COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13356 SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS

Appellee,

v.

ANTHONY DEW,

Defendant-Appellant.

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND NEW ENGLAND INNOCENCE PROJECT IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. App. P. 17(c)(1), amici curiae NAACP Legal Defense and Educational Fund, Inc. and New England Innocence Project hereby certify that they have no parent corporations and that no publicly held corporations own 10% or more of their stock.

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INTERESTS OF AMICI CURIAE [1]

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the pernicious influence of race on the administration of criminal justice and has a long history of serving as counsel of record and amicus curiae urging courts to acknowledge and combat convictions and sentences plagued by anti-Black racism. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Buck v. Davis*, 580 U.S. 100 (2017); *Reed v. Goertz*, No. 21-442 (U.S. Sup. Ct. argued Oct. 11, 2022) (as amicus); *United States v. Flores-Gonzalez*, No. 19-2204 (1st Cir. argued Nov. 18, 2022) (same). Based on the historical and geographical breadth of its expertise in identifying and combating racial discrimination in the administration of criminal justice, LDF's perspective will assist the Court.

[1] This Court has solicited amicus involvement.

The New England Innocence Project ("NEIP") is a nonprofit organization dedicated to correcting and preventing wrongful convictions in the six New England states. In addition to providing pro bono legal representation to individuals with claims of innocence, NEIP advocates for judicial and policy reforms that will reduce the risk of wrongful convictions. This includes ensuring that the presumption of innocence applies robustly and equally to all people and at all stages of the criminal process, from the moment of the first encounter with police through trial. It also includes ensuring that all evidence, regardless of its source or pedigree, is subjected to appropriately rigorous scrutiny and bears sufficient indicia of reliability before it is used against a criminal defendant. And, in recognition of the grossly disproportionate number of members of communities of color who have been wrongfully convicted, NEIP's mission includes ensuring that explicit or implicit racial biases do not operate to undermine the presumption of innocence or other rights guaranteed by the U.S. Constitution and the Declaration of Rights.

DECLARATION

Neither party nor party's counsel aided in preparing this brief, either in whole or in part. Neither party nor party's counsel, or any other person or entity, other than the amici curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of the brief. Neither LDF nor NEIP represents or has represented either one of the parties to the present appeal in another 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.

STATEMENT OF THE ISSUE

Should prejudice be presumed when a court-appointed defense attorney, who openly expresses bigoted views about Black people and Muslim people, represents a client who is both Black and Muslim?

FACTUAL BACKGROUND

Anthony Dew, who is Black and Muslim, was indicted on several charges in March 2015. *See* RA 35–54.[2] After his first two court-appointed attorneys withdrew, in February 2016, the trial court appointed Richard Doyle to represent him. *See* RA 12. That June, Mr. Dew entered a guilty plea to all but one of the charges against him and was sentenced to eight to ten years' imprisonment. *See* RA 101–02. In 2017, Mr. Dew filed a pro se motion for a new trial, where he argued his "guilty plea was not knowing, and voluntary, and intelligent because his counsel told him he needed to plead guilty, he was not ready to plead, and he did not understand the rights he was giving up." *Commonwealth v. Dew*, No. 18-P-1146, 2019 WL 2323910, at *5 n.8 (Mass. App. Ct. May 31, 2019). The trial court denied the motion, and that ruling was affirmed on appeal. *Id.*

Around the same time Mr. Dew moved for a new trial, it was reported to the Committee for Public Counsel Services ("CPCS") that from 2014 to 2017—the

[2] "RA" refers to Record Appendix; "PSRA" refers to Proposed Supplemental Record Appendix; "Comm. Br." refers to the Commonwealth's Response Brief.

timeframe Mr. Doyle was representing Mr. Dew—Mr. Doyle had posted over twenty bigoted and racist posts disparaging Black people and Muslim people on his public Facebook page. *See* RA 59; PSRA 4. Mr. Doyle's public Facebook posts trafficked in odious anti-Black racism, expressed rank Islamophobia, and even targeted his own clients.[3]

As examples of his racist posts, Mr. Doyle shared a picture of Black men wearing shirts and hats supporting former President Donald Trump, captioned "5 minutes after Trump legalizes weed in all 50 states." RA 72. In another post, he shared a picture of young Black men holding guns and beneath it, a picture of young Black children looking distraught, with the caption: "Don't glorify shooting people then cry like a bitch when someone you love gets shot." RA 73. When Mr. Doyle "checked in" via Facebook at the Suffolk County Courthouse (*i.e.*, noting his current location to the public), he captioned the post with "[a]ssorted thugs and bad guys." RA 83. In yet another post, he referred to his client's "gangbanging" when posting that he received a not guilty verdict, sarcastically asking at the same time: "Makes you feel a whole lot safer, huh?" RA 79. In the comments under that post, he added that his client asked for the return of his "cellphones (with his business contacts, no

[3] Mr. Doyle's posts also disparaged "illegals" and transgender individuals. *See, e.g.*, RA 69, 74.

doubt),” publicly suggesting that his acquitted client was a drug dealer. He then boasted of telling this client to “Jerk off.” RA 80.[4]

As for his Islamophobia, Mr. Doyle’s posts ranged from offensive to violent. As an example, Mr. Doyle posted a picture of a pig with its testicles hanging from the back of a truck with the caption: “Dear muslims, Kiss our big bacon balls.” RA 62. On another occasion, he posted that he “became a bigger hockey fan” after a Canadian hockey announcer supported “hooking up one raghead terrorist prisoner’s testicles to a car battery to get the truth out of the lying little camel shagger.” RA 63. Another post showed a picture of a law enforcement officer with the following embossed on it: “You tell those goat fuckers with the laundry on their heads that it’s wash day, and we’re bringing the fucking Maytag.” RA 64. Still another featured a still from the show *South Park* with the caption “Let’s not jump to conclu… Aaaaand its Muslims,” expressing the view that an act of terrorism would only be perpetrated by a Muslim person. *See* RA 67; *see also* RA 66 (“In Islam, you have to die for Allah”); RA 68 (lamenting people “making excuses for Muslims cutting people’s heads off”). This is just a flavor of Mr. Doyle’s Facebook feed.

