

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY

DOCKET NO. SJC-13356

COMMONWEALTH

V.

ANTHONY DEW

ON APPEAL FROM THE SUFFOLK DIVISION OF THE SUPERIOR
COURT DEPARTMENT

BRIEF of AMICI CURIAE COUNCIL ON AMERICAN-ISLAMIC
RELATIONS - MASSACHUSETTS, MUSLIM JUSTICE LEAGUE,
LAWYERS FOR CIVIL RIGHTS, MASSACHUSETTS BLACK WOMEN
ATTORNEYS, MASSACHUSETTS LAW REFORM INSTITUTE,
HISPANIC NATIONAL BAR ASSOCIATION, CITIZENS FOR
JUVENILE JUSTICE, AND JUSTICE RESOURCE INSTITUTE IN
SUPPORT OF APPELLANT AND REVERSAL

Corporate Disclosure Statement

Pursuant to Massachusetts Supreme Judicial Court Rule 1:21, *amici curiae* Council on American-Islamic Relations - Massachusetts; Muslim Justice League; Lawyers for Civil Rights; Massachusetts Black Women Attorneys; Massachusetts Law Reform Institute; Hispanic National Bar Association; Prisoners Legal Services of Massachusetts; Citizens for Juvenile Justice; and Justice Resource Institute make the following disclosures: They are non-profit corporations with no parent corporations, with no stock, and therefore with no publicly held company owning 10% or more of their stock.

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INTERESTS OF AMICI

This brief is submitted by the Council on American-Islamic Relations - Massachusetts; Muslim Justice League; Lawyers for Civil Rights; Massachusetts Black Women Attorneys; Massachusetts Law Reform Institute; Hispanic National Bar Association; Prisoners Legal Services of Massachusetts; Citizens for Juvenile Justice; and Justice Resource Institute as *amici curiae* urging the court to reverse the conviction of Anthony Dew and remand for a new trial. In addition, Amici respectfully request the Court to consider reviewing all cases where Attorney Doyle represented people of color and/or Muslims during the time he was making public, offensive Facebook posts discussed herein.

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(5), the *amici* jointly declare that no party or party's counsel had any part in authoring this brief; (B) that no person other than the *amici* contributed any money intended to fund the preparation or submission of this brief; and (C) none of the *amici* represents or has represented any of the parties in this appeal or any similar proceeding involving similar issues or was a party or represented a party in a

proceeding or legal transaction that is at issue in the present appeal.

The Council on American Islamic Relations (CAIR-MA) is a chapter of America's largest Muslim civil rights organization. CAIR-MA's mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote social justice understanding. CAIR-MA insists that Muslim defendants in criminal proceedings be afforded the same rights and protections as defendants of any other religion and, as such, is extremely concerned when a defense attorney representing a Muslim client has aired Islamophobic and racist views.

The Muslim Justice League (MJL) was created to organize and advocate for communities heavily impacted by surveillance and policing under the guise of "national security." While MJL focuses predominately on Massachusetts, and especially Boston, MJL has also lead a national advocacy campaign against federally funded "countering violent extremism" programs that typically equate Islam with terrorism. Biased policing policies are bad enough, without the criminal legal system condoning explicitly Islamophobic and racist statements by one of the key players in that system, the defense

attorney. For that reason, MJL adds its name to this brief.

Lawyers for Civil Rights (LCR) fosters equal opportunity and fights discrimination on behalf of people of color and immigrants. LCR engages in creative and courageous legal action, education, and advocacy in collaboration with law firms and community partners. LCR has a strong interest in ending identity-based disparities in the criminal justice system, and because defense attorney prejudice increases such disparities, LCR has a specific interest in seeing them curtailed.

The **Massachusetts Black Women Attorneys (MBWA)** seeks to ensure the equitable administration of justice, particularly as applied to Black women. MBWA is similarly concerned with social policy and civil rights issues impacting communities of color.

The **Massachusetts Law Reform Institute (MLRI)** is a statewide non-profit law and poverty center whose mission is to advance economic, social, and racial justice for low-income persons and communities. For more than 45 years, MLRI has engaged in legislative, administrative, and judicial advocacy on behalf of our clients and client groups. Particularly in light of the considerable body of evidence demonstrating the problems

of bias and racial inequality in the criminal justice system, MLRI has a strong interest in ensuring that the state's criminal laws do not have disparately negative impacts on racial and religious minorities.

Founded in 1972, the **Hispanic National Bar Association (HNBA)** has a membership comprising over 78,000 Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. HNBA regularly participates as amicus curiae in this Court, including in civil rights and constitutional cases of importance to the 62+ million people of Hispanic heritage living in the United States.

The **Prisoners' Legal Services of Massachusetts (PLS)**, formerly known as Massachusetts Correctional Legal Services, was established in 1972 to protect and promote the civil and constitutional rights of Massachusetts prisoners. PLS provides legal assistance through litigation, informal advocacy, and advice to prisoners and their families on a wide variety of issues. Through its Racial Equity in Corrections Initiative, PLS seeks to build awareness, solutions, and leadership to combat institutional racism and the discriminatory

treatment of black and brown people in the day-to-day operations of Massachusetts prisons and jails.

