COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **No. 1584 CR 10164**

COMMONWEALTH

v.

ANTHONY DEW

COMMONWEALTH'S SUPPLEMENTAL RESPONSE TO THE DEFENDANT'S MOTION FOR A NEW TRIAL

The Commonwealth responds to the defendant's motion for a new trial by acknowledging that he has raised a substantial issue that warrants further proceedings but arguing that the existence of the offensive material at issue does not by itself warrant a new trial.

BACKGROUND

On March 11, 2015, a Suffolk County grand jury indicted the defendant on nineteen charges: (1-5) five counts of trafficking a person for sexual servitude, in violation of G. L. c. 265, § 50(a); (6) rape, in violation of G. L. c. 265, § 22(b); (7-8) two counts of assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A(b); (9) assault and battery, in violation of G. L. c. 265, § 13A; (10) possession of a Class A substance with intent to distribute, in violation of G. L. c. 94C, § 32(b); (11-16) six counts of distributing a Class A substance, in violation of G. L. c. 94C, § 32(a); and (17-19) three counts of distributing a Class B substance, in violation of G. L. c. 94C, § 32A(a).

At arraignment, on March 17, 2105, this Court appointed Attorney June Jensen to represent the defendant. On April 23, 2015, Attorney Jenson withdrew, and Attorney Joseph M. Perullo was appointed to replace her. On January 13, 2016, the defendant filed a motion to remove counsel. On February 19, 2016, the motion was allowed, and Attorney Richard M. Doyle was appointed to represent the defendant.

On June 1, 2016, the defendant entered into a plea agreement pursuant to which he pled guilty to all of the charges except rape (count 6). He was sentenced to concurrent terms of eight to ten years in prison, with 504 days of jail credit, on counts 1-4 & 10, followed by concurrent terms of seven years of probation on the remaining charges (counts 5, 7-9, & 11-19).

On July 2, 2021, the defendant, pro se, filed a motion for a new trial. On September 20, 2021, he filed a revised motion for a new trial with the assistance of counsel. On October 1, 2021, the defendant's pro se motion for a new trial was dismissed at his request.

On December 6, 2021, the Commonwealth filed a short response to the defendant's motion in which it conceded that the defendant has raised a substantial issue that warrants an evidentiary hearing. At this Court's request, the Commonwealth now supplements that original response with further argument.

ARGUMENT

The Commonwealth concedes that the social media posts by Attorney Doyle attached to the defendant's motion (Dem. Att. 001-024)[1] are shocking and profoundly disturbing. Most of them are crude and profane and perpetuate the worst negative stereotypes of Muslim people, Black people, and members of other marginalized groups.[2] The Commonwealth also agrees that "discrimination on the basis of race [or religion], 'odious in all aspects, is especially pernicious in the administration of justice.'" *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017) (quoting *Rose v. Mitchell*, 443 U. S. 545, 555 (1979)). Accordingly, the Commonwealth 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 justice." *Id.* at 867. Nonetheless, the Commonwealth disagrees with the defendant that Doyle's expressions of bigotry alone, without any evidence that they affected the defendant's case, automatically require reversal of the defendant's convictions.

In his affidavit, the defendant admits that he "had no idea that Attorney Doyle was a racist and a religious bigot" until long after he pleaded guilty in this case, when he learned about Doyle's social media posts (D. Aff. para. 6-7). In other words,

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[1] "Dem. Att." Herein refers to the attachments to the affidavit of CPCS Attorney Elizabeth Dembitzer, who compiled and described the social media posts at issue. "D. Memo" refers to the defendant's memorandum in support of his motion; and "D. Aff." refers to his affidavit in support of his motion.

[2] The posts run from March of 2014 to September of 2016, which includes the time Attorney Doyle was representing the defendant. They are described in detail in the defendant's memorandum (D. Memo. 2) and need not be described again here.

Doyle did nothing during the three months he was representing the defendant that led the defendant to doubt that Doyle was acting zealously in the defendant's best interests. This admission illustrates a fundamental flaw in the defendant's argument. 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. It is safe to say that most defense attorneys, like most lay people, are repulsed by murder, rape, and other serious crimes. Yet we expect defense attorneys to be able to put those feelings aside and perform their duties professionally.

