STATE OF MICHIGAN

IN THE COURT OF APPEALS

People of the State of Michigan,

Plaintiff-Appellee,

v.

Court of Appeals No. 338238
Lower Court No. 16-001862-01-FH

Jeffrey Martin Six,

Defendant-Appellant.
_____/

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN & LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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INTEREST OF AMICI CURIAE

The ACLU of Michigan is the Michigan affiliate of the American Civil Liberties Union, a nationwide, nonprofit organization with over 1.75 million members nationwide and over 40,000 members in Michigan. The ACLU is dedicated to defending the Bill of Rights embodied in the United States Constitution and has litigated hundreds of cases in Michigan's state and federal courts as a plaintiff, on behalf of plaintiffs, and as *amici curiae*. The ACLU of Michigan is frequently involved in litigation involving constitutional protections, including those concerning the due process and equal protection rights of lesbian, gay, bisexual, and transgender ("LGBT") persons. Since 2001, the ACLU of Michigan has had a legal project devoted specifically to LGBT rights in order to foster a society in which LGBT people and people with HIV/AIDS enjoy the basic rights of equality, privacy and personal autonomy, and freedom of expression and association. The communities the ACLU of Michigan's LGBT Project represent depends on a fair and impartial judicial system to enforce their constitutional and other rights.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of LGBT people, and everyone living with HIV through impact litigation, education, and public policy work. Founded in 1973, Lambda Legal works across the country to challenge the systemic bias and discrimination LGBT and HIV-affected communities face, and in 2005, established a Fair Courts Project to expand access to justice in the courts for these communities and to support judicial independence and diversity. Lambda Legal has appeared as *amici curiae* in the Eleventh Circuit Court of Appeals in *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017) (specific *voir dire* as to bias based on sexual orientation required where sexual orientation is inextricably bound up with the issues at trial), the Ninth Circuit Court of Appeals in *Smithkline*

Beecham Corp. v. Abbott Laboratories, 740 F.3d 471(9th Cir. 2014) (classifications based on sexual orientation are subject to heightened scrutiny and equal protection prohibits peremptory strikes based on sexual orientation), and the California Court of Appeal, Third District in *People v. Douglas*, 22 Cal.App.5th 1162 (Ct. App. 2018) ("mixed motive" analysis, which considers whether a party who exercises a peremptory challenge against a prospective juror for an invidious reason may also have had one or more legitimate reasons for challenging that juror, is inapplicable when considering remedy for invidious discrimination in jury selection). The communities Lambda Legal represents depend upon a fair and impartial judicial system to enforce their constitutional and other rights.

SUMMARY OF ARGUMENT

Lesbian, gay, bisexual, and transgender people have suffered a long history of discrimination and exclusion based on invidious stereotypes.[1] This prejudice is reflected in the nation's courtrooms and is particularly harmful in the context of jury selection, as it reinforces historical prejudice in the court system, interferes with litigants' right to a fair trial, and undermines the integrity of the judicial system.

The United States Constitution guarantees a criminal defendant the right to a fair trial and impartial jury. "Among the most essential responsibilities of defense counsel is to protect their

[1] This case is about sexual orientation bias, which often confronts lesbian, gay, and bisexual people in the judicial system. Transgender people also face pernicious bias within the court system, on the basis of their gender identity. *See* Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client,* 66 Tex. Bar J. 558, 561 (2003) (stating that "potential jurors have openly admitted to anti-transgender prejudice"); *see also* Am. Bar Ass'n, Res. 113A (2013), archived at http://perma.cc/ZJ4M-FH73 (ABA resolution which, inter alia, urges governments to curtail the availability and effectiveness of trans panic defenses by requiring courts to give jury instructions regarding gender identity bias).

client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." *Holder v Palmer*, 588 F3d 328, 338 (CA 6, 2009) (quoting *Miller v Francis*, 269 F3d 609, 615 (CA 6, 2001)). A *voir dire* process that fails to adequately assess whether potential jurors have any prejudice that would impact their decisions fails to protect the litigants' right to a fair trial and impartial jury. *See Ham v South Carolina*, 409 US 524, 527; 93 S Ct 848, 850; 35 L Ed 2d 46 (1973); *Dellinger v United States*, 472 F 2d 340, 367 (CA 7, 1972). Accordingly, courts must allow specific questioning during *voir dire* when "there is a reasonable possibility that a particular prejudice might . . . influence[] the jury." *Rosales-Lopez v United States*, 451 US 182, 191 (1981). In determining whether there is a "reasonable possibility" of prejudice, courts must consider whether there is (1) a "potentially prejudicial issue" that (2) is "inextricably bound up with the conduct of the trial." *See Berthiaume v Smith*, 875 F3d 1354, 1358 (CA 11, 2017). This case meets that standard—juror bias about the defendant's sexual orientation was potentially prejudicial, and inextricably bound up with the conduct of the trial. Therefore, there was a reasonable possibility of prejudice and the trial court should have allowed specific questioning regarding sexual orientation bias.