[4] Mr. Doyle repeatedly made disparaging comments about his own clients on his public Facebook page, including once bragging of gifting a client “soap on a rope as a going away present”—apparently referring to rape in the prison system—and, on another occasion, checking in at the Suffolk County Superior Court and commenting, “Waaaaaaaaaaah!”—in reference to his juvenile clients. *See* RA 84–85; 82.

CPCS investigated and determined that Mr. Doyle was responsible for these public Facebook posts. *See* PSRA 29. And based on these posts, CPCS found that under Rule of Professional Conduct 1.7, Doyle had an "actual conflict" of interest representing "people of the Muslim faith" and "[p]eople who do not appear to be Caucasian." *See* PSRA 29–31.[5] CPCS therefore concluded that Mr. Doyle had a "duty to refrain from representing clients in these classes due to his personal beliefs about them." PSRA 32. And in February 2018, he was suspended from taking any criminal case assignments "for no less than 1 year," and required to complete an "ethics course and a cultural competency course" before requesting reinstatement. PSRA 50.

Mr. Dew did not learn about these posts until 2021. RA 57–58. When he did, Mr. Dew (with counsel) filed another motion for a new trial, arguing that being represented by a court-appointed attorney who was so deeply bigoted against him violated his rights under Articles 1 and 12 of the Massachusetts Declaration of Rights, and under the Sixth and Fourteenth Amendments to the federal Constitution. *See* RA 56. The trial court held a hearing on the motion in May 2022. *See* RA 102.

[5] CPCS also found that Mr. Doyle had a conflict with people "who are not documented with legal status" and an "apparent conflict" with people "who are not cisgender." PSRA 31. CPCS further concluded that Mr. Doyle violated his duty of confidentiality under Rule of Professional Conduct 1.6. *See* PSRA 32.

At the hearing, Mr. Dew testified about how Mr. Doyle's bigotry impacted his representation. For example, at their first meeting, Mr. Dew "was wearing a kufi prayer cap and holding dhikr prayer beads," RA 58, and "Doyle demanded that he take it off and 'not to wear that shit in a courtroom.'" RA 103. When they met a few weeks later, Mr. Dew was again wearing his kufi and "this time, Doyle left the room without" even speaking to him. *Id.* Mr. Dew further testified that he did not see his attorney again until they were in court shortly before trial was scheduled to start, where "Doyle advised [Mr. Dew] to take the plea offer and told him that any attempt by [Mr. Dew] to seek a new court appointed counsel would be futile, given that the matter was scheduled for trial." *Id.* The trial court credited this testimony, *id.*, yet held that Mr. Dew deserved no relief because he failed to "show that Doyle's performance was deficient or, if it was, that this likely had some impact on the outcome of the case." RA 110.

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel is viewed with a "peculiar sacredness." *Avery v. Alabama*, 308 U.S. 444, 447 (1940). This is so because "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). But not just any attorney will do. Under the Sixth Amendment, counsel owes the client a duty of *loyalty*, which has been

described as "perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Article 12 of the Massachusetts Declaration of rights goes further, "diverg[ing] from the Federal constitutional standard" to provide heightened protection and clarifying that an actual conflict of interest is always reversible error. *Commonwealth v. Shraiar*, 397 Mass. 16, 20 & n.3 (1986); *Commonwealth v. Hurley*, 391 Mass. 76, 81 (1984); *Commonwealth v. Hodge*, 386 Mass. 165, 169 (1982).

Counsel cannot be loyal to a client and zealously represent their interests when they openly harbor animus against people of the client's race and religion. Throughout the course of representation, defense counsel is tasked with pivotal decisions, from investigation to plea negotiations, that affect the course of a case. If counsel harbors bias towards the client, there is no way to measure how that bias will influence the representation, but it is almost certain that "the cumulative effect will be to impair the defense." *Ellis v. Harrison*, 947 F.3d 555, 562 (9th Cir. 2020) (Nguyen, J., concurring).

As the Committee for Public Counsel Services found here, when a court-appointed lawyer openly harbors racial and religious animus, they cannot ethically represent a person against whom they harbor animus. It is necessarily a conflict of interest. And when this bias surfaces, prejudice must be presumed: Under Massachusetts law, a conflicted lawyer is never harmless. *See Shraiar*, 397 Mass. at 20.

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Upholding a verdict tainted by racial and religious animus "not only poses a substantial risk of a miscarriage of justice but also, if left unaddressed, would risk systemic injury to the administration of justice." *Commonwealth v. Ralph R.*, 490 Mass. 770, 785–86 (2022) (citation and internal quotation marks omitted). Such a holding would "poison[] public confidence in the judicial process," injuring "the law as an institution" and "the community at large." *Buck v. Davis*, 580 U.S. 100, 124 (2017) (internal quotation marks and citations omitted). Thus, prejudice must be presumed when court-appointed defense counsel, who openly expresses bigoted views about Black people and Muslim people, represents a client who is both Black and Muslim. This Court should reverse Mr. Dew's convictions.