The Justice Resource Institute (JRI) works in partnership with individuals, families, communities and government to pursue the social justice inherent in opening doors to opportunity and independence. JRI is a leader in social justice, with over 100 programs - including extensive work in the criminal justice system - to meet the needs of underserved individuals, families, and communities, including people of color and religious minorities.

Citizens for Juvenile Justice (CfJJ) is the only independent, statewide, nonprofit organization working exclusively to improve the juvenile justice and other youth serving systems in Massachusetts. CfJJ's mission is to advocate for statewide systemic reform that achieves equitable youth justice. CfJJ believes that both the needs of young people and public safety are best served by fair and effective systems that recognize the ways children are different from adults and that focus primarily on rehabilitation rather than an overreliance on punitive approaches. Core to these ideas of fairness and equity is CfJJ's work to illuminate and address racial and ethnic disparities that impact

Massachusetts youth, including those at decision points
in the juvenile and criminal legal system.

Pursuant to Rule 17 of Massachusetts Rules of Appellate Procedure, Council on American-Islamic Relations - Massachusetts; Muslim Justice League; Lawyers for Civil Rights; Massachusetts Black Women Attorneys; Massachusetts Law Reform Institute; Hispanic National Bar Association; Prisoners Legal Services of Massachusetts; Citizens for Juvenile Justice; and Justice Resource Institute, submit this amicus brief in support of Defendant's appeal from the Suffolk Division of the Superior Court Department.

INTRODUCTION

"Allah be praised. Go meet your 72 fat, smelly virgins, asshole." These are the words of attorney Richard Doyle, who a state agency appointed to represent indigent defendant Anthony Dew, a Black man of the Muslim faith. Attorney Doyle wrote this when commenting on a video showing a Muslim person being blown up with a caption referring to the person as a "goat fucker."

Attorney Doyle publicly made these comments and many other racist, Islamophobic screeds while simultaneously representing Mr. Dew. A fundamental tenet of our criminal-justice system requires attorneys to faithfully and zealously represent their clients and act

in their clients' best interests. Yet, here, Attorney Doyle harbored a hatred for and belief in the criminality of the person he was bound to defend so extreme that he advocated for torture and death of Black people and Muslims - solely based on their identity. Altogether, Attorney Doyle made over twenty racist and bigoted posts on his public Facebook page between 2014 through 2017, encompassing the entire time he represented Mr. Dew.

History and social science confirm what common sense tells us: that when people hold this type of deep-seated prejudice, it fundamentally alters the way they interact with the targets of their hate, in innumerable and multi-faceted ways. The full extent of that impact is unknowable, but the record in this case shows examples of how Attorney Doyle's hatred manifested itself in the course of his defense of Mr. Dew. During Attorney Doyle's first meeting with Mr. Dew, he demanded Mr. Dew remove his kufi (a cap Muslims wear to signal devotion) and instructed him "not to wear that shit in a courtroom." At their next and only other meeting, Attorney Doyle observed Mr. Dew again wearing a kufi and left without ever speaking to his client.

Attorney Doyle's prejudice towards non-whites and Muslims created a conflict of interest that belied his

ability to advocate on Mr. Dew's behalf faithfully and zealously. Where, as here, a conflicted attorney represented the defendant, the defendant is entitled to a new trial automatically without any further showing. *Commonwealth v. Hodge*, 386 Mass. 165, 169 (1982). The defendant need not show he suffered prejudice because the "impossible burden" of proving the effect of having conflicted counsel would impinge the "fundamental" right to counsel. *Id.*

Moreover, the appointment of Attorney Doyle to represent Mr. Dew constitutes structural error. Such error occurs when a defendant "essentially is denied the assistance of any qualified attorney who could theoretically represent him in a way that does not undermine our trust in the adversary system." *Commonwealth v. Valentin*, 470 Mass. 186, 197 (2014). Structural error, which does not require a defendant to prove he suffered prejudice, should be applied here, lest the substantial body of law treating religious and racial bias as a uniquely injurious problem meriting exceptional legal response be undermined.

Under this Court's rules and Massachusetts law, the Committee for Public Counsel Services (CPCS), a state agency, is legally responsible for providing counsel to

indigent defendants. CPCS has a statutory duty and responsibility to identify and enlist appropriate and qualified counsel, and to monitor and evaluate such counsel. Consequently, Attorney Doyle's appointment was a crucial component of the Commonwealth's judicial system. Here, CPCS investigated and suspended Attorney Doyle after it learned of his abhorrent views, concluding Attorney Doyle had a conflict of interest that prevented him from adequately representing Black people and/or Muslims.

Allowing the lower court's decision to stand under the circumstances would undermine the integrity of the judicial system and, accordingly, it should be reversed, and Mr. Dew should be granted a new trial.

BACKGROUND

A. Mr. Dew's Court-Appointed Lawyer Openly and Publicly Expressed Racist and Islamophobic Views at the Same Time He Was Representing Mr. Dew.

Mr. Dew was accused of running a sex-trafficking and drug-distribution operation. RA 100.¹ On February 19, 2016, the trial court appointed Attorney Doyle to represent Mr. Dew, and he did so until Mr. Dew entered

¹ The Commonwealth charged him with 19 counts, including a later-dropped rape charge, five counts of human trafficking, two counts of assault and battery with a dangerous weapon, and multiple charges of possession of heroin and cocaine with intent to distribute. *Id.*

a guilty plea to all but one charge on June 1, 2016. RA 57.

