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Introduction to

Brief of *Amici Curiae*

Fred T. Korematsu Center for Law and Equality,
Asian Bar Association of Washington,
South Asian Bar Association of Washington,
and Washington Women Lawyers

Bias in the Courtroom, One Degree Removed: The Story of *Turner v. Stime* and *Amicus* Participation

Robert S. Chang and Taki V. Flevaris*

Bias in the courtroom usually conjures up images of lawyers engaging in discriminatory jury selection¹ or judges or juries being biased toward one of the litigants.² Rarely does the issue arise of juror racial bias directed toward a party's attorney.³ Even more rare is direct evidence of such juror bias.

A medical malpractice case tried in late 2008 in Spokane County, Washington, presented such direct evidence. After a defense verdict was handed down, certain jurors in this case approached the plaintiffs' Japanese American attorney, Mark Kamitomo, and raised concerns that the other jurors had been referring to Mr. Kamitomo as "Mr. Miyagi," "Mr. Kamikaze," and by other such names. Further, the verdict against the plaintiffs was rendered on December 7,

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1. See, e.g., *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

2. Recent articles discussing bias among judges include the following: Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1232 (2009) (finding that judges harbor implicit biases which have potential to impact decision-making but who, at least under explicit test conditions, "managed, for the most part, to avoid the influence of unconscious biases when they were told of the defendant's race."). Recent articles discussing bias among juries include the following: Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 463-65 (1996) (discussing juror bias in cases involving determination of reasonableness when self-defense is asserted); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 633 (2005) (finding a small but reliable racial bias effect in juror decision-making, though noting that the meta-analysis involved simulated juror situations, most of which involved important differences from the way real world juries operate).

3. See, e.g., Russ K.E. Espinoza & Cynthia Willis-Esqueda, *Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans*, 14 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 364 (2008); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010). Scholarly treatment of juror racial bias is more the exception rather than the rule.

and one juror stated at the time that the ridicule of Mr. Kamitomo was “almost appropriate” given that it was Pearl Harbor Day. This medical malpractice case involved a White doctor and White plaintiffs. Race, other than the body of the plaintiffs’ attorney, was not present as an issue in the case. Yet these and other racially disparaging remarks were made by certain jurors during deliberations.⁴ When these remarks came to the attention of the trial judge, the judge ordered a new trial.⁵ The defendant appealed this decision.

Word about this case spread quickly through Washington’s minority bar associations. The Asian Bar Association of Washington (ABAW) and the South Asian Bar Association of Washington (SABAW) approached the newly formed Fred T. Korematsu Center for Law and Equality at Seattle University School of Law about drafting an *amicus* brief for the appeal. This was to be the Korematsu Center’s first brief in its Civil Rights Amicus Project, which seeks to use *amicus* participation to democratize the courts.⁶ Following lessons learned from the use of an *amicus* brief to organize the Asian American community to support marriage equality in California,⁷ the Project views *amicus* participation as part of a larger social change strategy centered on education and organizing, with litigation serving as one vehicle along with other tools.⁸

After the Korematsu Center decided to participate as an *amicus* party, and specifically to draft a brief and invite ABAW and SABAW to sign on, we were approached by another organization interested in joining our brief.⁹ This other organization had made plans to have someone else draft an *amicus* brief for them, but those plans fell through. Later in the process, Washington Women Lawyers joined our brief.¹⁰

In the meantime, the ACLU of Washington planned its own *amicus* brief in support of the trial judge’s order of a new trial, which was joined by Columbia Legal Services, the Korean American Bar Association, the Latino/a Bar Association of Washington, the Loren Miller Bar Association, Middle Eastern Legal Association of Washington, Northwest Indian Bar Association, and

4. Brief of Respondents at 12-14, *Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009) (No. 27037-8-III).

5. Transcript of Oral Ruling at 6-9, *Turner v. Stime*, No. 05-2-05374-1, 2008 WL 4375521 (Wash. Super. Ct. Mar. 28, 2008)

6. See Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 - ASIAN PAC. AM. L.J. 22 (2009) (discussing how *amicus* practice can be used to organize communities around a legal issue and to democratize the courts, giving otherwise excluded groups a voice before the court).

7. *Id.*

8. Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 STAN. J. C.R. & C.L. 197 (2011); Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010) (discussing multidimensional advocacy).

9. By not revealing this organization’s name, we are able to write more explicitly below about the circumstances leading to this group’s ultimate decision not to join our brief.

10. Brief for Fred T. Korematsu Center for Law and Equality et al. as Amicus Curiae Supporting Respondents, *Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009) (No. 27037-8-III).

Vietnamese American Bar Association of Washington.¹¹ In addition, the Washington State Association for Justice Foundation filed an *amicus* brief in support of the new trial order.¹²

Conversations between the different *amicus* groups led the different lead teams to plan different positions. The Korematsu Center brought three significant issues to the court's attention. First, a long and unfortunate history of discrimination against Japanese Americans and Asian Americans provides a context for the remarks by the jury. Second, social science literature about the nature and effect of prejudicial remarks demonstrates how bias directed against an attorney negatively affects the jury's decision-making process. Third, allowing such remarks would negatively impact diversity in the legal profession because clients and firms might think twice before hiring minority attorneys.

