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the lgbt bar association of greater new york

June 15, 2018

The Honorable Daniel J. O'Donnell
Legislative Office Building, 712
Albany, NY 12248

Dear Assembly Member O'Donnell:

Re: **Assembly Bill A05001**

The LGBT Bar Association of Greater New York (LeGaL) was one of the nation's first bar associations of the lesbian, gay, bisexual, and transgender legal community. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community and promoting the expertise and advancement of LGBT legal professionals.

We write to express our support for Senate Bill S50, which would restrict the nature of extreme emotional disturbance as an affirmative defense to the charge of murder in the second degree under the New York Penal Law to exclude non-violent sexual advances or sudden discovery of a person's sexual orientation or gender identity. These so-called "gay panic" or "trans panic" defenses in our criminal justice system use the sexual orientation or gender identity of homicide victims to explain or excuse a defendant's intent to kill them. Senate Bill S50 seeks to affirmatively ban the use of these "defenses," which perpetuate violence against lesbian, gay, bisexual, and transgender individuals, and to codify that their lives are just as valuable as those lives of other New Yorkers.

In 2016, more than 1,300 hate crimes based on sexual orientation and gender identity were reported to the Federal Bureau of Investigation by local law enforcement agencies.[1] Our local agencies reported 123 hate-based incidents against LGBT New Yorkers in that year alone, up from 107 the year prior.[2] Issues with underreporting to law enforcement by LGBT crime

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1 *See* Fed. Bureau of Investigation, U.S. Dep't of Justice, Hate Crime Statistics (2016), *available at* https://ucr.fbi.gov/hate-crime/2016.

2 *Id.*

victims means the number of incidents is likely to be much higher.[3] While the state legislature has worked to address criminal conduct based on bias and prejudice—including conduct targeting sexual orientation and gender identity—with the passage of the Hate Crimes Act of 2000,[4] violence against LGBT New Yorkers continues throughout the state.[5]

The Hate Crimes Act increases the severity of a specific offense motivated by bias.[6] For example, assault in the third degree, normally a class A misdemeanor, when motivated by bias, becomes a class E felony.[7] Yet, while our Penal Law recognizes a heightened penalty for certain offenses motivated by hate based on sexual orientation, gender identity, and other protected classes, gay and trans panic defenses remain valid defenses under New York case law. These defenses promote violence against LGBT people by offering a *lesser* punishment to their killers.

While gay and trans panic defense theories are not themselves codified under the Penal Law, they are used in conjunction with New York's extreme emotional disturbance defense to murder in the second degree. In New York, a person is guilty of murder in the second degree when, "[w]ith intent to cause the death of another person, he causes the death of such person or of a third person."[8] In addition, it is an affirmative defense to second degree murder when:

> [t]he defendant acted under the influence of extreme emotional disturbance for which there was a ***reasonable explanation or excuse***, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime[.][9]

"Extreme" emotional disturbance "preludes mere annoyance or unhappiness or anger, but requires disturbance ***excessive and violent in its effect*** upon the defendant experiencing it" and causing a "significant mental trauma."[10] Used in conjunction with the extreme emotional

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3 *See* James J. Nolan & Yoshio Akiyama, *An Analysis of Factors That Affect Law Enforcement Participation in Hate Crime Reporting,* 15 J. Contemp. Crim. Just. J. 111, 114 (1999).

4 N.Y. Penal Law § 485.00 *et seq*.

5 For example, in Kings County, New York's most populous county, "nearly half" of the cases handled by the District Attorney's Office's Hate Crimes Unit "involve incidents wherein a member of the LGBTQ community has been targeted." The Brooklyn District Attorney's Office, Civil Rights Bureau & Hate Crimes Unit, http://brooklynda.org/civil-rights-bureau/ (last visited May 24, 2018).

6 *See* N.Y. Crim. Proc. Law § 485.10.

7 See N.Y. Crim. Proc. Law § 485.10(2).

8 N.Y. Penal Law § 125.25(1).

9 N.Y. Penal Law § 125.25(1)(a) (emphasis added).

10 *People v. Patterson*, 39 N.Y.2d 288, 293–303 (1976) (emphasis added) (internal quotation marks omitted).

disturbance defense to second degree murder, gay and trans panic defenses seek to provide a "reasonable explanation or excuse" for the defendant's intent to kill.[11] Accordingly, New York courts currently equate unwanted same-sex sexual advances to "excessive and violent" conduct causing "significant mental trauma."[12]

