



POSITION ON PROPOSED LEGISLATION

BILL: SB 554 - Mitigation - Sex, Gender Identity, or Sexual Orientation
POSITION: INFORMATION
DATE: February 11, 2020

Whether certain facts or circumstances affect a given person to such a degree that their subjective consciousness is overridden by what is referred to as a “heat of passion,” and whether they then act in accord with that passion, is traditionally entrusted to the “trier of fact:” the judge or jury who are closest to the totality of evidence and arguments for and against the accused.

This area of the law can be referred to as the doctrine of “legally adequate provocation,” and is typically used, almost always unsuccessfully, to attempt to avoid conviction on a more serious offense. Legally adequate provocation requires provocation “calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason.” *Girouard v. State*, 321 Md. 532, 539, 583 A.2d 718, 722 (1991) (quoting *Carter v. State*, 66 Md. App. 567, 572, 505 A.2d 545, 548 (1986)). Most higher level or first degree crimes have a specific and focused level of *mens rea*, or intent component, while lesser included or lower degree offenses will typically have a *mens rea* of more general character. Legally adequate provocation argues that the mental cloud created by a heat of passion negatives any specific or calculated reasoning and thus makes a lower, more general level of intent crime more fitting to the facts.

In practice, deciding whether something constitutes legally adequate provocation is broken down into five factors that each must be satisfied:

- there must have been adequate provocation;
- the killing must have been in the heat of passion;

- it must have been a sudden heat of passion, i.e. the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool;
- there must have been a causal connection between the provocation, the passion, and the fatal act; and
- the individual to provoke the rage must also be the victim.

The defendant bears the burden of generating the issue of legally adequate provocation for consideration by a trier of fact. The State must then prove any one of the factors was not present beyond a reasonable doubt. In a cursory review of over 40 recent Maryland appellate cases where the issue of provocation was raised, not one successful use of the doctrine appears to have been indicated.

We recognize and decry the reality of abuse and irrational discrimination towards the LGBTQ+ community, both historical and contemporary, along with other marginalized and oppressed groups, but as legislators weigh this bill, it should be recognized that in our system of justice, it is the triers of fact, particularly juries made up of our peers, who have always had the legitimate role and power – and are best situated – to decide what society is prepared to accept as legally adequate under any given set of circumstances.



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