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The Honorable William C. Smith, Jr.  
Senate Judicial Proceedings Committee  
2 East  
Miller Senate Office Building  
Annapolis, MD 21401

### **Testimony of FreeState Justice**

#### **IN SUPPORT OF**

#### **SB0554: Crimes - Mitigation - Sex, Gender Identity, or Sexual Orientation**

To the Honorable Chair William C. Smith, Jr., Vice Chair Jeff Waldstreicher, and esteemed members of the Judicial Proceedings Committee:

FreeState Justice is Maryland's lesbian, gay, bisexual, transgender, and queer (LGBTQ) civil rights advocacy organization. Each year, we provide free legal services to dozens, if not hundreds, of LGBTQ Marylanders who could not otherwise be able to afford an attorney.

Despite significant advances in recent years, the LGBTQ community continues to be subjected to discrimination and violence at rates significantly above the state and national averages. From hazing and gaybashing to gruesome homicides, LGBTQ individuals often find themselves the targets of violence simply because of their sexual orientation or gender identity. But while the state of Maryland rightly treats these acts as hate crimes,<sup>1</sup> criminal defendants are nonetheless able to rely on a "queer panic" defense to mitigate their offenses.

The queer panic defense can take many forms, but prototypically claims that a criminal defendant's crimes are excused or justified because "his violent actions were in response to a (homo)sexual advance."<sup>2</sup> In effect, the defense argues that the

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<sup>1</sup> See Crim. Law § 10-301 et seq.

<sup>2</sup> Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 at 475 (2008).

victim's advances provoked the defendant, and that the defendant's homicide or assault is justified because a reasonable person would have reacted the same way had they been hit on by a queer person under the same circumstances.

In other cases, especially those involving transgender individuals, violence comes as a result of the defendant's, rather than the victim's, sexual advances. There, defendants claim that discovering the victim's transgender status "was so upsetting to the defendant that he panicked and lost self-control, and therefore he should be acquitted of murder and instead convicted of a lesser offense, such as voluntary manslaughter."<sup>3</sup> In many of these cases, the victim allegedly "provoked" the defendant not by making sexual advances on him, but by merely existing as a sexualized object.

Regardless of the specifics, however, the defense is manifestly unjust. It treats LGBTQ individuals as sexual deviants who deserve to die for simply existing, while privileging the feelings of the heterosexual, cisgender individuals who kill them.

More troublingly, in some cases the panic defense has been used as a sham defense where the defendant was well aware of the victim's sexual orientation or gender identity from the beginning. Indeed, this was the case in one of the earliest examples of a gay panic defense being used, the murder of William T. Simpson in Miami during a robbery in 1954.<sup>4</sup>

In other cases, defendants have used possibly sham panic defenses to excuse unrelated crimes, such as in the death of Monsignor Thomas Wells in Germantown, Maryland, in 2000. In that case, the defendant, Robert Paul Lucas, broke into the Mother Seton Catholic Church, where he encountered Wells. According to Lucas, Wells then came onto him and tried to coerce him into performing oral sex on Wells. Lucas did not raise this defense until weeks after his arrest, however; prosecutors argued more plausibly that Lucas had come across Wells while attempting to steal from the church. Regardless of whether Lucas invented his panic defense out of whole cloth, it worked: after considering the mitigation evidence, the jury convicted Lucas of second degree, rather than first degree, murder.<sup>5</sup>

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<sup>3</sup> Cynthia Lee, *Revisiting the Trans Panic Defense*, 57 AM. CRIM. L. REV. \_\_\_ (2020) (forthcoming).

<sup>4</sup> See "Death in Miami," *The Daily Mirror*, *The Los Angeles Times* (Nov. 20, 2010), available at <https://latimesblogs.latimes.com/thedailymirror/2010/11/death-in-miami.html>.

