on other grounds*, 114 Wn.2d 77, 785 P.2d 1134 (1990)).

Appellate courts are reluctant to set aside an order granting a new trial. *Hendrickson v. Konopaski*, 14 Wn.App. 390, 392, 541 P.2d 1001 (1975) (citing *State v. Gobin*, 73 Wn.2d 206, 437 P.2d 389 (1968)). Great deference is due to the trial court's determination that no prejudice occurred. *State v. Briggs*, 55 Wn.App. 44, 60, 776 P.2d 415 (1982). But even *greater* weight is due to the trial court's decision to grant a new trial. *Id.* (emphasis

added). If the trial court had *any* doubt that the misconduct affected the verdict, it is obliged to resolve that doubt in *favor* of granting a new trial. *Halverson*, 82 Wn.2d at 750 (citing *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 918 (1962)) (emphasis added).

B. The Legal Standard for a New Trial Based on Juror Misconduct is Met Where, as Here, Jurors Engage in Conduct Demonstrating Racial Bias.

1. Statements or conduct demonstrating racial bias violate the right to a fair trial.

"The Constitution guarantees litigants in a civil case a fair and impartial tribunal, free from actual bias or prejudice." *Alejo Jimenez v. Heyliger*, 792 F.Supp 910, 917-18 (D.P.R. 1992). Courts have a duty to enforce this constitutional mandate to ensure equality and fairness when called on to act in litigated cases. *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986). Discrimination within the judicial system is most pernicious because it is "a stimulant to . . . [racial] prejudice which is an impediment to securing . . . equal justice which the law aims to secure to all others." *Strauder v. West Virginia*, 10 Otto 303, 308 100 U.S. 303, 308, 25 L.Ed 664 (1880). As a result, "[t]he justice system, and the courts especially, must jealously guard . . . [that] sacred trust to assure equal treatment before the law." *Powell v. Allstate Ins. Co.*, 652 So.2d 354, 358 (Fl. 1995).

The duty to eradicate racial discrimination in the justice system never ceases. *See Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *Batson,* the prosecutor used peremptory challenges to create an all-Caucasian jury in a criminal case against an African-American male. *Id.* at 82-83. The United States Supreme Court reversed the conviction and remanded holding:

> Purposeful racial discrimination in . . . [judicial proceedings] violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. 'The very idea of a jury is a body ... composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.'

Id. at 86 (internal citations omitted). The Court concluded that "selection procedures that purposefully exclude persons from the jury based on their race undermines public confidence in the fairness of our system of justice." *Id.* at 87 (citations omitted).

Similarly, racially biased or derogatory acts by a juror impugn the integrity of the fact-finding process and pose a serious threat to a fair trial. *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002) (citing *Weddington v. State*, 545 A.2d 607, 613 (Del. 1988)). *See also Heller*, 785 F.2d at 1527 (The guarantee of equal treatment makes clear that juror statements

demonstrating racial bias violate the guarantee of both federal and state constitutions).

In *Varner*, a juror was overheard commenting to his peers that it would be a miracle if a white person did not get robbed or beaten while in an African-American neighborhood. *Id.* at 302. The Minnesota Supreme Court reversed the lower court's failure to grant a new trial, holding that "[i]n case[s] where race should be irrelevant, racial considerations, in particular, can affect a juror's impartiality and must be removed from courtroom proceedings to the fullest extent possible." *Id.* The court reasoned that racial comments allow the jurors to view the defendant as coming from a different community than themselves. *Id.* (citing *United State ex rel. Hayes v. McKendrick*, 481 F.2d 152, 160-61 (2nd Cir. 1973)).

Citing *McFarland v. Smith*, 611 F.2d 414 (2nd Cir. 1979), the *Varner* court explained:

> To raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore. Even a reference that is not derogatory may carry impermissible connotations, or may trigger prejudiced responses in the listeners that the speaker might neither have predicted nor intended.