Mr. Dew is Black and a Muslim, and Attorney Doyle was publicly and virulently biased against people who identify and appear like Mr. Dew. When Attorney Doyle first met Mr. Dew, Mr. Dew was wearing a kufi. RA 103. Attorney Doyle demanded Mr. Dew remove the kufi and "not to wear that shit in a courtroom." *Id.* The second time Attorney Doyle met Mr. Dew, he left without speaking to Mr. Dew, who was again wearing a kufi. *Id.* These interactions notwithstanding, Mr. Dew did not then realize Attorney Doyle was a racist Islamophobe.

Unbeknownst to Mr. Dew, by 2016 Attorney Doyle had spent years publicly expressing views the Commonwealth concedes are "quite disturbing, crude, and profane." RA 104. To cite a few examples of the extreme, offensive content, Attorney Doyle shared a meme on Facebook describing Muslim people as "goat fuckers with laundry on their heads" and stating that "it's wash day, and we're bringing the fucking Maytag." RA 104. When sharing another anti-Muslim video, he wrote "Allah be praised. Go meet your 72 fat, smelly virgins, asshole." *Id.*

Another meme Attorney Doyle shared was directed at Black people, with a group of Black men holding guns at

the top of the image and a group of crying Black people below. RA 73. The top of the meme read, "don't glorify shooting people," and the bottom, "then cry like a bitch when someone you love gets shot." *Id.* Attorney Doyle shared another meme containing several pictures of Black men wearing clothing supportive of former President Trump with the caption: "5 minutes after Trump legalizes weed in all 50 states." RA 72. This list does not come close to capturing all the reprehensible things Attorney Doyle expressed via Facebook. See Sec. Am. Brief for the Defendant on Appeal at 10-12; see also PSRA 5 - 34.

B. CPCS Concluded Attorney Doyle Had an Actual Conflict that Prevented Him from Properly Representing People of Color and Muslims.

Massachusetts' rules and statutes govern attorney conduct and representation of indigent defendants in criminal matters. Section 6 of Supreme Judicial Court Rule 3:10 provides that if a "judge finds that a party is indigent ... the judge shall assign the Committee for Public Counsel Services to provide representation for the party" Chapter 211D of the Massachusetts General Laws, in turn, governs the conduct of CPCS. Chapter 211D, Sec. 4 obligates CPCS to "establish standards and guidelines for the training, qualification, and removal of counsel in the public and private counsel divisions

who accept its appointments" Section 10 requires CPCS to "monitor and evaluate compliance with the standards and the performance of counsel in its divisions in order to insure competent representation of defendants in all courts of the commonwealth" and "establish a procedure for the review and disposition of client complaints." CPCS has created an "Assigned Counsel Manual" containing policies and procedures for appointed counsel, including for investigating bad behavior. See Committee for Public Counsel Services, ASSIGNED COUNSEL MANUAL (version 1.15, Dec. 13, 2022).²

CPCS discovered Attorney Doyle's Facebook posts and, in 2017, launched an investigation into his activities. RA 102. The attorney appointed to lead CPCS's investigation concluded Attorney Doyle had an actual conflict that prevented him from properly representing people of the Muslim faith and non-white people. PSRA 29-31.³ The investigator noted "the fact that [Attorney Doyle's] posts were designed to induce conversation and demean people of the Muslim faith in a

² Available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf>.

³ While not directly relevant to Mr. Dew's case, the investigating attorney also concluded Attorney Doyle had a conflict as to people without documented legal immigration status and an apparent conflict existed with respect to people who identify as transgender. PSRA 31-32.

public forum[] *cannot be reconciled with his duty of loyalty to his clients.*" PSRA 30 (emphasis added). The investigator also identified "a pervasive pattern of posts that depict non-Caucasian people in a derogatory and demeaning way." *Id.* Accordingly, he concluded Attorney Doyle had "a *duty to refrain from representing clients in these classes due to his personal beliefs about them*, which duty is inconsistent with the duty day assignment system" in CPCS Performance Guidelines. PSRA 32 (emphasis added). Based on the investigation, CPCS suspended Attorney Doyle for no less than a year and required him to take ethics and cultural competency courses. PSRA 50.

C. Because of Racial Bias, People of Color Suffer Worse Outcomes when They Interact with the Justice System than do White People.

CPCS's conclusion that Attorney Doyle had an actual conflict that would affect his ability to competently represent Black and/or Muslim people is supported not only by common sense but also by history and science. Research has repeatedly shown that one's biases and prejudices are inextricably linked to how one behaves toward others.⁴ Many studies have proven that even a

⁴ See Baumer, E. (2015). Reassessing and redirecting research on race and sentencing. *Justice Quarterly*, 30(2), 231-261.

person's *implicit* biases, which are held unconsciously and often unknowingly, regularly manifest themselves in real-world behavior.⁵ Given the profound effect that such implicit bias has on people's behavior, extreme *explicit*, publicly expressed racism and overt prejudice self-evidently must affect behavior.