Not only did the trial court fail to abide by the constitutional requirements outlined above, it also failed to follow additional *voir dire* requirements imposed by the state. The Michigan Supreme Court has held that a trial court "abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441, 447 (1994). The trial court's failure to question potential jurors regarding sexual orientation bias, which deprived defense counsel of the ability to intelligently exercise challenges, was an abuse of discretion.

In sum, the trial court's refusal to conduct *voir dire* regarding sexual orientation bias violated Mr. Six's constitutional rights to a fair trial and an impartial jury, and was an abuse of discretion under well-established Michigan law. This Court should reverse.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO QUESTION JURORS REGARDING POTENTIAL SEXUAL ORIENTATION BIAS WAS UNCONSTITUTIONAL.

a. The U.S. Constitution requires courts to permit *voir dire* regarding specific issues that are (1) potentially prejudicial, and (2) inextricably bound up with the conduct of the trial.

A criminal defendant has an absolute constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *Duncan v Louisiana*, 391 US 145 (1988); *People v Miller*, 411 Mich 321, 326 (1981). Defendants are also entitled to fairness in the judicial process—a right embodied in the Due Process Clause of the Fourteenth Amendment. *Ham v South Carolina*, 409 US 524, 527; 93 S Ct 848, 850; 35 L Ed 2d 46 (1973); *see also Lisenba v California*, 314 US 219, 236; 62 S Ct 280, 290; 86 L Ed 166 (1941) (aim of Due Process is "to prevent fundamental unfairness" at trial). Thorough and probing *voir dire* of potential jurors plays an indispensable role in securing these twin constitutional guarantees.

The purpose of *voir dire* is to elicit enough information for development of a reasonable justification for excluding those who are not impartial from the jury. *People v Brown*, 46 Mich App 592, 594 (1973); *People v Harvey*, 167 Mich App 734, 742 (1988). This vital process takes on constitutional proportions in two respects. First, "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez*, 451 US at 188. Second, *voir dire* regarding potential biases or

prejudices helps to ensure "the essential fairness required by the Due Process Clause of the Fourteenth Amendment." *See Ham*, 409 US at 527.

While judges have broad discretion to determine the scope and method of *voir dire*, it is well settled that its inquiry "must be conducted in thorough, competent, and complete fashion . . . with sufficient thoroughness that the duty to learn a prospective juror's past history and personal prejudices is fulfilled." *Vezina v Theriot Marine Serv*, 610 F2d 251, 252 (CA 5, 1980). A *voir dire* process that does not provide "reasonable assurance that prejudice would be discovered" fails to protect a party's right to an impartial jury. *Dellinger v United States*, 472 F2d 340, 367 (CA 7, 1972). Moreover, a court's discretion to determine the scope and method of *voir dire* is circumscribed in cases that "present circumstances in which an impermissible threat to the fair trial guaranteed by due process is posed by a trial court's refusal to question prospective jurors" about biases or prejudices. *See Ristaino v Ross*, 424 US 589, 595; 96 S Ct 1017, 1021; 47 L Ed 2d 258 (1976).

Accordingly, courts must allow specific questioning during *voir dire* when "there is a reasonable possibility that a particular type of prejudice might . . . influence[] the jury."[2] The "critical factor" in making this determination is whether (1) there is a "potentially prejudicial issue" (2) which is "inextricably bound up with the conduct of the trial." *See Berthiaume v Smith*, 875 F3d 1354, 1358 (CA 11, 2017).

[2] Some courts have stated this principle as requiring specific questioning when there is a "constitutionally significant likelihood" of juror prejudice. Regardless of how the principle is stated, the standard is the same: courts must allow *voir dire* on potentially prejudicial issues that are inextricably bound up with the conduct of the trial. *See Berthiaume v Smith*, 875 F3d 1354, 1358 (CA 11, 2017).

This rule has its genesis in two Supreme Court cases—*Ham v South Carolina*, 409 US 524, and *Ristaino v Ross*, 424 US 589. In *Ham*, the Supreme Court held that a trial court's refusal to question potential jurors about racial prejudice was unconstitutional:

> South Carolina law permits challenges for cause, and authorizes the trial judge to conduct voir dire examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the jurors interrogated on the issue of racial bias."

See Ham, 409 US at 527. Three years later, the Supreme Court reaffirmed and clarified this holding, stating that questioning of jurors regarding racial bias was required in *Ham* because the defendant had asserted he was framed in retaliation for his civil rights work, and "[r]acial issues therefore were inextricably bound up with the conduct of the trial." *See Ristaino*, 424 US at 597.

The rule set forth in *Ham* and *Ristaino* governs this case. Courts have a constitutional obligation to ensure that a criminal defendant's rights to a fair trial and an impartial jury are not impeded by a trial court's refusal to question prospective jurors about salient biases and prejudices. Thus, courts must permit voir dire regarding issues that are (1) potentially prejudicial, and (2) inextricably bound up with the conduct of the trial. *See Berthiaume*, 875 F3d at 1358.

b. Juror bias about a litigant's sexual orientation is potentially prejudicial.