On September 25, 2003, Mickey Cass strangled and killed his roommate, Victor Dombrova, in their Brooklyn apartment.[13] The defendant admitted to the killing, and told police that he "just lost it" when the victim grabbed his genitals and made sexual advances towards him during an argument.[14] The defendant also admitted to strangling and killing another man, Kevin Bosinski, in Buffalo the year prior.[15] Cass and Bosinski met at a bar, after which Cass slept at Bosinski's apartment.[16] When the defendant woke up, the victim was on top of Cass, "kissing and grabbing him."[17] Cass told police that he "completely lost control" and strangled Bosinski.[18]

At the trial of the Dombrova murder, Cass raised extreme emotional disturbance as an affirmative defense, "claiming his violent response to Dombrova's unexpected sexual advances was due to mental illness caused by protracted sexual abuse he suffered as a child."[19] The trial court allowed the prosecution to introduce evidence of Cass's strangulation of Bosinski to rebut Cass's gay panic defense, because it showed that he "had a premeditated intent to target gay men for violence."[20] Although the jury ultimately rejected Cass's defense and convicted him of murder in the second degree, had he been successful, Cass's second-degree murder charge would have been reduced to first-degree manslaughter, which can carry a much lighter sentence.[21]

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11 *See, e.g., People v. Foster*, 159 A.D.2d 801, 553 N.Y.S.2d 489, 490 (1990) ("The jury, finding [the statement that a fight ensued after defendant rebuffed the victim's homosexual advance] credible, could have determined that defendant was so offended by Biller's advance that he acted under extreme emotional disturbance."); *People v. Spaich*, 259 A.D.2d 996, 688 N.Y.S.2d 324 (1999) (defendant who stabbed neighbor with a hunting knife after the neighbor made "homosexual advances toward him" raised affirmative defense that he had acted under the influence of extreme emotional disturbance).

12 *Patterson*, 39 N.Y.2d at 293–303.

13 *People v. Cass*, 18 N.Y.3d 553, 556 (2012).

14 *Id.*

15 *Id*.

16 *Id.*

17 *Id*. at 557.

18 *Id*.

19 *Id*. at 558.

20 *Id.* at 563.

21 *Id*. at 557.

In some cases, defendants have been allowed to introduce evidence of a victim's prior same-sex sexual conduct to support a defense of extreme emotional disturbance.[22] Thus, even if the defense is ultimately unsuccessful, it may nonetheless allow defendants to use the public's perception of gay people as sexual predators and deviants by showing juries evidence of prior sexual conduct,[23] which is typically barred in most cases under the Criminal Procedure Law.[24]

More recently, on August 17, 2013, Islan Nettles met James Dixon on the streets in Harlem.[25] Dixon started flirting with Nettles, unaware that she was a transgender woman.[26] When Dixon's friends started mocking him, Dixon became enraged and struck Nettles, causing her to fall to the ground.[27] Evidence indicated that she was repeatedly struck while lying on the pavement, and that her head had been rammed into the pavement.[28] Five days after the incident, Nettles died as a result of her injuries at age 21.[29]

Dixon later told police officers that he "just didn't want to be fooled," and that he had gone into "a blind fury" when he discovered that Nettles was transgender.[30] On the eve of trial, Dixon pled guilty to manslaughter in exchange for a promised sentence of 12 years in prison, out of a maximum sentence of 25 years.[31]

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22 *See People v. Childs*, 161 Misc. 2d 749, 753, 615 N.Y.S.2d 232 (Sup. Ct. Bronx County 1994) ("Barring the evidence of the deceased's prior [homo]sexual conduct in this case would abridge the defendant's constitutional right to adduce evidence in his own defense. This is especially true in this case where the defendant claims that he suffered extreme emotional disturbance as a result of alleged unwanted sexual advances by the deceased. If believed, this evidence could lend support to the defense allegations.").

23 *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 566 (2008) ("There is no question that when murder defendants argue gay panic, they seek to tap into deep-seated biases against and stereotypes about gay males as deviant sexual predators who pose a threat to innocent young heterosexual males.").

24 *See* N.Y. Crim. Proc. Law § 60.43 ("Evidence of the victim's sexual conduct, including the past sexual conduct of a deceased victim, may not be admitted in a prosecution for any offense, attempt to commit an offense or conspiracy to commit an offense defined in the penal law unless such evidence is determined by the court to be relevant and admissible in the interests of justice, after an offer of proof by the proponent of such evidence outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination.").

25 James C. McKinley Jr., *Brooklyn Man Pleads Guilty in Transgender Woman's 2013 Death*, N.Y. Times, Apr. 4, 2016, https://www.nytimes.com/2016/04/05/nyregion/brooklyn-man-james-dixon-pleads-guilty-to-manslaughter-in-transgender-womans-death.html.

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*.

