



2526 SAINT PAUL STREET  
BALTIMORE, MD 21218  
TEL (410) 625-LGBT (5428)  
FAX (410) 625-7423  
[www.freestate-justice.org](http://www.freestate-justice.org)

C.P. Hoffman  
Legal Director  
[cphoffman@freestate-justice.org](mailto:cphoffman@freestate-justice.org)

February 4, 2021

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

#### **SB46: Crimes – Mitigation – Race, Color, National Origin, Sex, Gender Identity, or Sexual Orientation**

To the Chair, Vice Chair, 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 victim’s advances provoked the defendant, and that the defendant’s homicide or

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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).

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, the Maryland judiciary does not track instances in which defenses are raised at every criminal trial, nor do commercial legal databases such as Westlaw or Lexis Nexis. Even if they did, however, these databases would still miss the significant number of cases that never made it to trial. The large percentage of cases that end with a plea bargain means many cases never reach a stage where a panic defense can be recorded on the official record, even if it has been and would continue to be used in private negotiations with the office of the state's attorney.

Due to this, tracking the use of the panic defense has fallen to impartial private individuals, legal practitioners, and academics, primarily through reviews of media reports and reports from legal practitioners.<sup>9</sup> According to such analyses, there have been at least four cases in which the panic defense has been used in Maryland. Despite the various outcomes in convictions and sentencing, these cases demonstrate that even in Maryland, we have seen the use of this courtroom tactic achieve some degree of success.

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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> See *id.*

***Dykes v. State*, 319 Md. 206 (1990)**

Jon Carlton Dykes killed Dwight Lee Landon in Landon's home in Somerset County, stabbing him over 200 times with two separate knives. Over a two hour interrogation, Dykes offered three separate stories for the killing: 1) that Landon had kidnapped him at gunpoint, taken him to his home, and threatened to sexually assault him, forcing Dykes to kill him in self-defense; 2) that Dykes had voluntarily gone to Landon's house to purchase cocaine, but the two ended up in a knife fight after Dykes walked in on Landon masturbating; and 3) that the two ended up in a knife fight after Dykes walked in on Landon masturbating *and* Landon propositioned him.

At trial, Dykes was convicted of second degree murder. That conviction was later overturned by the Court of Appeals in 1990 on the grounds that the trial judge had not properly instructed the jury on perfect and imperfect self-defense. Per the Court of Appeals, by determining that the defenses of perfect and imperfect self-defense did not apply, the trial judge improperly assumed the jury's role as finder of fact.

Subsequently, on retrial, once again assessing the perpetrator's own various stories of the activities that led up to the killing, Dykes was once again found guilty of second degree murder.

***State v. Lucas*, Circuit Court for Montgomery County #00-6039-11815-3 (2000)**

In June 1999, Robert Paul Lucas entered the Mother Seton Roman Catholic Church in Germantown by force, where he then encountered Monsignor Thomas Wells, ultimately stabbing the priest nearly a dozen times until he was dead. According to the story told by Lucas at trial, Monsignor Wells initially welcomed him to the church and later allegedly made sexual advances, attempting to coerce Lucas into performing oral sex on him. Lucas then claimed that he reacted in a violent panic, before leaving the church with a variety of stolen goods, including over \$800 in cash and the priest's watch.<sup>10</sup>

At trial, prosecutors attempted to emphasize that Lucas had not claimed Monsignor Wells had come on to him until months after the killing. Nonetheless, the jury, after

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<sup>10</sup> See Susan Levine, "Priest's Killer Tells Court of Struggle," *The Washington Post* (May 31, 2001), available at <https://www.washingtonpost.com/archive/local/2001/05/31/priests-killer-tells-court-of-struggle/1c35ac03-f659-475a-85c7-87919780e523/>.

considering the mitigation evidence and Lucas's own account of the excuse for the killing, convicted Lucas of second degree, rather than first degree, murder.

***State v. Allen, Circuit Court for Charles County #08-K-02-000161 (2002), Allen v. State, Court of Special Appeals No. 02268 (2004)***

In October 2001, Jeffrey Allen met John Butler in a gay cruising area in Washington, DC, before traveling with him to Butler's cabin in Charles County, where he stabbed him multiple times ultimately killing him. After meeting for the first time, the pair had sex and may have engaged in recreational drug use. The next morning, Allen became upset when Butler was not getting up quickly enough to take him home. After Allen stated he would take Butler's keys and drive himself home, Butler got up and approached Allen to calm him down. At this point, Allen grabbed a kitchen knife and stabbed Butler multiple times, killing him, and took the car. Allen subsequently crashed Butler's car into a ditch, after which time he presented himself to the police.