Comments that demonstrate a "racial or ethnic bias in the courts is not simply a matter of political correctness to be brushed aside by a thick-skinned judiciary." *Varner*, 643 N.W.2d at 305 (citing *Powell*, 652 So.2d

at 358). Such comments should be confronted whenever improperly raised in judicial proceedings. *Id.*

The jurors in this case referred to Mr. Kamitomo by the name "Mr. Miyagi," which refers to a fictional character made popular by the *Karate Kid* films. In the film, Mr. Miyagi is a Japanese karate master who learned karate from his father, a fisherman. The jurors in this case also referred to Mr. Kamitomo by the name "Mr. Kamikaze." The term "kamikaze" most commonly refers to Japanese military aviators whose missions consisted of intentionally crashing their aircraft, which were full of torpedoes, fuel tanks, bombs, and other types of explosive materials, into Allied ships during the Second World War. The trial judge properly examined these prejudicial remarks and properly considered that the verdict was rendered on Pearl Harbor Day. *See State v. Johnson*, 630 N.W.2d 79, 83 (S.D. 2001).

In *Johnson*, the defendant, an African-American male, was accused of third degree rape of a Caucasian woman. *Id.* at 80. During deliberations, it was discovered that a juror uttered the phrase "I've got a rope," to which another juror replied, "I have a tree." *Id.* The jurors testified before the trial judge that the comments were jokes, they [the jurors] were neither biased nor prejudiced, and the comments would not carry over to their decision. *Id.* at 81. In reversing the denial of the

defendant's motion for a new trial, the South Dakota Supreme Court held that "use of derogatory racial terms in a case with an African-American defendant strikes at the heart of the fair trial protections." *Id.* at 83. The court reasoned that the "prejudicial remarks were of a severe nature that indirectly classified . . . [the defendant] by his race and invoked the prejudice associated with the historical treatment of African-American males . . ." *Id.* at 85.

Likewise, the remarks in this case classified Mr. Kamitomo by his race and invoked popular stereotypes associated with individuals of Japanese heritage. These statements could reasonably be interpreted as either having sinister implications, an insult or pejorative to a cross-section of the general population. *See State v. Phillips*, 731 A.2d 101, 107, 322 N.J. Super. 429 (N.J. 1999). The jurors' claims of innocuousness were diminished by the fact that the jurors did not use nicknames to refer to Appellants' counsel, who was Caucasian and whose name several jurors claimed to also have difficulty pronouncing.

It also made little difference that the infection or influence may have been slight as claimed by Appellants. *Alejo Jimeniez*, 792 F.Supp. at 919 (reference to plaintiff's national origin was totally extraneous to the nature of the alleged malpractice claims). Respondents' right to a fair trial was implicated due to strong evidence that extraneous prejudicial influences may

have tainted the integrity of the entire verdict. *Id.* ("Juries necessarily act as a unit and the misconduct of any juror, actual or implied . . . forestalls or prevents a fair and proper consideration to the evidence."). The trial court's conclusion that these statements created doubt whether the verdict was free of taint of racial bias was not an abuse of discretion.

2. Evidence of racial bias or derogatory statements are sufficient to support a trial court's finding that doubt exists whether the verdict was free of prejudice.

"Allegations that a juror or jurors were racially biased strikes at the very heart of the right to trial by an impartial jury. *Phillips*, 731 A.2d at 108. Our system of justice seeks the truth, whatever the jury finds the truth to be, but that truth cannot be determined when the jury is exposed to extraneous prejudices or information that the judge finds . . . might have affected . . . [the jury]". *After Hour Welding, Inc. v. Laneil Mgmt. Co.*, 324 N.W.2d 686, 692, 108 Wis.2d 734 (Wis. 1982). A "fair trial that is free of improper racial implications is . . . basic" and evidence of "[j]uror bias . . . will not be tolerated in our judicial system . . ." *Fisher v. State*, 690 A.2d 917, 920 (Del. 1996) (racially derogative statements, as well as racial slurs or statements indicating racial bias can never be harmless error under the federal constitution). A new trial is a common cure for violations of this important right.