History unfortunately provides a multitude of examples. People of color have long borne the brunt of societal prejudice and bias. As this Court has recognized, the pernicious impacts of racism on generations of Black people are legion, beginning with the horrors of slavery and the Black Codes that followed, to last century's legacy of Jim Crow laws and housing policies that continue to make it difficult for Black homeowners and prospective buyers (see, e.g., red-lining, the subprime crisis, and current discrimination

⁵ See, e.g., Dr. Arin N. Reeves, *Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing* (2014), available at: <https://diversity.missouristate.edu/assets/diversityconference/14468226472014040114WritteninBlackandWhiteYPS.pdf> (study in which law-firm partners were sent and asked to evaluate briefs identical in every way except the reviewers were told the author was either white or Black and scored the brief written by the Black person less favorably); Joel Schwarz, *Blacks More Likely to be Shot than Whites even when Holding Harmless Objects*, July 8, 2003 (available at <https://www.washington.edu/news/2003/07/08/blacks-more-likely-to-be-shot-than-whites-even-when-holding-harmless-objects/> (study where participants were randomly shown individuals and asked to determine whether the individual shown had a gun, and participants were most likely to incorrectly assume Black individuals had guns and shoot at them)).

documented in housing valuations). One can draw a straight line from this history to the persistence of hate crimes, subpar education, health disparities, disproportionate police violence, and minorities being purposely shut out of certain fields and excluded from government programs.⁶ American Muslims have, particularly since the terrorist attacks of September 11, 2001, likewise found themselves subject to violence and discrimination because of increased identity-based bias and prejudice.⁷

The effects of prejudice against Black and Brown people are felt acutely in the criminal-justice system. Black and Brown people receive harsher sentences than white people, and their percentage of the prison

⁶ See, e.g., American Public Health Association, Health Equity Resource Library, *The Impact of Racism on the Health and Well-Being of the Nation*, available at <https://www.health.state.mn.us/communities/practice/resources/equitylibrary/apha-impactracism.html>; Center for American Progress, *Systematic Racism at the USDA Has Virtually Eliminated Black Farmers* (2019), available at <https://www.americanprogress.org/press/release-systematic-racism-usda-virtually-eliminated-black-farmers/>.

⁷ See generally Pavan S. Krishnamurthy, *Racial Bias in the United States Armed Forces: A Threat to National Security in the Era of Renewed Great Power Competition*, 29 Va. J. Soc. Pol'y & L. 31, 43-48 (2022) (discussing the impact of racism on people of color in the armed forces, including the story of a Muslim soldier's imprisonment after reporting abuse at Guantanamo Bay and noting "a 2019 Government Accountability Office report unambiguously stated that 'Black and Hispanic service members across the armed forces are more likely than white service members to be investigated, received non-judicial punishments such as an Article 15 or to be court-martialed for alleged violations of the Uniform Code of Military Justice.'" (internal citations omitted)).

population far exceeds their representation in the U.S. population.⁸ But it is not just the prison population: people of color suffer worse outcomes in every aspect of the criminal-justice system. They are the targets of more stop-and-frisks,⁹ are charged with more serious offenses for similar conduct,¹⁰ and are punished more harshly for similar crimes.¹¹ The data regarding Massachusetts' criminal-justice system show disparities even greater than the national figures. A report

⁸ See *infra* n. 25 (regarding racism and mass incarceration). This remains true even when controlling for factors such as socioeconomic status and the severity of the alleged crimes. *Id.* A recent study commissioned by this Court confirms these same trends exist in Massachusetts. Elizabeth T. Bishop & Brook Hopkins et al., *Racial Disparities in the Massachusetts Criminal System*, Harvard Law School Criminal Justice Policy Program, 18 (Sept. 2020) <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (Sept. 2020) ("Research shows that police officers stop, search, and arrest more Black and Brown people more than White people.")

⁹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, The Sentencing Project, 13-14 (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> (identifying racism prevalent in stop and frisks); see also Elizabeth T. Bishop & Brook Hopkins et al., *Racial Disparities in the Massachusetts Criminal System*, Harvard Law School Criminal Justice Policy Program, 18 (Sept. 2020) <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (Sept. 2020) ("Research shows that police officers stop, search, and arrest more Black and Brown people more than White people.")

¹⁰ *Id.* at 2 (black and Latinx people face more serious charges); see also p. 20-21 (including data on offense seriousness by race).

¹¹ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, The Sentencing Project, 14-15 (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> ("Still other research finds that prosecutorial charging decisions play out unequally when viewed by race, placing Blacks at a significant disadvantage to whites. Prosecutors are more likely to charge Black defendants under state habitual offender laws.")

regarding the Boston Police Department's civilian encounters between 2007 and 2010 "showed that despite making up only 24% of Boston's population, Black people were subject to 63% of reported encounters where Boston police officers interrogated, stopped, frisked, or searched a civilian."¹² Racial disparities carry through the Commonwealth's criminal-justice system. For example, the Massachusetts Sentencing Commission reported that Black people are incarcerated 7.9 times more than white people and Hispanic people 4.9 times more than white people, compared to the national figures of 5.8 times and 1.3 times, respectively.¹³

¹² Elizabeth T. Bishop & Brook Hopkins et al., Racial Disparities in the Massachusetts Criminal System, Harvard Law School Criminal Justice Policy Program, 18 (Sept. 2020) available at <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf>

¹³ Selected Race Statistics, *Massachusetts Sentencing Commission* (Sept. 27, 2016), <https://www.mass.gov/doc/selected-race-statistics/download>; see also Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, The Sentencing Project, 5 (Oct. 13, 2021) <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> ("Latinx individuals are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of whites. Ethnic disparities are highest in Massachusetts, which reports an ethnic differential of 4.1:1.").