<sup>5</sup> See Susan Levine, "Priest's Killer Tells Court of Struggle," *The Washington Post* (May 31, 2001), available at

Unfortunately, panic defenses are not a thing of the past. W. Carsten Andresen, Assistant Professor of Criminal Justice at St. Edward's University, has identified at least 104 cases in which a queer panic defense has been used, though he notes that he is "certain there are hundreds of cases that I have yet to identify."<sup>6</sup>

Although queer panic defenses have been used across the country since at least the 1950s,<sup>7</sup> Professor Andresen notes that it is difficult to state how frequently the defenses are used because the cases are not tracked in a systemic way, either by the state or federal government. The FBI data on homicides, for instance, does not track the sexual orientation or gender identity of the victim.<sup>8</sup> Likewise, judicial databases do not track every defense raised at every criminal trial, and, regardless, would miss cases that never made it to trial, in which panic defenses were raised prior to or as part of a plea bargain.

But while we do not know the scope of uses of the panic defense, we do know the scope of violence against LGBTQ Marylanders. According to the Maryland State Police 2017 Hate/Bias Report, of 183 verified hate crimes committed in 2017, 21 were committed based on the victim's sexual orientation, with an additional 12 based on the victim's gender identity.<sup>9</sup> In 2019, at least three black trans women

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<https://www.washingtonpost.com/archive/local/2001/05/31/priests-killer-tells-court-of-struggle/1c35ac03-f659-475a-85c7-87919780e523/>.

<sup>6</sup> W. Carsten Andresen, "I track murder cases that use the 'gay panic defense,' a controversial practice banned in 9 states," *The Conversation* (Jan. 29, 2020), available at <http://theconversation.com/i-track-murder-cases-that-use-the-gay-panic-defense-a-controversial-practice-banned-in-9-states-129973>.

<sup>7</sup> See Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471 at 489-521 (2008).

<sup>8</sup> See W. Carsten Andresen, "I track murder cases that use the 'gay panic defense,' a controversial practice banned in 9 states," *The Conversation* (Jan. 29, 2020), available at <http://theconversation.com/i-track-murder-cases-that-use-the-gay-panic-defense-a-controversial-practice-banned-in-9-states-129973>.

<sup>9</sup> Maryland State Police, State of Maryland 2017 Hate/Bias Report (Sept. 1, 2018) at 5, available at <http://www.mcac.maryland.gov/resources/2017%20Maryland%20Hate%20Bias%20Report.pdf>.

were killed in Maryland: Ashanti Carmon<sup>10</sup> and Zoe Spears<sup>11</sup> in Fairmount Heights, Prince George’s County, and Bailey Reeves in Baltimore.<sup>12</sup>

These deaths, and others like them across the country, have left many LGBTQ Marylanders, especially transgender Marylanders, feeling under attack. And yet, those who would do violence to us are still able to justify that violence by relying on the panic defense in its various forms.

It’s time for Maryland to close this loophole and join the nine states that have already banned the panic defense.

For this reason, FreeState Justice urges a favorable report on Senate Bill 554.

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<sup>10</sup> See Tim Fitzsimons, “She did not deserve that’: Trans woman fatally shot in Maryland,” *NBC News* (April 1, 2019), available at <https://www.nbcnews.com/feature/nbc-out/she-did-not-deserve-trans-woman-fatally-shot-maryland-n989751>.

<sup>11</sup> See Natalie Delgadillo, “Community Mourns Zoe Spears, Second Trans Woman Killed on Eastern Avenue This Year,” *DCist* (June 17, 2019), available at <https://dcist.com/story/19/06/17/community-mourns-zoe-spears-second-trans-woman-killed-on-eastern-avenue-this-year/>.

<sup>12</sup> See “At vigil for transgender teen killed in Baltimore, LGBTQ community stresses unity in face of violence,” *The Baltimore Sun* (Sept. 6, 2019), available at <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-17-year-old-transgender-teen-killed-20190907-dvsu63crwjf7pmqtiub3rzxl3e-story.html>.