ARGUMENT

I. PREJUDICE MUST BE PRESUMED WHEN A COURT-APPOINTED ATTORNEY OPENLY EXPRESSES BIGOTED VIEWS ABOUT BLACK PEOPLE AND MUSLIM PEOPLE AND THEN REPRESENTS A CLIENT WHO IS BOTH BLACK AND MUSLIM.

A. The Right to Counsel Is Fundamental Under Article 12 of the Massachusetts Declaration of Rights and the Sixth Amendment to the Constitution. Reversal Is Required When Counsel Is Conflicted Due to Explicit Racial and Religious Animus.

The Sixth Amendment contains several procedural safeguards that secure the "basic elements of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684–85

(1984). These safeguards include, for example, a defendant's right to be tried before an "impartial jury," and a defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. But as the Supreme Court has explained, of "all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will promote the ultimate objective that the guilty be convicted and the innocent go free." *Id.* at 655 (quotation marks and citation omitted). The right to counsel "was designed to assure fairness in the adversary criminal process." *Wheat v. United States*, 486 U.S. 153, 158 (1988).

In *Strickland*, the Supreme Court set the standard for evaluating claims of ineffective assistance of counsel. *Strickland*, 466 U.S. at 686. In general, if a defendant is represented by counsel, and is claiming counsel's performance was constitutionally inadequate, the defendant must prove: (1) "that counsel's performance was deficient"; and (2) "that the deficient performance prejudiced the defense." *Id.* at 687. *Strickland* ineffective-assistance-of-counsel claims generally require a prejudice showing because "a defendant has a right to effective representation, not a right to an attorney who performs his duties mistake-free." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017) (quotation marks and citation omitted); *see also Strickland*,

466 U.S. at 691–92 ("[The] purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.").

Strickland made clear, however, that not all Sixth Amendment claims concerning the assistance of counsel can be measured by the standard two-part test. Indeed, the Court expressly cautioned against applying the prejudice inquiry in a "mechanical" fashion because, "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id.* at 670, 692. For example, a defendant need not show prejudice for a claim that he was actually or constructively denied the assistance of counsel. *Id.* Prejudice is presumed if the state interferes with a defendant's right to counsel. *Id.* at 692. And "prejudice is presumed when counsel is burdened by an actual conflict of interest." *Id.*

When expounding on why prejudice is presumed when counsel has a conflict of interest, *Strickland* explained that such a conflict "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Id.* When a lawyer is conflicted, prejudice must also be presumed, *Strickland* continued, because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Id.* Thus, "it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest." *Id*.

This Court has adopted a more rigid rule for conflicts of interest under the Massachusetts Declaration of Rights: While the Supreme Court interprets the right of effective assistance of counsel under the Sixth Amendment to require a showing that "'an actual conflict of interest adversely affected his lawyer's performance' . . . art. 12 provides greater safeguards than the Bill of Rights of the United States Constitution." *Hurley*, 391 Mass. at 81–82 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). In Massachusetts, "[o]nce a genuine conflict is shown, the defendant is not required under art. 12 to shoulder the additional burden of proving actual prejudice or an adverse effect on his counsel's performance." *Shraiar*, 397 Mass. at 20; *see also, Hurley,* 391 Mass. at 81 ("Such a fundamental right should not depend on a defendant's ability to meet the nearly impossible burden of proving that a genuine conflict of interest resulted in an adverse effect on his trial counsel's performance.").

Likewise, when deciding how courts should review constitutional errors during a criminal trial, the Supreme Court has held that, on one hand, there are "classic 'trial error[s],'" which are "subject to harmless-error analysis." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). On the other hand, there are constitutional violations that "affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. For these "structural" errors, "a

reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). Instead, the court must "presume that the process was impaired" and grant the defendant relief. *Id.*

The Supreme Court has articulated "broad rationales for finding an error to be structural." *Weaver*, 137 S. Ct. at 1903 (quotation marks omitted). Specifically, an error must be considered structural when "the error's effects are simply too hard to measure" or where an error of that nature will "always result in fundamental unfairness." *Id.*

With these parameters in mind, the Supreme Court has presumed prejudice in several contexts when defendants' Sixth Amendment rights are violated, as those are the types of violations that affect "the framework of any criminal trial" and whose impact are "simply too hard to measure." *Id.* at 1903, 1907. Structural errors discussed by the Supreme Court include "the total deprivation of the right to counsel at trial," a judge "who was not impartial," and the denial of a public trial. *Arizona*, 499 U.S. at 309. Thus, although the situations in which the Court has considered an error "structural" are "limited," the Supreme Court has repeatedly found structural error and presumed prejudice in Sixth Amendment contexts. *See Neder v. United States*, 527 U.S. 1, 8 (1999) (collecting cases).

The Supreme Court has also presumed prejudice when racial bias infects criminal proceedings. For example, when racial bias taints the grand jury process, a defendant need not show prejudice. *See Vasquez*, 474 U.S. at 261–64. And when racial bias infects jury selection, reversal is required regardless of whether a defendant can prove prejudice. *See Batson v. Kentucky*, 476 U.S. 79, 99–100 (1986). These cases track the never-ending "imperative to purge racial prejudice from the administration of justice." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017).