Despite the facts of the case suggesting a consensual sexual relationship turning violent, Allen raised a panic defense at trial. This instant case again shows an admitted murderer using the excuse of the gay panic defense as the decedent cannot present contradictory evidence. The defense was ultimately unsuccessful, and Allen was found guilty of first degree murder.

***State v. Gonzalez, Circuit Court for Montgomery County # 05-6038-14591-4 (2005), Gonzalez v. State, Court of Special Appeals No. 2003 (2008)***

On the night of October 30, 2005, Tomas Gonzalez met Dung Tri Dao after a night out of heavy drinking. According to Gonzalez, the two went to a restaurant, where they drank further, before Gonzalez blacked out. Gonzalez testified that when he came to, Dao was pulling down his pants. Gonzalez claims the two then struggled, and he ultimately hit Dao with a nearby rock. Forensic evidence suggested that Dao had been hit repeatedly in the head with the rock, including after he was already on the ground. After the incident, Gonzalez made his way to a nearby gas station, where he asked the attendant to call 911.

At trial, Gonzalez testified that he had he had panicked as a result of believing his life was at risk and that Dao was planning to rape him. His attorney sought to introduce statements made to the gas station attendant as excited utterances to establish his panicked state, but the Circuit Court excluded them, while permitting Gonzalez to present a defense of self-defense. The jury ultimately convicted Gonzalez of intentional manslaughter, rather than second degree murder. The conviction was subsequently upheld by the Court of Special Appeals.

### ***State v. Harton, Circuit Court for Howard County #13-K-05-044768 (2007)***

Two married women known to have been close friends in a clinical psychology doctoral program at Loyola College spent a spring break evening in a drinking spree when Melissa Burch Harton strangled the other with her bare hands dumping Natasha Bacchus' half-clothed body by a local pool before dawn. During questioning, the killer presented various stories to the police including an imagined abduction by a half-dozen men and a fictitious affair with an abusive man. After several hours, Harton admitted to the killing yet claimed the death by strangulation was accidental.

Harton's counsel claimed successfully before the jury that Harton was only defending herself against Bacchus attack that may have been motivated by a sexual advance, unrequited lesbian affection, a deep fear of abandonment, or even a secret hatred. While prosecutors attempted to press for a first-degree conviction, defense lawyers argued for a full acquittal, and the jury ultimately convicted Harton of involuntary manslaughter.

After the two week trial, Harton said to the press, "I'm so relieved, I now will have a life to live."<sup>11</sup> Sentenced to ten years, after two years and 177 days time served, Harton pled guilty to involuntary manslaughter, which is not considered to be a violent crime, and was freed as a judge suspended the remainder of her sentence.

### **Violence Against LGBTQ+ Marylanders**

While we cannot fully quantify 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>12</sup> In 2019, at least three black trans women were killed

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<sup>11</sup> Amit R. Paley, "Md. Woman Convicted of Killing Female Friend," *The Washington Post* (Feb 11, 2006), available at <https://www.washingtonpost.com/archive/local/2006/02/11/md-woman-convicted-of-killing-female-friend/fdd1b5c2-e61c-45e1-baf1-db2d8d84cff2/>.

<sup>12</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>.



in Maryland: Ashanti Carmon<sup>13</sup> and Zoe Spears<sup>14</sup> in Fairmount Heights, Prince George's County, and Bailey Reeves in Baltimore.<sup>15</sup> In 2020, they were joined by Johanna Metzger, who was killed in Baltimore in April.<sup>16</sup>

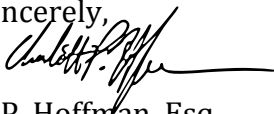
These deaths, and others like them across the country, have left many LGBTQ+ Marylanders, especially transgender Marylanders, feeling under attack. And yet, those who would do violence to us are still able to justify that violence by relying on the panic defense in its various forms.

The shocking level of violence against the LGBTQ community continues, and it is vital that Maryland acts now to prevent those who would hurt us from using our identity as their excuse. Passing this bill into law keeps killers from using their own alleged "panic" as justification for their violence. The "panic" defenses, even if not widely documented, is widely used, and undermines the human dignity and self-worth of LGBTQ Marylanders.

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 SB46.

Sincerely,



C.P. Hoffman, Esq.

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<sup>13</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>14</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>15</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>.

<sup>16</sup> See Michelle Siegel, "Transgender Woman Stabbed to Death in Baltimore," *The Washington Blade* (Apr. 17, 2020), available at <https://www.washingtonblade.com/2020/04/17/transgender-woman-stabbed-to-death-in-baltimore/>.