For example, in *State v. Jackson*, 75 Wn.App. 537, 540, 879 P.2d 307, 311 (1994), convictions were reversed after a juror revealed that during the deliberations, she overheard several racially biased comments during a conversation between two other jurors. Among the comments overheard were statements that: "'There are a lot more coloreds now then [*sic*] there ever used to be.' 'The worst part of the reunion was that I had to socialize with the coloreds.' 'You know how those coloreds are.'" *Id.* Instead of conducting an evidentiary hearing and examining the jurors, the trial judge concluded that the statements revealed "no sort of racial prejudice or bias against Negroes in general." *Id.* at 540-42.

The Washington Court of Appeals remanded for a new trial and reasoned that such statements taken as a whole created a clear inference of racial bias. "In particular, the statements reveal [the] juror['s] aversion toward associating with African-Americans and a predisposition toward making generalizations about African-Americans as a group." *Id.* at 543. The court ruled that the juror's statements demonstrated the existence of certain discriminatory views that may have affected the juror's ability to decide the case fairly and impartially. *Id.*

United States v. Henley, 238 F.3d 1111, 1113 (9th Cir. 2001), involved allegations that a juror used racial slurs to refer to African-Americans. In particular, a juror inferred that African-Americans (using

the racial slur) were guilty and should be hanged or lynched. The Ninth Circuit ruled that the district court's failure to interview the jury was erroneous and remanded with instructions that the court enter detailed findings and make specific determinations regarding the alleged statements and racial bias. *Id.* at 1120-22. "[I]f a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the [S]ixth [A]mendment's guarantee to a fair trial and impartial jury." *Id.* at 1120 (*citing Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987)). *See also Heller*, 785 F.2d at 1524 (evidence of racial statements referring to hanging Jewish people and using racial and ethnic slurs sufficient evidence of juror misconduct); *Tobias v. Smith*, 468 F.Supp. 1287, 1289-91 (W.D.N.Y. 1979) (statement "[y]ou can't tell one black from another" sufficient to support new trial on ground of juror misconduct).

New trials have also been ordered in civil cases where there was evidence that a juror made a racially biased or derogatory statement. In *Powell*, some of the jurors made derogatory statements regarding African-Americans and made jokes about physically harming African-Americans. 652 So.2d at 356. When questioned, the jurors denied that the jokes meant anything or that they were prejudiced against plaintiff, who was African-American. *Id.* The Florida Supreme Court remanded for a determination

of whether the statements were made as asserted. *Id.* at 358. The court concluded that if the statements were made, then the trial court must order a new trial. *Id.*

In *Tapia v. Barker*, 160 Cal. App.3d 761, 206 Cal. Rptr. 803 (1984), a juror inquired about the citizenship of the plaintiff, who had suffered a personal injury. Other jurors were overheard making statements regarding the plaintiff's ability to handle money because he was a Mexican, statements regarding Mexicans making big legal claims in the United States and taking the money back to Mexico, and racially derogatory remarks about Mexican men in general. *Id.* at 765. The California Court of Appeals admonished this as an "insidious discussion of race" and reversed the trial court's denial of a new trial. *Id.* at 766. Describing the duty of the court in this situation, the court held that "not only must our courts render impartial justice, . . . they must also appear to do so in order to maintain confidence in our legal system." *Id.* ("The misconduct which occurred in this case not only erodes confidence in the legal system; it violates the constitutional guarantee of a fair trial.")

In *After Hour Welding, Inc.*, a juror referred to a defense witness, who was an officer of the corporate corporation, as "a cheap Jew." 324 N.W.2d at 688. Noting the well-documented evidence of anti-Semitism and other racial prejudice in America, the Wisconsin Supreme Court held

that "[w]henever it comes to a trial court's attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender or national origin, judges should be especially sensitive to such allegations and conduct an investigation . . ." *Id.* at 690. Accordingly, the court remanded the case for such a hearing. *Id.* at 691. *See also Wright v. CTL Distribution, Inc.*, 650 So.2d 641, 642-44 (Fl. Dist. Ct. App. 1995) (case remanded for jury interview regarding racial slurs and comments made during deliberations and if witnesses unavailable then new trial ordered).