In fulfilling its independent obligation to interpret the Massachusetts Constitution, *see, e.g.*, *Commonwealth v. Simon*, 456 Mass. 280, 291 (2010), this Court has been steadfast in presuming prejudice when faced with evidence that racial bias infected trial proceedings. For example, this Court has made clear that when racial bias influences jury selection, a defendant does not have to prove that he was prejudiced; a new trial is required. *See, e.g.*, *Commonwealth v. Ortega*, 480 Mass. 603 (2018); *Commonwealth v. Soares*, 377 Mass. 461 (1979). And just a few months ago, this Court held that the seating of a racially biased juror is structural error, cautioning that "a guilty verdict arising from racial or ethnic bias not only poses a substantial risk of a miscarriage of justice but also, if left unaddressed would risk systemic injury to the administration of justice." *Commonwealth v. Ralph R.*, 490 Mass. 770, 785–86 (2022) (quotation and citation omitted).

Here, it is indisputable that Mr. Doyle's public Facebook posts expressed unabashed racial bias and Islamophobia. And CPCS found that Mr. Doyle had an actual conflict of interest representing people of Muslim faith and people of color, *see* PSRA 29–31, which the Commonwealth ignores. Thus, because Article 12 of the Massachusetts Declaration of Rights and the Sixth Amendment guarantee the right to conflict-free counsel, *Commonwealth v. Goldman*, 395 Mass. 495, 505 (1985), Mr. Dew's state and federal constitutional rights were violated when he was represented by an attorney who was bigoted against groups to which Mr. Dew belongs.

The trial court, applying the *Strickland* two-prong test held that Mr. Dew was not entitled to relief, however, because, in its view, he could not prove prejudice. This Court must reverse. Prejudice must be presumed when a court appoints a lawyer to represent an indigent criminal defendant, and that lawyer openly and repeatedly demonstrates racial and religious animus against people of the defendant's race and religion during the time of the representation. Such a presumption is necessary because the harm caused by a bigoted defense attorney is impossible to measure, and a defendant being appointed a bigoted attorney undermines the fairness of the trial proceedings and the integrity of the judiciary.

B. The Harm of Racial Bias Expressed by Defense Counsel Is Pernicious and Immeasurable.

As outlined above, an investigation by the Committee for Public Counsel Services determined that Richard Doyle had an "actual conflict of interest" in representing a Black person of the Muslim faith—or a person like Mr. Dew. PSRA 29–31.[6] CPCS reached this conclusion based on evidence showing a "pervasive pattern" of racism and bigotry, citing more than twenty social media posts—many of which were made while he was representing Mr. Dew—in which Mr. Doyle publicly and repeatedly described people of color and people of the Muslim faith in "a derogatory and demeaning way." PSRA at 30–31. Put differently, the investigation concluded that Mr. Doyle's public Facebook posts reflected "the depth of his antipathy for people of color." *Ellis v. Harrison*, 947 F.3d 555, 564 (9th Cir. 2020) (Nguyen, J., concurring). And by finding that Mr. Doyle had a conflict representing both people of color and people of Muslim faith, CPCS necessarily found that Mr. Doyle's prejudice was "so extreme and deep-rooted that it would be impossible for him to fairly represent a non-white defendant." *Id.*

[6] *Citing* Mass. R. Prof. C. 1.7 ("A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."); *Shraiar,* 397 Mass. at 20 ("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.") (citation and internal quotation marks omitted).

In light of Mr. Doyle's unmistakable bigotry, this Court must assume that Mr. Dew was prejudiced. There is no way to measure the harm that flows from the appointment of conflicted counsel, especially when that conflict stems from racial and religious discrimination. Throughout the course of representation, defense attorneys must make decisions, both big and small, that are critical to a defendant's representation and to the outcome of the case. In other words, their "performance is the sum of countless discretionary actions—and inactions—on behalf of a client." *Ellis*, 947 F.3d at 562 (Nguyen, J., concurring). "When defense counsel makes these discretionary decisions in disregard of the client's interests on account of counsel's racism, the cumulative effect will be to impair the defense, but there is no way to pinpoint how it does so." *Id.*

Indeed, studies demonstrate that racial bias can influence the representational process in numerous deleterious ways. As Bryan Stevenson has explained, "[p]eople of color in the United States, particularly young black men, are burdened with a presumption of guilt and dangerousness."[7] A growing body of research has shown that this presumption—one publicly and explicitly endorsed by Mr. Doyle—can affect "evaluations of ambiguous evidence" causing defense attorneys to "interpret

[7] Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in *Policing the Black Man* 4 (Angela J. Davis ed., 2017).

information as more probative of guilt."[8] Such evaluations influence the ways that defense attorneys allocate limited resources in the face of "crushing caseloads,"[9] informing pivotal decisions from whether to "conduct a fact investigation"[10] to whether to "forgo possible motions to suppress government evidence."[11] Moreover, a lawyer who discriminates on the basis of race or religion "may be more accepting of higher sentencing recommendations for black versus white clients and, thus less likely to negotiate aggressively for lower sentences or to conduct mitigation investigations."[12]

Prejudice can also harm the attorney-client relationship, leading to "mutual distrust," and, in turn, causing attorneys to "end the contact earlier" and spend less time with negatively stereotyped clients.[13] As a result, such bias impedes the ability