> The Sixth Amendment does not demand that a criminal defendant and his counsel share a worldview—merely that the attorney loyally represent the client's interests. *See Morris v. Slappy*, 461 U.S. 1, 13, (1983). There are many reasons a lawyer may not like a client. Criminal defense attorneys are accustomed to representing individuals who commit reprehensible acts, and we assume that they can set aside any personal distaste for such clients during the representation. See *Von Moltke v. Gillies*, 332 U.S. 708, 725-26, (1948) (plurality op.) (remarking that the "[u]ndivided allegiance and faithful, devoted service to a client" demanded of counsel by the Sixth Amendment is nowhere more honorable than when "the accused [is] a member of an unpopular or hated group, or . . . charged with an offense which is peculiarly abhorrent"). An attorney's racial biases against a client need not be any different.

Ellis v. Harrison, 947 F.3d 555, 563-64 (9th Cir. en banc 2020) (Nguyen, J. concurring).[3]

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[3] In *Ellis*, the majority issued a short order reversing the district court's denial of the defendant's petition for a writ of habeas corpus on the ground that the Government had changed its position and now agreed that the judgment should be reversed. *Id.* at 555-56. Three justices joined in a long concurring opinion discussing the defendant's trial counsel's racism, *id.* at 556-64 (Nguyen, J. concurring); five justices joined in a short concurring opinion to rebut a point in the dissent, *id.* at

Attorney Doyle practiced law as a defense attorney in the Boston area for over twenty years, yet the defendant has not produced any evidence that Doyle ever let his personal prejudices affect his professionalism in court or his representation of any of his clients, much less his representation of the defendant himself. On the contrary, some of the social media posts at issue demonstrate how zealously Doyle advocated for his clients. In one, he brags that he "beat another gun case today" (Dem. Att. 016). In a comment to the same post, he says that his client (whose race is unspecified) was factually innocent and "not a bad guy" (Dem. Att. 016). In a comment to another post about a not-guilty verdict on a firearm charge, he brags that he "just saved years off the kid's ass" (Dem. Att. 18).

The only negative social media comment Doyle made about one of his clients pertained to a young "punk" who said, "I don't like you attitude, Doyle" (Dem. Att. 023).[4] Doyle responded that the client should "come back with a new lawyer or a toothbrush" (Dem. Att. 024). By all indications, this response was sparked by indignation rather than bigotry. Indeed, there is no evidence of this client's race or religion.

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564 (Watsford, J., concurring); and one justice dissented, *id.* at 565-74 (Callahan, J., dissenting).

[4] The defendant is incorrect in asserting that Doyle once endorsed a "description of his criminal defense work as 'bathing in filth'" (D. Memo. 6, 7). The commenter to whom Doyle was responding had said that Doyle would "bathe in filth ***as long as it's green***" (Dem. Att. 15) (emphasis added). In this context, the word "filth" plainly refers to money (*i.e.*, filthy lucre) rather than Doyle's clients.

In these circumstances, Doyle's expressions of racial and religious bigotry, as horrible as they were, do not require reversal of the defendant's convictions per se, without any consideration of the specific facts of this case.

> An attorney's racist statement outside the courtroom that has nothing to do with a client, though contemptible and potentially sanctionable, 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. See Sheri Lynn Johnson et al., Racial Epithets in the Criminal Process, 2011 Mich. St. L. Rev. 755, 785-86 (2011) (arguing that "[i]n general, unless [an attorney's racial] epithet is used to describe a criminal defendant, it should not trigger per se reversal" because "the point is whether or not the [attorney] has exhibited an intensity of bias that cannot be squared with race-neutral decision making" in a particular case).

Ellis, 947 F.3d at 563-64 (Nguyen, J. concurring) (footnote omitted). Here, as shown above, Doyle did not let his bigotry cross the line from social media to the courtroom. His misconduct thus stands in stark contrast to that of Ames, the defense attorney in *Ellis*, who openly disparaged people of color at every level of the justice system, from judges to his own clients.