ARGUMENT

I. Attorney Doyle's Overt Racism and Islamophobia Created an Actual Conflict of Interest with Mr. Dew.

"A defendant is entitled to the untrammelled and unimpaired assistance of counsel free of any conflict of interest." *Commonwealth v. Hodge*, 386 Mass. 165, 169 (1982) (emphasis added). Mr. Dew was deprived of this right because Attorney Doyle had an actual conflict of interest with Mr. Dew. Attorney Doyle's racism and Islamophobia created conflicts akin to situations of conflicting relational and pecuniary interests. History and decades of research have shown that overt prejudices such as those exhibited by Attorney Doyle influence behavior in countless ways that are fundamentally incompatible with zealous representation. And, tellingly, when CPCS itself investigated Attorney Doyle, it determined he had an actual conflict with Muslim and non-White defendants. RA 98.

In Massachusetts, counsel's actual conflicts of interest do not require defendants to demonstrate that the conflict adversely affected counsel's performance. *Commonwealth v. Nadal-Ginard*, 70 Mass.App.Ct. 1110 (2007). In this respect, the Massachusetts Declaration of Rights affords greater protection than the Sixth

Amendment to the United States Constitution. See *Commonwealth v. Martinez*, 425 Mass. 382, 388 (1997) (“we have held that art. 12 does not require a defendant to demonstrate prejudice, once a genuine conflict has been shown”). Thus, where counsel is actually conflicted, the defendant is *automatically* entitled to a new trial unless the defendant knowingly consents. See *Hodge*, 386 Mass. at 169 (“having established a genuine conflict of interest, Hodge was required to prove neither actual prejudice nor adverse effect on his trial counsel’s performance to entitle him to a new trial under art. 12.”) The reason for this rule is simple: requiring the defendant to probe the mental conflict of counsel would be an “impossible burden” on the “fundamental” right to effective assistance of counsel. *Id.*¹⁴

Moreover, courts regularly grant new trials where judges or juries demonstrate bias against a defendant. There is no reason to apply less exacting standards of neutrality to state-appointed defense counsel with demonstrated biases. Defense-counsel bias, like judge and juror bias, taints the fairness of criminal

¹⁴ Similarly, when considering racism in the context of police stops, this Court acknowledged that where the evidentiary burden to establish discrimination is too great, identifying instances of racial profiling is “a nearly impossible bar.” *Commonwealth v. Long*, 485 Mass. 711, 723 (2020).

proceedings and undermines the already fragile confidence in the criminal-justice system, particularly for communities of color.

A. Attorney Doyle's Racism and Islamophobia Are Analogous to Other Established Actual Conflicts.

"An 'actual' or 'genuine' conflict of interest arises where the 'independent professional judgment' of trial counsel is impaired, either by his own interests, or by the interests of another client." *Commonwealth v. Perkins*, 450 Mass. 834, 852 (2008). A conflict frequently arises where counsel has professional obligations to another person that might be adverse to his or her client. See e.g., *Mass. R. Prof'l Conduct* 1.7–1.11. However, a conflict need not be based on divergent professional interests. A conflict also arises where counsel's personal interests conflict with his or her client's. See e.g., *Mass. R. Prof'l Conduct* 1.7 comm. 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."); *Mass. R. Prof'l Conduct* 1.7 comms. 11–12A (providing guidance on avoiding conflicts based on family, romantic, or sexual relationships).

For example, this Court has held that a lawyer's interpersonal relationships can create an actual

conflict. In *Commonwealth v. Croken*, the Court held that an actual conflict arose based on defense counsel's marriage to an attorney in the prosecutor's office. 432 Mass. 266, 273 (2000) ("in a case where a lawyer's representation of a client may be significantly limited by his ties to his relatives and intimate companions, professional ethics are implicated just as they would in a case where the lawyer represents a second client with litigation interests potentially adverse to those of the first client"). This Court emphasized that counsel's personal relationship had "irreducible emotional and moral dimensions, and it heavily bears on how any ordinary human being goes about making important decisions." *Id.* Similarly, Massachusetts courts routinely acknowledge an attorney's financial interests may pose an actual conflict of interest. See *Hodge*, 386 Mass. at 167 (attorney had actual conflict where his firm represented a witness he cross-examined, because he had a financial interest in not antagonizing his firm's client); *Commonwealth v. Nadal-Ginard*, 70 Mass.App.Ct. 1110 (2007) (holding that defense counsel's alleged inflation and misappropriation of client funds could amount to an actual conflict).