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[8] L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2635–36 (2013).
[9] *Id.* at 2635 ("Of necessity, defenders must begin evaluating cases from the moment they are assigned. Their initial evaluations will affect a variety of subsequent decisions important to the ultimate resolution of the case.")
[10] *Id.*
[11] *Id.* at 2636. *See also* RA 102–03 (noting that Mr. Doyle failed to file a motion to suppress which the prior attorney had deemed viable).
[12] *Id.* at 2640; *see also,* Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. Personality & Soc. Pysch. 292, 292–94 (2008); RA 102–03 (showing that Mr. Doyle encouraged Mr. Dew to accept a sentence of eight to ten years, significantly longer than the mandatory minimum, five to seven years, which the prior attorney had sought).
[13] *Id.* at 2637–38; *see also* Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 St. Mary's J. on Legal Mal-

of attorneys to listen to and effectively communicate with both clients and essential witnesses, causing a break down in the attorney-client relationship and hampering the entire representation.[14]

When a case is resolved by guilty plea, the risk of defense counsel's biases affecting their representation is even greater, and the harm more likely to evade review. By nature, plea bargaining is a "low-visibility, off-the-record, and informal process that usually occurs in conference rooms and courtroom hallways—or through private telephone calls or e-mails—far away from the prying eyes and ears of open court."[15] The "secretive" nature of plea bargaining can "invite[] arbitrary

practice & Ethics 278, 292–99 (2014); *infra* at 35 (describing how Mr. Doyle declined to meet with Mr. Dew while he wore his religious headgear—depriving him of counsel).

[14] *See Id.* at 2636–38; *see also* Michelle Tong & Samantha Artiga, *Use of Race in Clinical Diagnosis and Decision Making: Overview and Implications*, KFF (Dec. 9, 2021), https://www.kff.org/racial-equity-and-health-policy/issue-brief/use-of-race-in-clinical-diagnosis-and-decision-making-overview-and-implications/ (noting that medical provider bias—including explicit endorsement of racially-biased viewpoints on biological differences of Black patients—is correlated with "poorer patient-provider interactions," which leads to undertreatment).

[15] Ram Subramanian et al., Vera Inst. of Just., *In the Shadows: A Review of the Research on Plea Bargaining* 3 (Sept. 2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf; *see also* Daniel S. McConkie*, Judges As Framers of Plea Bargaining*, 26 Stan. L. & Pol'y Rev. 61, 63 (2015) ("[P]lea bargaining happens with little judicial involvement—between prosecutors and defense attorneys, behind closed doors and with practically no public oversight").

results."[16] In fact, research indicates that racial stereotypes are more likely to influence the decision-making process of attorneys engaged in plea bargaining in part because of this "broad, unfettered discretion."[17]

Defense attorneys play a vital role in both negotiating plea bargains and advising clients on the favorability of the plea. As a result, "the advice of attorneys has been shown to be an important predictor of defendant plea decisions."[18] *See also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (noting that counsel's work during plea negotiations is often "'the only stage when legal aid and advice would help'" the accused) (quoting *Spano v. New York*, 360 U.S. 315, 326 (1959)). And studies show that "the probability of conviction estimate and the probability of guilt estimate [are] significant predictors of plea advice, such that as estimations of the probability of conviction increased and as estimators of the probability of guilt increased, the

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[16] Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014), www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty; *see also,* Nancy Gertner, *'Why Innocent People Plead Guilty': An Exchange*, N.Y. Rev. of Books (Jan. 8, 2015), https://www.nybooks.com/articles/2015/01/08/why-innocent-plead-guilty-exchange/.

[17] Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. Crim. L. & Criminology 93, 95–96 (2020).

[18] Rebecca K. Helm et al., *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 Psych. Crime & L. 915, 918–19 (2018); *see also,* Kelsey S. Henderson & Lora M. Levett, *Plea-bargaining: The Influence of Counsel.* Advances in Psych. & L., Nov. 2019, at 1, 22–25 (collecting studies showing that the advice of counsel—and even perceptions of counsel's incompetence—influences decisions to accept plea offers, and that these effects are strongest on those who are innocent of the crime charged).

chance of advising the client to plead guilty increased."[19] When defense counsel harbors bigoted views that presume the guilt of people of color and Muslim people, there is a real risk that their bias will affect how they negotiate the plea bargaining process to the detriment of the client.

As these studies illustrate, racial bias adversely impacts representation in ways that are "pervasive and unpredictable," and the burden of proving that impact "may be substantial . . . particularly as to things that may have been left not said or not done by counsel." *Commonwealth v. Mosher*, 455 Mass. 811, 819 (2010) (quoting *Commonwealth v. Cobb*, 379 Mass. 456, 461 (1980)). In view of the "insuperable" burden of "probing the resolve and possible mental conflict of counsel," *Cobb,* 379 Mass. at 461, Massachusetts has long recognized that an actual conflict of interest is a structural error from which prejudice must be presumed. As a result, under Article 12 of the Massachusetts Declaration of Rights, evidence of an actual conflict of interest warrants a new trial without need to prove an adverse effect on representation or actual prejudice. *See Shraiar*, 397 Mass. at 20; *Hodge*, 386 Mass. at 169–70; *Hurley*, 391 Mass. at 81–82. In short, "a trial is fundamentally unfair if defense counsel harbors extreme and deep-rooted ill will toward the defendant on account of his race." *Ellis*, 947 F.3d at 562 (Nguyen, J., concurring).

[19] Helm et al., *supra* note 18, at 925–26.