> Ames' utter contempt for people of color infected his professional life as well [as his private life]. He openly expressed his belief that "[Black] people can't learn anything," and, referring to his legal secretary at the time, stated that "he was going to fire that dumb little nigger" if his former secretary would agree to come back to work for him. Ames more than once called the African American secretary a "dumb fucking bitch" to her face . . . . A fiscal clerk at the San Bernardino courthouse during Ellis's trials heard Ames employ "racist terms to characterize court personnel, his employees, and his clients." Even in the presence of a courthouse employee, Ames referred to an Asian American judge as a "fucking Jap" who should "remember Pearl Harbor." Sometime in the first half of 1991, Ames told another legal secretary that his African

> American co-counsel was "a big black nigger trying to be a white man." At the time, Ellis's co-defendant had an African American attorney.
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> Significantly, Ames openly expressed hostility to his clients who were minorities. At work, Ames would "consistently refer to his African American clients as 'niggers.'" In May 1990, Ames described a client who had been sentenced to death as a "nigger" who "got what he deserved." He said of another client, Isaac Gutierrez, that "he deserve[d] to fry." Ames was indifferent to his clients' fate due solely to their race, stating that he "did not care what happened to" a client "because his client was black."

Ellis, 947 F.3d at 557; *see also Frazer v. United States,* 18 F.3d 778, 783 (9th Cir. 1994) ("appointed lawyer call[ed client] to his face a 'stupid nigger son of a bitch' and . . . threaten[ed] to provide substandard performance for him if he cho[se] to exercise his right to go to trial"). As Ames' bigotry thus permeated his work in the justice system, it required a new trial. As shown above, Doyle's bigotry did not.

Three factors distinguish this case from *Commonwealth v. Frances Choy*, No. 0383CR00300, memorandum of decision and order on defendant's motion for post-conviction relief (Sept. 17, 2020), on which the defendant relies (D. Memo. 5).[5] First, the misconduct in *Choy* was committed by prosecutors, *see id.* at 12-17, who are held to a higher standard than defense attorneys. *See Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171, 172 (2021) ("The Constitution requires . . . that the government's conduct of the trial be free from all that is deliberately devious or inconsistent with the highest standards of professional conduct.") (quoting *Commonwealth v. Vaughn*, 32 Mass. App. Ct. 435, 435 (1992)). Second, the prosecutors in *Choy* used Asian stereotypes and anti-Asian slurs to refer to people

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[5] The *Choy* decision is attached to the defendant's motion as Exhibit 1.

involved in the case, including the defendant, the victims, and the prosecution's key witness. *See Choy* memorandum at 13-14. Third, several additional problems arose in *Choy* that called into question not only whether justice had been done but also whether the defendant was factually guilty. *See id.* at 8 & n.1, 17-45. None of those three factors is present in the case at bar.

There is also no merit to the defendant's analogies to cases involving racism expressed by jurors, a defendant's right to choose an attorney, and conflict of interest. On the contrary, the juror cases illustrate the Commonwealth's point. All of them involve statements allegedly made by jurors during a trail. *See, e.g.*, *Commonwealth v. McCowan*, 458 Mass. 461, 490-98 (2010) (juror's statement during deliberations that victim's injuries were consistent with "when a big black guy beats up on a small woman" did not require new trial); *Commonwealth v. Hart*, 93 Mass. App. Ct. 565, 567-71 (juror's joke on morning of trial date that it was "a good day for a hanging" was cured by excusing the juror and examining the remaining jurors to ensure they could still be impartial), *review denied*, 480 Mass. 1110 (2018). The defendant has not cited any case, nor is the Commonwealth aware of any, in which a new trial has been granted based on a statement made by a juror outside the context of the judicial system. As for the other two types of cases, the defendant concedes that he was not entitled to an appointed attorney of his choice (D. Memo, 5-6), and he has not cited any case in which an attorney's personal prejudices have been held to constitute a conflict of interest.

The Commonwealth ends as it began by decrying Doyle's social media posts. The defendant is right in calling them "deeply offensive," "morally reprehensible,"

"loathsome," and "dehumanizing." Nonetheless, further proceedings are needed to determine whether these horrible posts had any impact on this particular case.

Respectfully Submitted,
FOR THE COMMONWEALTH

KEVIN HAYDEN
District Attorney
for the Suffolk District

/s/ Paul B. Linn

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PAUL B. LINN
Assistant District Attorney
BBO#: 559194
One Bulfinch Place
Boston, MA 02114
(617) 619-4000
Paul.Linn@mass.gov

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CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury this 28th day of January, 2022, that I have served a copy of the within response on Ed Gaffney, counsel for the defendant, by email at edgaffneywriter@gmail.com.

/s/ Paul B. Linn

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PAUL B. LINN, A.D.A.