Because lawyers do not often publicly proclaim overtly racist and Islamophobic sentiments that violate attorney ethics, there is limited case law concerning an attorney's explicit racial or religious biases giving rise to an actual conflict. Here, however, the State agency responsible for Attorney Doyle's appointment, CPCS, *has already determined* that he had an actual conflict of interest against non-white and Islamic people. RA 98 (Choice of Counsel form circulated by Attorney Doyle warning potential clients that CPCS "found that I have a bias against people of the Muslim faith, people who do not appear to be Caucasian (white), and undocumented people. *The complaint found that I have an actual conflict* and should not ethically represent people in these groups.") (emphasis added). Since the pertinent facts are not in dispute, this case presents an ideal vehicle for the Court to consider, reach, and definitively resolve this issue, identifying a conflict between an attorney's identity-based prejudices and a client's interests. Mr. Doyle's overtly racist and Islamophobic statements made it crystal clear that he is prejudiced against people of color and Muslim people such that no inferential leap need be made. Thus, there are no factual or legal issues that might impede this

Court from determining the important predicate question of what relief should be available to people like Mr. Dew who experience identity-based discrimination directly within the legal system.

Analogy to other actual conflicts reinforces CPCS's conclusion. Like the interpersonal relationships discussed in *Croken*, an attorney's race and religious biases have "irreducible emotional and moral dimensions" that "heavily bear[] on how any ordinary human being goes about making important decisions." Against the logical, verifiable truth that one's biases affect behavior, the Commonwealth argues that "the essence of a defense attorney's job is to provide a competent and zealous defense for a client regardless of the attorney's feelings toward the client." Commonwealth Brief at 14. The Commonwealth's attempt to equate distaste for an individual defendant and his or her conduct with deep, systemic racism should not be credited. In some cases, a defense attorney's distaste for a potential client's actions *might* in fact create a conflict of interest, just as Attorney Doyle's racism and prejudice did here. For example, if an attorney had been personally victimized or affected by child sexual abuse and held a deep grudge against such abusers, that

attorney would likely be conflicted from representing an accused abuser in future cases. That situation would in fact be analogous to Attorney Doyle's representation of Mr. Dew here, because Mr. Dew was exactly the type of person that was the subject of Attorney Doyle's racism and religious bigotry.

Attorney Doyle's candid Facebook posts provide rare insight into the way his prejudices influenced his representation of clients. One meme he shared suggested Muslims were automatically blameworthy: "Let's not jump to conclu. . . . aaaaaand its Muslims." RA 67. Similarly, he insinuated he felt "dirty" when he defends non-white defendants, stating (regarding his representation of a white man): "I can walk away from this one without feeling dirty. Doesn't happen much." RA 76.

And whatever one might glean from his Facebook posts, there is no guesswork required here, because Attorney Doyle's interactions with Mr. Dew indicate his Muslim faith impacted Attorney Doyle's representation of him by impeding case-related meetings where legal strategy, mitigating factors, and potential defenses would typically be discussed. In their first meeting, Attorney Doyle told Mr. Dew "not to wear that shit [a kufi] in the courtroom." RA 103. Two weeks later,

Attorney Doyle terminated their second meeting without any discussion because Mr. Dew was wearing the kufi. RA 103. State-appointed representation - and the quality thereof - should not be contingent on the removal of religious, cultural, or identity-based garments.

While no prejudice to Mr. Dew need be shown due to Attorney Doyle's conflict, as with other conflicts, defense counsel's bias hinders zealous representation of a defendant's interests in numerous ways. Where counsel harbors predispositions about the guilt of certain groups, those predispositions affect counsel's advising, strategy, and likelihood of suggesting a plea deal. "The tendency to start out with a presupposition of guilt influences attorneys' subsequent judgments about the character of the defendant, his past acts, the evidence, and the wisdom of accepting a plea deal." Molly J. Walker Wilson, *Defense Attorney Bias and the Rush to the Plea*, 65 Kan. L. Rev. 271, 280-81 (2016); see also L. Song Richardson & Philip A. Goff, *Implicit Bias in the Public Defender Triage*, 122 Yale L.J. 2626, 2636 (2013) ("when clients are black or otherwise criminally stereotyped, IBs [implicit biases] can influence evidence evaluation, potentially causing PDs [public defenders] to unintentionally interpret information as more probative

of guilt. Consequently, PDs may determine that the state will have little difficulty meeting its burden of proof and thus, that the case does not warrant much effort.") Moreover, counsel's preconceptions lead to confirmation bias, by which "biases trigger initial expectations, and later evidence is interpreted to be consistent with these early attitudes." Wilson, *Defense Attorney Bias*, *supra*, at 283. Bias may also cause counsel to discredit their client's version of events, and thus "they may not follow up on leads or may forgo possible motions to suppress government evidence." L. Song Richardson, *Implicit Bias in the Public Defender Triage*, *supra*, at 2636. Research suggests these biases may be particularly powerful where the defendant is represented by a public defender. *Id.* at 274 ("when cognitive resources are stretched, as is the case when a public defender is representing a larger number of defendants, biased judgments are more likely."). These studies identify the dangers of *implicit* biases, a form of bias that is *less evident and extreme* than that exhibited by Mr. Doyle. Given these dangers, there is ample support for treating defense-counsel racial and religious prejudice the same as other conflicts of interests, as discussed *infra* Section I.B. State-appointed counsel simply cannot

provide adequate representation while harboring dehumanizing notions of the inherent criminality of non-white people.