C. The Most Basic Notions of Fairness Are Violated When a Lawyer Who Engages in a Public and Pervasive Pattern of Racist and Bigoted Expressions of Hate Against Black and Muslim People Represents a Person Who Is Both Black and Muslim.

In an adversarial system, defense counsel play a vital role in preventing miscarriages of justice. *See e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (recognizing that the "guiding hand of counsel" is required at "every step in the proceedings . . . to assure fair trials . . . in which every defendant stands equal before the law"); *Cronic*, 466 U.S. at 656 (1984) ("Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'") (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980)).

Tracing the modern roots of the right to counsel—strengthened "during the heart of the Civil Rights era"—reveals an underlying "concern[ ] about the way black defendants were treated in the criminal and juvenile justice systems."[20] In many ways, the right to counsel served as "an important legal corollary to the Civil Rights struggle," calling on defense attorneys to "stand in the gap between the coercive

[20] Kristin Henning, *Race, Paternalism, and the Right to Counsel,* 54 Am. Crim. L. Rev. 649, 649 (2017); *see also*, Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 Sup. Ct. Rev. 59, 85–86 (2010) ("It is hard to overstate the sense of urgency driving the Court's concern over racial discrimination in the enforcement of the criminal law . . . the right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanic.")

power of the state and the relatively limited power of the indigent accused, who were and still are disproportionately black and Latino."[21]

"Given this valiant legacy of indigent defense, it is disturbing to contemplate the possibility of racial bias in the criminal defense bar."[22] Nevertheless—on the rare occasion when, as here, outright discrimination is laid publicly and disturbingly bare—that harm must be remedied. Under the Sixth Amendment, and the more protective Article 12 of the Massachusetts Declaration of Rights, this Court has long held that when racial bias undermines important constitutional rights required for a fair trial, it "can never be treated as harmless error" and is "prejudicial per se." *Commonwealth v. Soares*, 377 Mass. 461, 492 (1979); *accord Ralph R.*, 490 Mass. 770, 785–86 (2022); *Commonwealth v. Kozubal*, 488 Mass. 575, 580 (2021); *Commonwealth v. Ortega*, 480 Mass. 603, 607 (2018); *Commonwealth v. Robertson*, 480 Mass. 383, 393, 397 (2018); *Commonwealth v. Jones*, 477 Mass. 307, 319 (2017); *Commonwealth v. Benoit*, 452 Mass. 212, 222–23, 226 (2008); *Commonwealth v. Long*, 419 Mass. 798, 806–07 (1995).[23] As this Court said recently, "[w]hile 'all forms of improper bias pose challenges to the trial process,' racial and ethnic bias

[21] Henning, *supra* note 20, at 649.
[22] *Id.*
[23] Even the risk or appearance of racial bias is intolerable. *See Commonwealth v. Choy*, No. 0383-CR-00300, 2020 WL 10053106, at *4–5 (Mass. Super. Ct. Sept. 17, 2020) (new trial required where prosecutor's emails demonstrating racial bias made it "appear[] that justice may not have been done" (quoting Mass. R. P. 30(b)).

'implicate unique historical, constitutional, and institutional concerns,' and to "ignore concerns about the influence of racial bias . . . might well offend fundamental fairness." *Commonwealth v. McCalop*, 485 Mass. 790, 798–99 (2020) (cleaned up).

The "unmistakable premise underlying these precedents is that discrimination on the basis of race, 'odious in all respects, is especially pernicious in the administration of justice,'" *Peña-Rodriguez*, 580 U.S. at 223 (quoting *Rose v. Mitchell*, 443 U.S. at 555), and renders the adjudication process "fundamentally unfair." *Ellis*, 947 F.3d at 564 (Nguyen, J., concurring); s*ee also Ralph R.*, 490 Mass. at 780. In view of this fundamental unfairness, "racial bias in the justice system must be addressed . . . with added precaution." *Peña-Rodriguez*, 580 U.S. at 225.

It would be entirely inconsistent to require a strict showing of prejudice when the person constitutionally obligated to protect their client's rights engages in repeated public expressions of vile and violent racism and religious bigotry against the same groups to which their client belongs. Such a result would flout the most basic notions of fairness, particularly for indigent clients, who do not have the choice to refuse to subject themselves to that indignity. And that result would "injure[] not only the defendant" but also "public confidence in the judicial process" and the "democratic ideal reflected in the processes of our courts." *Buck v. Davis*, 580 U.S. 100, 124 (2017) (internal quotation marks and citations omitted). Thus, in the rare case in which a "lawyer's racial bias against racial minorities is so extreme and deep-

rooted . . . we must presume that counsel's racism prejudiced the result." *Ellis*, 947 F.3d at 564 (Nguyen, J., concurring).

As the investigation into Mr. Doyle concluded, his racial and religious biases were "extreme and deep-rooted." *Id.*; *see* PSRA 29–31. Far from a stray remark made in private, or a comment "said in jest," *Commonwealth v. McCowen*, 458 Mass. 461, 496 (2010), as the trial court intimated, *see* RA 112, Mr. Doyle's hate was public, legion, and included taunting racial epithets and support for violence.

Despite this pervasive pattern of dehumanizing public posts against Black and Muslim people, the court below concluded that it was not a conflict for Mr. Doyle to represent a person who was Black and Muslim, reasoning in part that "there is no Massachusetts authority (or for that matter, any authority outside of Massachusetts), which supports" such a finding. RA 108. This Court must reject that conclusion.