The ACLU brief focused on establishing the legal standard for a new trial based on juror misconduct when jurors engage in conduct demonstrating racial bias against a litigant's attorney, and on the importance of keeping the taint of racial bias out of the litigation process. The WSAJ Foundation, a supporting organization of the Washington State Association for Justice (WSAJ), focused on the evidentiary issue regarding the appropriateness of consideration of facts regarding juror bias. They argued that what happened in this case was a structural error, analogous to improper juror selection, which necessarily requires a new trial without a showing of harmful error. They further argued that the standard of review for a grant of new trial is and should be deferential.

In taking these different arguments and points of emphasis, we were mindful of the perspectives and wishes of the respective *amicus* parties. Each of us invested the resources to produce these briefs because of the significant issues raised by the case. We thought it vital to add our voices in this matter because of its impact on minority attorneys and on minority communities. On appeal, defense counsel argued that the jurors' remarks were not prejudicial, and in any case, were only directed to an attorney and not to the parties in the case. In response, our arguments focused on establishing that the remarks in question were undoubtedly prejudicial, likely had an effect on the jury's deliberations, represented a threat to minorities in the legal profession, and presented an unacceptable stamp of racial bias on our justice system. If jurors can express bias in courts impotent to provide a remedy, we would be taking a few steps back in our quest to achieve racial equality. As it turned out, there were no *amicus* briefs filed in support of the defendant's appeal of the new trial order.

The Korematsu Center created a research team that included Lorraine Bannai, Robert Chang, and Taki Flevaris, as well as Keith Talbot representing ABAW and Suchi Sharma representing SABAW. To help with our history section we invited Roger Daniels, who is, along with Sucheng Chan and Ronald Takaki,

11. Brief for American Civil Liberties Union of Washington et al. as Amici Curiae Supporting Respondents, *Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009) (No. 27037-8-III).

12. Brief for Washington State Association for Justice Foundation as Amicus Curiae, *Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009) (No. 27037-8-III).

among the preeminent scholars of Asian American history. Our decision to include Daniels was consistent with our decision to infuse an academic perspective into all of our advocacy efforts.

We filed our brief with Division III of the Washington Court of Appeals on September 10, 2009. Oral argument took place on October 13, 2009. On December 17, 2009, the appellate panel delivered its decision upholding the trial court's grant of a new trial.¹³ The defendants did not appeal.

We were pleased with the outcome, but one question that guides the work of the Korematsu Center is, "What about tomorrow?" We achieved a good litigation outcome, but what impact will an intermediate appellate opinion out of eastern Washington have? In order to increase awareness and continue an ongoing dialogue, Korematsu Advocacy Fellow Taki Flevaris has been actively speaking at continuing legal education panels about the case.¹⁴ Another goal is to create durable knowledge products. Publication of our *amicus* brief in this journal helps to accomplish this goal. We believe that education really is the key to durable social change. Toward the same end, we are canvassing existing educational materials - casebooks, treatises, *et cetera*. - to locate where they treat or do not treat the subject matter of our *amicus* brief and the case. We are working to develop educational materials, such as an edited version of the case with notes, excerpts from the *amicus* brief, a problem or question constructed based on the issues, a note that could be added to already existing materials and footnotes for insertion that refer to the case and/or brief. Our next step is to send these educational materials to authors of casebooks and treatises with suggestions of how they might incorporate these materials.

While our work on the brief led us to receive SABAW's 2009 Community Service Award, we also learned some hard lessons. We were extremely disappointed when one of the organizations that had approached us decided on filing day that they would not sign on. A few days earlier, that organization insisted on having final editing authority, apparently in accordance with their policy. Though the Korematsu Center was open to hearing and trying to address concerns, we refused to give this organization final editing authority, especially when they insisted that we delete much of our section on the history of Washington's legal profession. We also found that this policy - which had not been communicated to us - was inconsistent with our understanding of our relationship as fellow *amici*, and was disrespectful of the other *amici* signing onto the brief.

From this, though, we learned the importance of clarifying the working relationship as early as possible. We also learned the importance of having drafts in good shape that can be distributed earlier, so that issues can be resolved promptly; or, if conflicts cannot be resolved, *amicus* parties still have the

13. *Turner v. Stime*, 222 P.3d 1243 (Wash. Ct. App. 2009).

14. CLE presentations were made at the Washington State Bar Association, Washington State Attorney General's Office, Access to Justice Board/Bar Leaders Conference, Washington's Statewide Diversity Conference, and Oregon State Bar's Convocation on Equality.

opportunity to draft or sign onto other briefs.

With these lessons in mind, the Korematsu Center's Civil Rights Amicus Project continues its active involvement with communities and courts, seeking to combat discrimination and amplify the voices of those who suffer from it. In subsequent cases, involving issues ranging from national origin bias in family law,¹⁵ to the use of cross-racial eyewitness identification in criminal law,¹⁶ the Project has sought to establish working relationships early, draft with clarity and force, and to present courts with the unified voice of communities affected by these issues. We offer our involvement in *Turner v. Stime* and our Civil Rights Amicus Project as a model for how centers and clinics in law schools can engage in effective advocacy that helps to democratize the courts.

15. *In re Marriage of Katare*, 105 P.3d 44 (Wash Ct. App. 2004).

16. *State v. Allen*, 255 P.3d 784 (Wash. Ct. App. 2011), *aff'd*, 294 P.3d 679 (Wash. 2013).