B. The Situation here Is Analogous to Situations Where Racism by Other Judicial Decision Makers Required a New Trial.

While there are few documented instances of defense attorneys displaying racial animus as overtly or transparently as Attorney Doyle, the law nevertheless recognizes the fundamental taint that exists when racial bias infects the judicial system. This Court should draw on jurisprudence examining judicial and juror racial bias, where the presence of bias requires a new trial without a showing of prejudice. In *Commonwealth v. Laguer*, this Court held a juror's overtly racist statements about a Hispanic defendant (if proven to have occurred) automatically entitled the defendant to a new trial. 410 Mass. 89, 99 (1991). In *Laguer*, a juror submitted an affidavit stating that another juror made racist statements about the defendant throughout his trial. *Id.* at 94. The statements included that, "the goddamned spic is guilty just sitting there; look at him. Why bother having the trial," and that the defendant could be guilty of rape because "spics screw all day and

night." *Id.*; ¹⁵ *Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016) (remanding to district court for evidentiary hearing regarding judge's racial bias observing that "structural error occurs when a judge with actual bias against a defendant presides at his trial").

Here, Attorney Doyle's statements are just as extreme as the juror's in *Laguer*. Like that juror, Attorney Doyle made statements that presume guilt based on race or religion. *See supra*, at 4-6, 19. Such "radicalized assumptions by key justice system decision makers unfairly influence outcomes for people who encounter the system." *See Ashley Nellis, The Color of Justice: Racial and Ethnic Disparities in State Prisons, The Sentencing Project*, 12-13 (Oct. 13, 2021).¹⁶ Whether the offending prejudices come from a juror, judge, or defense counsel should be immaterial, as individuals in each of the roles have influence on the fairness of the resolution of a defendant's charges.

II. Court Appointment of Openly Racist, Islamophobic Defense Counsel Constitutes Structural Error.

¹⁵ This Court remanded the case to the superior court for further fact-finding regarding this issue. *Id.* at 98.

¹⁶ Available at: <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/>

A structural error is considered per se prejudicial because it affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Wilder v. United States*, 806 F.3d 653, 658 (1st Cir. 2015); *Commonwealth v. Francis*, 485 Mass. 86, 100 (2020) ("although some structural errors have subtle effects which are difficult to evaluate, all structural errors pervade the entire trial process, and defy analysis by harmless-error standards, requiring reversal even when there is overwhelming evidence of the defendant's guilt."); *Commonwealth v. LaChance*, 469 Mass. 854, 857 (2014) ("Where a defendant raises a properly preserved claim of structural error, this court will presume prejudice and reversal is automatic."). Such errors include the denial of counsel or the right to a public trial, racial discrimination in the selection of a jury, or trial before a biased judge. *Commonwealth v. Francis*, 485 Mass. at 100. Prejudice is also presumed when counsel operates under a conflict of interest. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("Given the obligation of counsel to avoid conflicts of interest ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest."). Indeed, "[w]here

a constitutional right to counsel exists ... there is a correlative right to representation that is free from conflicts of interest." *State v. Lopez*, 271 Conn. 724, 736, 859 A.2d 898, 905 (2004). Attorney Doyle's conflict of interest functionally denied Mr. Dew counsel, constituting structural error that "def[ies] analysis by harmless-error standards..." *Francis*, 485 Mass. at 100.

The Sixth Amendment guarantees: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. Because of the hallowed place in the American pantheon of the right to counsel, "denials of counsel constitute structural error and require no showing of prejudice to warrant reversal." *Commonwealth v. Valentin*, 470 Mass. 186, 194 (2014). And the denial need not be explicit or absolute: constructive denial is structural error where the "defendant essentially is denied the assistance of any qualified attorney who could theoretically represent him in a way that does not undermine our trust in the adversary system." *Id.* at 197. Courts have found structural error based on denial of counsel where counsel was unprepared, where the attorney has a conflict of interest, where the court failed to follow protocols for forfeiting the right to counsel, and where

counsel expressed hostility towards his client. *Id.* at 196-197; *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir. 1997). While the circumstances rising to the level of counsel denial are admittedly rare, CPCS's assignment of the openly racist, Islamophobic Attorney Doyle to represent Mr. Dew clears the bar. *See generally supra* 4-6, 19 (describing Attorney Doyle's racist, Islamophobic Facebook posts and prejudice displayed towards Mr. Dew during the representation).¹⁷ This type of open hostility and failure to provide representation based on the client's race and religious beliefs would undermine trust in the adversary system - especially in minority communities - if permitted to stand.