Here, Mr. Kamitomo was referred to by derogatory names that identified him by his race and invoked popular stereotypes associated with individuals of Japanese heritage. The prejudicial impact on Respondents may have been especially harsh in view of the fact that the verdict was rendered on Pearl Harbor Day. *See Johnson*, 630 N.W.2d at 83 (juror's reference to having a rope especially harsh because African-American defendant was accused of raping a Caucasian girl). The trial court's review of the racially derogatory comments and its conclusion that the comments constituted misconduct that prejudiced Respondents was not an abuse of discretion.

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3. Statements by a juror that reveal evidence of racial bias constitute misconduct that may be examined by a trial court.

American jurisprudence favors stable and certain verdicts and encourages frank and free discussion between jurors. *Halverson*, 82 Wn.2d at 749-50. As a result, there is a general prohibition against breaching the secrecy of deliberations. *Id.* But this policy yields if there are charges of juror misconduct, which the trial court has discretion to determine after viewing juror affidavits **or** examining jurors.[1] *Richards*, 59 Wn.App. at 271 (citing *Gardner*, 60 Wn.2d at 846). A trial court may rely on those portions of a juror's affidavit that state facts and circumstances of juror misconduct. *Hendrickson*, 14 Wn.App. at 392 (citing *Gardner*, 60 Wn.2d at 836). A trial court may not rely on those portions of an affidavit that attest to matters inhering in the verdict, *i.e.* statements that reveal or purport to reveal the collective thought processes leading to a verdict. *Gardner*, 60 Wn.2d at 841; *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

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[1] Relying on *Estate of Bowers*, 132 Wn.App. 332, 339, 131 P.3d 916 (2006), Appellants erroneously argue that "[d]ecisions based on declarations, affidavits and written documents are reviewed *de novo*." *Bowers* did not apply the *de novo* standard to the appeal of a trial court's decision to grant a new trial. Nor did *Bowers* discuss or reject abuse of discretion as the proper standard of review on a motion for new trial. The *de novo* standard discussed in *Bowers* applied to an appeal of the trial court's decision to admit a will into probate – a decision that was based exclusively on the written record. *Id.*

Evidence of racial bias is a general exception to the rule against juror testimony. *See Marshall v. State*, 854 So.2d 1235, 1240 (Fl. 2003); *Tobias*, 468 F.Supp. at 1291 (race is an improper consideration for a jury, just as ethnic origin and religion, and "jurors who manifest racial prejudice have no place in the jury room"). Comments regarding race do not reveal the collective thought processes leading to a verdict. *See Marshall*, 854 So.2d at 1240 (citing *Powell*, 652 So.2d at 356-57 (racially derogatory remarks and racial slurs constitute an overt act and do not inhere in the verdict). These statements are the equivalent "of information by a juror to fellow jurors, which is outside the recorded evidence of the trial and not subject to the protections and limitations of open court proceedings." *Richards*, 59 Wn.App. at 270. *See also Henley*, 238 F.3d at 1113 ("Racial prejudice is . . . a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine."); *Moss v. Sanger*, 75 Tex 321, 321, 12 S.W. 619 (Tex. 1889) ("Cases ought to be tried in a court of justice upon the facts provided; and whether a party be a Jew or gentile, white or black, is a matter of indifference.").