First, the lack of precedent reveals how rare and egregious Mr. Doyle's conduct was, not that Mr. Doyle's conduct is condoned by law. A court-appointed defense lawyer who publicly expresses animus towards clients of certain races and religions "is corrupted by conflicting interests," *Strickland*, 466 U.S. at 691–92, and cannot be the person relied upon to protect and "assert any other rights [his client] may have." *Cronic*, 466 U.S. at 654.

Second, relatedly, the lower court's reasoning overlooks the carefully conducted CPCS investigation, which concluded that Mr. Doyle had an "actual conflict"

of interest with "people of the Muslim faith" and "[p]eople who do not appear to be Caucasian," PSRA 29–31. In fact, Mr. Doyle's racial prejudice was so "extreme and deep-rooted" that it created for him a "duty to refrain from representing clients in these classes due to his personal beliefs about them." PSRA 32. That is an extraordinary finding, which reflects the serious conflict of interest that prevented Mr. Doyle from fulfilling his most basic duty—the duty of loyalty—to Mr. Dew. Under this Court's precedents, this finding of a conflict compels reversal. *See Shraiar*, 397 Mass. at 20.

Despite the specific finding that Mr. Doyle had an "actual conflict" representing Black people and Muslim people, the lower court and Commonwealth claim that there was no conflict because Mr. Doyle's expressions of bigotry were "extra-judicial" and did not "involve flaws in the judicial process itself." Comm. Br. 13–19. According to both, "Doyle was able to keep his private opinions separate from his professional life," so his bias did not affect the process. Comm. Br. 15; *see also* RA 108–10. These arguments are belied by the record, the defense function, and the law.

Far from a "private opinion[] separate from his professional life," Comm. Br. 15, the record is clear that Mr. Doyle's publicly expressed bias did infect his representation of Mr. Dew. Upon first meeting Mr. Dew, an integral moment in the attorney-client relationship,[24] Mr. Doyle demanded that Mr. Dew take off his religious

[24] *See e.g.*, Richardson & Goff, *supra* note 8, at 2636–37.

headwear—a kufi—telling him to "'not wear that shit in the courtroom.'" RA 103. When they met again several weeks later, Mr. Dew was again wearing his kufi and "this time, Mr. Doyle left the room without [even speaking to him]." *Id*. Mr. Dew did not see Mr. Doyle again until he was pushed to plead guilty and told that "any attempt . . . to seek a new court appointed counsel would be futile." *Id*. In other words, after the first meeting where Mr. Doyle told Mr. Dew not to "wear that shit," the only other time he spoke to his client was right before he pleaded guilty in exchange for a sentence of eight to ten years behind bars.

Three months before he was assigned to represent Mr. Dew—a Black man and practicing Muslim—Mr. Doyle publicly posted derogatory language referring to people of the Muslim faith as "goat fuckers with the laundry on their heads." PSRA 10. The next month, another post equated people of the Muslim faith with terrorists: "Let's not jump to conclu . . . Aaaaand it's Muslims." PSRA 11. In still another post, Mr. Doyle threatened violence against "raghead terrorist[s]." PSRA 9. Given the clear nexus between publicly promoting the epithet "raghead" and refusing to engage with his client when he wore religious headwear, there is no question that Mr. Doyle did not keep his private opinions separate from his work as a defense attorney. Refusal to speak with a client during a legal visit is not "extra-judicial"—it is a fundamental abrogation of the core responsibilities of the defense attorney and

demonstrates that even under the less protective *Cronic* standard, Mr. Doyle's conflict of interest adversely affected the representation.

Indeed, Mr. Doyle's racism and bigotry did not disappear once he entered the courthouse doors. As detailed above, Mr. Doyle made bigoted and derogatory public posts *while in court*, posting his location as "Suffolk County Courthouse," while likening his clients to "[a]ssorted bad guys and thugs." RA 83. The court below incorrectly characterized this post as race-neutral—writing that it simply reflected a "general disdain for many of his clients." RA 104. But the word "thug" is not race-neutral. Rather, as Columbia University Professor John McWhorter explains, it is a "sly way" of saying "black people" and "anybody who wonders whether thug is becoming the new N-word doesn't need to. It[] most certainly is."[25] In another post, Mr. Doyle publicly called his client a "gangbanger," which represents the linguistic evolution of the "brute caricature" of Black people dating back to Jim Crow.[26]

None of those examples, though, should be needed to understand that Mr. Doyle's public posts (inaccurately called "private opinions") commingled with his

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[25] NPR, *The Racially Charged Meaning Behind the Word 'Thug'* (Apr. 30, 2015), https://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug; *see also Gaston v. Bd. of Educ.*, No. 17 C 1024, 2019 U.S. Dist. LEXIS 15080, at *17 (N.D. Ill. Jan. 31, 2019) ("'thug' . . . is a racially-charged word").

[26] *See The Brute Caricature*, Ferris State University, Jim Crow Museum, https://www.ferris.edu/HTMLS/news/jimcrow/brute/homepage.htm (last visited Jan. 16, 2023).

professional life: When someone publicly expresses such hateful language about a group of people, we know that hate does not disappear when they put on a suit and walk into the courtroom.