Islan Nettles was not only transgender but also a poor woman of color.[32] Prior to her brutal death, Nettles had only recently been "out" as trans, had gotten a job at H&M and her own apartment, and was starting her own fashion line.[33] Her life was taken away just as it was starting.

Because Dixon was charged with first degree manslaughter, rather than second degree murder, invoking the defense of extreme emotional disturbance would not have reduced the top charge and potential sentence. Nonetheless, Dixon's attempt to justify killing Nettles after discovering her gender identity is reflective of a system that endorses a blame-shifting strategy upon which those accused of LGBT murder think they can rely in order to rally the anti-LGBT biases of judges and juries and mitigate their perceived culpability.

In addition to their harm to the LGBT community, gay and trans panic defenses also lack any basis in medical or scientific fact. The gay panic defense derives from a psychological disorder called "homosexual panic disorder," coined in 1920 by Edward Kempf.[34] Homosexual panic disorder was said to cause heterosexual-identified people with same-sex attraction to experience anxiety, helplessness, and passivity.[35] The trans panic defense derives from the gay panic defense, having its roots in patriarchy and heteronormativity.[36] Homosexual panic disorder was stripped of any legitimacy by the American Psychiatric Association since 1973,[37] has never been said to cause patients to respond to homosexual advances with violence, and has never been an appropriate defense to murder.

In 2013, the American Bar Association unanimously called for legislative action to curtail the availability and effectiveness of the gay and trans panic defenses.[38] Since the ABA issued its resolution, one or both defenses have already been abolished in California (2014)[39] and

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32 Yanan Wang, *The Islan Nettles Killing: What the Trial Means to a Transgender Community Anxious for a Reckoning*, The Washington Post, Apr. 4, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/04/04/the-islan-nettles-killing-what-the-trial-means-to-a-transgender-community-anxious-for-a-reckoning/?noredirect=on&utm_ term=.b42db36dc946.

33 *Id*.

34 Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 Law & Sexuality: Rev. Lesbian & Gay Legal Issues 81, 82 (1992).

35 *Id.*, at 86.

36 *See* Aimee Wodda & Vanessa R. Panfil, *"Don't Talk to Me About Deception": The Necessary Erosion of the Trans* Panic Defense*, 78 Alb. L. Rev. 926, 940–41 (2014/2015).

37 Christina Pei-Lin Chen, Note: *Provocation's Privileged Desire: The "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 Cornell J.L. & Pub. Pol'y 195, 202 (2000).

38 AM. BAR ASS'N, RESOLUTION 113A AND REPORT 1 (2013), *available at* http://lgbtbar.org/wp-content/uploads/2014/02/Gay-and-Trans-Panic-Defenses-Resolution.pdf.

39 Cal. Penal Code § 192(f)(1) ("[T]he provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant[.]").

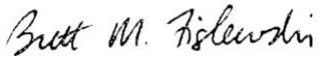
Illinois (2017).[40] LeGaL agrees with the American Bar Association that these "defenses" have no place in our criminal justice system, which is often viewed as a model for other states. The availability of these defenses in our system sends a message to LGBT New Yorkers—that their lives are not equal.

The enactment of Senate Bill S50 would add the following language to New York's extreme emotion disturbance defense: "*A non-violent sexual advance or the discovery of a person's sexual orientation or gender identity does not constitute a 'reasonable explanation or excuse' as used in this paragraph.*"[41]

Gay and trans panic defenses run afoul of New York's anti-hate legislation enacted nearly two decades ago. Passage of this proposed legislation will alleviate this irreconcilable inconsistency in our criminal justice system and help ensure that those who commit violent acts are unable to profit from unconscious public biases against LGBT people and escape justice. LGBT New Yorkers should not have to live in fear that being out could provide justification for violence against them. It is time for New York to join other states in adopting similar legislation. On behalf of our association and the communities we serve, I urge your effort in ensuring the passage of Senate Bill S50.

Sincerely,

Eric Lesh
Executive Director



Brett Figlewski
Legal Director

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40 720 Ill. Comp. Stat. 5/9-1(c) ("[A]n action that does not otherwise mitigate first degree murder cannot qualify as a mitigating factor for first degree murder because of the discovery, knowledge, or disclosure of the victim's sexual orientation[.]"); 720 Ill. Comp. Stat. 5/9-2(b) ("[A]n action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim's sexual orientation[.]").

41 *See* AM. BAR ASS'N, at 13 ([L]egislatures should specify that neither a non-violent sexual advance, nor the discovery of a person's sex or gender identity, constitutes legally adequate provocation to mitigate the severity of any non-capital crime. Such an exception would be consistent with the holdings of state supreme courts that have expressly rejected non-sexual advances as a basis for provocation, and with similar categorical exceptions adopted by other state legislatures.") (footnotes omitted).