In granting the motion for a new trial, the trial court examined only the statements referencing Respondents' attorney as "Mr. Kamikaze," "Mr. Miyashi," Mr. Miyagi," or "Mr. Havacoma," and the alleged reference to Pearl Harbor Day. CP 545-58. The trial court ruled that the use of

nicknames to refer to Mr. Kamitomo were racially motivated and reflected a reasonable concern as to the objectivity of the jurors. *Id.* The court also ruled that the statement regarding Pearl Harbor Day indicated that racial bias against Mr. Kamitomo's Japanese ancestry was entertained. *Id.* The court found that "the names that were used were uncontested, one-sided and undeniably derogatory comments and references to the ethnicity of Mr. Kamitomo, a participant in the trial." *Id.*

Juror Smith and Juror Canfield's denials of racial bias did not diminish the finding that misconduct occurred. *See Richards*, 59 Wn.App. at 272 ("[i]t [wa]s not for the juror to say what effect the remarks may have had upon his verdict. . . ."). As explained by the Eleventh Circuit, an individual who harbors certain negative stereotypes is prevented, despite his or her protestations to the contrary, from making decisions based solely on the facts and law. *Heller*, 785 F.2d at 1527. "[T]he bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'" *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1983) (internal citations omitted).

Characterizing the derogatory references to Mr. Kamitomo as a joke also did not diminish any potential prejudice. *Varner*, 643 N.W.2d at

306 ("If a racially based statement is unacceptable, a joke used as a vehicle to communicate the same message is no less acceptable."). Because racially biased humor "is by its very nature an expression of prejudice on the part of the maker[,] . . . those harboring such thoughts often attempt to mask them by cloaking them in a 'teasing' garb." *Heller*, 785 F.2d at 1527.

"[W]hile the rule against impeachment of a jury verdict is strong and necessary, it is not written in stone nor is it a door incapable of being opened. It competes with the desire and duty of the judicial system to avoid injustice and to redress the grievances of private litigants." *After Hour Welding, Inc.*, 324 N.W.2d at 689. The court in this case properly examined references that were derogatory and based on racial stereotypes. The trial court's exercise of discretion was proper in light of the facts and circumstances, which at the very least, created doubt as to whether bias or prejudice against Respondents' counsel existed due to his Japanese heritage.

IV. CONCLUSION

"[R]acial discrimination . . . [is] not ancient history." *Bartlett v. Strickland*, __ U.S. __ , 129 S.Ct. 1231, 1249, 173 L.Ed.2d 173 (2009). The demeaning references to Mr. Kamitomo made by Juror Smith and Juror Canfield raised serious questions regarding the verdict and seriously jeopardized Respondents' right to a fair and impartial jury. Because of the

serious doubt whether prejudice resulted from the jurors' misconduct, the trial court properly exercised its discretion to grant a new trial.

DATED this 9th day of September, 2009.

ACLU of WASHINGTON FOUNDATION

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CERTIFICATE OF SERVICE

On September 9, 2009, I, Shaakirrah R. Sanders, delivered the foregoing to the Washington State Court of Appeals, Division III, Clerk's Office, via federal express to 500 North Cedar Street, Spokane, Washington 99201-1905 on behalf of the ACLU, CLS, KABA, LBAW, LMBA, MELAW, NIBA, and VABAW. On September 9, 2009, I also had delivered via federal express a copy of the foregoing to:

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I had delivered via U.S. Mail a copy of the foregoing to:

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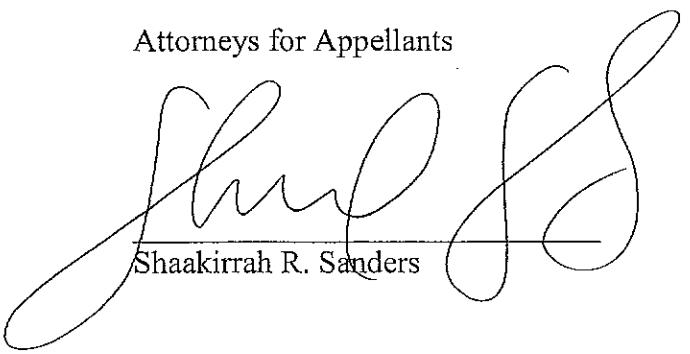

Shaakirrah R. Sanders