On that point, the lower court and Commonwealth reason that "most defense attorneys, like most lay people, are repulsed by murder, rape, and other serious crimes, yet defense attorneys are expected to be able to – and do – put those feelings aside and perform their duties professionally." Comm. Br. 14; *see also* RA 108. Aside from being a deeply simplistic view of defense attorneys, there is a critical difference between not liking something someone has allegedly done and hating someone for who they are. *See Buck*, 580 U.S. at 123 ("Our law punishes people for what they do, not who they are.").

In arguing that prejudice should not be presumed, the Commonwealth and lower court rely on the *Ellis* concurrence's statement that an "attorney's racist statement outside the courtroom that has nothing to do with a client . . . does not in and of itself call for the reversal of every criminal conviction involving a defendant of the targeted race in which the attorney participated." *Ellis*, 947 F.3d at 563 (Nguyen, J., concurring). This reliance is misplaced. As the concurrence made clear, there are occasions when "a lawyer's racial bias against racial minorities is so extreme and

deep-rooted that it would be impossible for him to fairly represent a non-white defendant." *Id.* at 564.[27] Such is the case here.

Finally, the Commonwealth employs the slippery slope fallacy and claims that Mr. Dew's argument "raises the specter of disqualifying attorneys based solely on defensible political opinions." Comm. Br. 22. Mr. Dew's argument does no such thing. The difference between "decrying Islamic terrorism" (to cite the Commonwealth's example of a defensible political opinion, Comm. Br. 22) and expressing hatred toward Muslims, or "favoring strict immigration" (another Commonwealth example, Comm Br. 22) and giving undocumented immigrants "the Jimmy Hoffa treatment" (killing them and disposing of their bodies, as Mr. Doyle commented), RA 69, is clear.[28] Here, there is no question that Mr. Doyle's posts crossed the line from "defensible political positions" to public expressions of "extreme racism," at times directed toward clients. Thus, there is no question that Mr. Doyle had an actual conflict of interest—as CPCS concluded—which rendered Mr. Dew's adjudication process "fundamentally unfair and its result unreliable." *Ellis*, 947 F.3d at 564 (Nguyen, J., concurring).

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[27] Indeed, in *Ellis*, "[the lawyer] did not abuse Ellis directly to his face with racial invective" and, as here, Mr. Ellis was apparently unaware of his lawyer's racism until after the representation. *See Ellis*, 947 F.3d at 562. The State of California in *Ellis* conceded that relief was warranted. *See id.* at 561.

[28] Amanda Mannen, *Jimmy Hoffa Is a Cultural Punchline, But Exactly What Happened?*, Cracked (July 31, 2022), https://www.cracked.com/article_34830_jimmy-hoffa-is-a-cultural-punchline-but-exactly-what-happened.html.

In a rare case like this, where counsel's racial bias is so plainly and publicly stated, failing to provide a remedy is pernicious not only because it deprives the defendant of rights secured by the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, but also because it systematically infects and "poisons public confidence in the judicial process," injuring "the law as an institution" and "the community at large." *Buck*, 580 U.S. at 124 (internal quotation marks and citations omitted); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1418 (2020) (Kavanaugh, J., concurring) ("[U]nfairness and racial bias[] can undermine confidence in and respect for the criminal justice system."). When confronted with such clear discrimination, putting the burden on the accused to prove prejudice sends the "unmistakable message," *Ortega*, 480 Mass. at 607 (quoting *Sanchez v. Roden*, 753 F.3d 279, 299 (1st Cir. 2014)), that the criminal legal system tolerates bias and signals that ours is a system of justice for some rather than justice for all.

This signal is reinforced by the lower court and the Commonwealth purporting to condemn Mr. Doyle's racism while throwing up their hands. The Commonwealth asserted that it is "dedicated to working 'to rise above racial [and religious] classifications that are so inconsistent with our commitment to the equal dignity of all persons' and 'to purge racial [and religious] prejudice from the administration of jus-

tice.'" Comm. Br. 13 (quoting *Peña-Rodriguez*, 580 U.S. at 867). Such words accompanied by inaction—indeed, resistance to relief for a defendant whose most fundamental right to a fair trial was denied by overt racism and Islamophobia—would severely undermine the integrity of the criminal legal system. As this Court recently recognized, "[t]his must be a time not just of reflection but of action."[29] An institution cannot be "recommitt[ed] . . . to the systemic change needed to make equality under the law an enduring reality for all,"[30] and at the same time hold that a lawyer who publicly dehumanizes Black and Muslim people can adequately represent a client who is both Black and Muslim.

CONCLUSION

This Court should hold that Mr. Doyle harbored an actual conflict of interest with—and thus could not ethically represent—people of color and people of the Muslim faith, that Mr. Dew's right to conflict-free counsel was violated as a result, and that prejudice must be presumed. Mr. Dew's convictions should be reversed.

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[29] *Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020)*, Mass.gov (June 3, 2020), https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and-the-bar-june-3-2020.

[30] *Id.*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Mass R. App. P. 17 and 20(a), as this brief has been prepared using Microsoft Word Version 2211 in 14-point Times font and contains 7,497 words.

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CERTIFICATE OF SERVICE

Per Mass. R. App. P. Rule 13(e), I hereby certify that on January 18, 2023, I electronically filed the foregoing *Unopposed Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. and New England Innocence Project in Support of Appellant and Reversal* with the Clerk of the Court for the Supreme Judicial Court in *Commonwealth of Massachusetts v. Anthony Dew*, No. SJC-13356. Additionally, hard copies will be shipped to the Clerk's Office by a third-party commercial carrier, and two hard copies were shipped to counsel for each party listed below.

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