Rickman v. Bell is instructive. 131 F.3d 1150. In *Rickman*, the Sixth Circuit Court of Appeals held counsel's failure to advocate for petitioner's cause and counsel's repeated expressions of hostility toward petitioner amounted to constructive denial of petitioner's right to assistance of counsel such that

¹⁷ The fact that Mr. Dew did not know of Attorney Doyle's views at the time is irrelevant. Unaware that the process had "los[t] its character as a confrontation between adversaries," *U.S. v. Cronin*, 466 U.S. 648, 656-57 (1984), Mr. Dew, an untrained layman, could not adequately detect and remedy the pernicious effect of Attorney Doyle's bias. And whether Mr. Dew was aware of Attorney Doyle's racism or not, Attorney Dew's repulsive beliefs were so likely to result in poor performance for Mr. Dew that an inquiry into its effects is unnecessary, and prejudice should be presumed.

prejudice would be presumed. *Id.* at 1154. The *Rickman* court explained that in certain Sixth Amendment contexts, such as actual or constructive denial of the assistance of counsel, prejudice is legally presumed. *Id.* at 1155 (citing *Strickland*, 466 U.S. at 698). The "[m]ost obvious" circumstance where that might arise is the denial of counsel. *Id.* at 1155 (quoting *U.S. v. Cronin*, 466 U.S. 648, 659 (1984)). The attorney in *Rickman* repeatedly expressed contempt for his client, such as referring to him as "sick boy" and "wild man." *Id.* at 1157-58. The Sixth Circuit concluded such behavior "can be termed nothing short of shocking and professionally outrageous." *Id.* at 1156. Attorney Doyle's hostility toward Mr. Dew went far beyond calling him "sick" or "wild." Attorney Doyle's open hostility to his client's race and religion included objecting to Mr. Dew's wearing of his kufi, which was, according to Attorney Doyle, "shit," and which prompted Attorney Doyle to leave a meeting without even speaking to his client. Such conduct, especially when coupled with Attorney Doyle's abhorrent Facebook posts, goes beyond the "shocking and professionally outrageous" conduct in *Rickman*, and constitutes constructive denial of counsel such that prejudice should be presumed.

This Court has found structural error based on much less. In *Commonwealth v. Francis*, the defendant was convicted of first-degree murder for killing his former girlfriend. 485 Mass. 86, 87 (2020). At a sidebar during arraignment, an attorney who was not on the list of approved counsel for murder cases offered to represent the defendant privately, pro bono, which the court allowed. *Id.* Throughout his representation of the defendant at trial and on direct appeal following conviction, the attorney never explained the arrangement to the defendant. *Id.* CPCS screened the case in 1992-1993 and again in 2000 without the issue ever being raised. *Id.* Then, in 2015, the defendant moved for a new trial, arguing the appointment violated his Sixth Amendment rights. *Id.* at 87-88. The defendant never suggested the attorney's representation was ineffective apart from the appointment itself. *Id.* at 88. Nonetheless, this Court concluded that the defendant's right to choice of private counsel was violated and that the violation was a structural error, requiring automatic reversal absent waiver. *Id.* Here, the facts are far worse, given Attorney Doyle's public flaunting of his prejudices and demonstrated hostility towards Mr. Dew and people like him, thus denying Mr. Dew an attorney

who would "represent him in a way that does not undermine our trust in the adversary system." *Valentin*, 470 Mass. at 197.

Time and again, courts have recognized that racial bias in the courtroom is a structural error because it "raises serious questions as to the fairness of the proceedings conducted there," "mars the integrity of the judicial system[,] and prevents the idea of democratic government from becoming a reality."¹⁸ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). For this reason, courts have repeatedly held that injection of racial prejudice into criminal proceedings constitutes structural error that requires no showing of prejudice. *Swain v. Alabama*, 380 U.S. 202, 203-04, 219 (1965) (denying citizen from serving on a jury on the basis of race "is reversible error without a showing of prejudice"); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (systematically excluding African Americans from

¹⁸ This Court has recognized the bias against people of color in the criminal-justice system and acknowledged how that bias creates distrust amongst people of color. In *Commonwealth v. Warren*, 475 Mass. 530, 539 (2016), the Court noted that "black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations. Black men were also disproportionately targeted for repeat police encounters." These findings led this Court to the conclusion that when Black men flee from the police it may not be indicative of guilt but instead motivated by the prevalence of racial profiling. *Id.*

a grand jury is a "fundamental flaw" that undermines the structural integrity of the criminal tribunal, "and is not amenable to harmless-error review."); *Norris v. United States*, 820 F.3d 1261, 1266 (11th Cir. 2016) (structural error occurs when a judge with racial bias against a defendant presides his trial); *Vasquez*, 474 U.S. at 264 (a prosecutor's deliberate decision to charge a defendant on account of his race is structural error).

The "unmistakable principle" offended by Attorney Doyle's representation of Mr. Dew is that racial discrimination in the justice system is intolerable. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 223 (2017). It does not matter, for purposes of the structural-error inquiry whether bias resides in the judge, prosecutor, juror, or, as here, court-appointed defense counsel. In each case, racial or religious bias infects a criminal trial with a structural defect and keeps the trial from "serv[ing] its function as a vehicle for the determination of guilt or innocence, and no criminal punishment [that results] may be regarded as fundamentally fair." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Treating Attorney Doyle's overt and abhorrent religious and racial animus as a structural error is

necessary to safeguard the public's confidence, especially in communities of color, in the fairness of criminal proceedings.

CONCLUSION

For these reasons, Amici respectfully urge the Court to reverse and remand this case to the lower court for a new trial. In addition, Amici respectfully request the Court to consider reviewing all cases where Attorney Doyle represented people of color and/or Muslims during the time he was making his public, offensive Facebook posts discussed herein.

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Respectfully submitted on
behalf of *amici curiae*,



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