As courts have recognized, "the risk that jurors might harbor latent prejudices on the basis of sexual orientation is not trivial," given "the long history of cultural disapprobation and prior legal condemnation of same-sex relationships" and non-heterosexual people. *Berthiaume v Smith*, 875 F3d 1354, 1359. Until the mid-20th century, same-sex intimacy was widely condemned as immoral, and was often criminalized. *See Obergefell v Hodges*, 135 S Ct 2584,

2596; 192 L Ed 2d 609 (2015); *Lawrence v Texas*, 539 US 558, 578–79; 123 S Ct 2472, 2484; 156 L Ed 2d 508 (2003) (holding unconstitutional state law prohibiting same-sex intimacy). Non-heterosexual people were "prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate." *Id.* Indeed, "[f]or much of the 20th century . . . homosexuality was treated as an illness." *Id.*

Michigan has been no exception to this long history of legal and cultural disapproval of LGBT people and same-sex relationships. For years, Michigan law prohibited same-sex couples from marrying, MCL 551.1, and prevented recognition of their legal marriages from other states, MCL 551.271—a ban enacted through a ballot initiative that Michigan voters passed by an 18-point margin.[3] In recent years, the State has prohibited public employers from offering health insurance coverage to same-sex partners of employees, *Bassett v Snyder*, 951 F Supp 2d 939 (ED Mich, 2013); *National Pride at Work, Inc. v. Governor*, 481 Mich. 56, 60; 748 NW2d 524, 529 (2008), and refused to recognize hundreds of legal marriages that were entered after Michigan's marriage ban was declared unconstitutional, *Caspar v Snyder*, 77 F Supp 3d 616 (ED Mich, 2015). The State is currently being sued for its policy of permitting faith-based foster and adoption agencies to refuse to work with same-sex couples. *Dumont v Lyon*, No. 2:17-CV-1380 (ED Mich). And Michigan's Elliott Larsen Civil Rights Act still does not explicitly prohibit

[3] *See* CNN, *Election 2004 – Ballot Measures* <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures> (accessed June 18, 2018).

discrimination on the basis of sexual orientation or gender identity, despite efforts to amend the law to include these categories for more than two decades.[4]

Against this backdrop of historical disapprobation of LGBT people and same-sex relationships in Michigan and nationwide, it is unsurprising that many prospective jurors continue to express moral disapproval of lesbian, gay, and bisexual people, as reported decisions and *voir dire* transcripts reveal.[5] Indeed, many prospective jurors, when asked about sexual orientation during *voir dire*, volunteer statements "rang[ing] from assertions of moral or religious beliefs that homosexuality is wrong . . . to outright animus."[6] As jurors, lawyers, litigants, and defendants, people who are lesbian, gay, bisexual, or transgender (LGBT) may face both overt and subtle discrimination. Legal scholars Joey Mogul, Kay Whitlock, and Andrea Ritchie have noted that "[a]nonymous surveys conducted by judicial commissions and bar associations to

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[4] In addition, the Michigan legislature has introduced legislation that would permit discrimination against LGBT people, and would prohibit transgender persons from using public restrooms in accordance with their gender identity. *See* H.B. 5958, 2014 Leg., (Mich. 2014); and S.B. 993, 2016 Leg., (Mich. 2016). In 2015, the Human Rights Campaign ranked Michigan as one of the 29 worst states for LGBT equality, under the "High Priority to Achieve Basic Equality" category, explaining that "[m]ost states in this category have bad laws undermining LGBT equality, from criminalization of HIV and sodomy, to religious-based discrimination. None have explicit statewide non-discrimination protections for sexual orientation or gender identity." *See* Human Rights Campaign, 2014 State of Equality: A Review of State Legislation Affecting the Lesbian, gay, Bisexual and Transgender Community, 88 (2014). On a national level, in 2016 alone, more than 200 anti-LGBT bills were introduced in 34 legislatures across the country. *See* Human Rights Campaign, Listen: HRC Legal Director Answers Members' Questions on Anti-LGBT State Bills (2016).

[5] *See* Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv J L & Gender 407, 412 (2014) (citing statements evidencing sexual orientation bias, made by prospective jurors during voir dire). Additionally, according to a *Gallup* poll, as of May 1, 2018, 23% of Americans do not think that consensual gay and lesbian relationships should be legal. Furthermore, three years after the *Obergefell* decision, 31% of Americans still believe that same-sex marriage should not be legalized. *Gay and Lesbian Rights*, Gallup, http://news.gallup.com/poll/1651/gay-lesbian-rights.aspx. (last visited June 1, 2018).

[6] *See* Shay, *supra* note 5, at 412.

determine the level of bias or prejudice suffered by gay and lesbian court users and employees found that homophobic prejudices continue to permeate courthouses around the country. These studies . . . universally concluded that the majority of gay and lesbian litigants experienced courthouses as hostile and threatening environments, whether in criminal or civil cases."[7] In a recent national survey of LGBT people, respondents reported experiencing a range of negative courthouse encounters, ranging from overhearing negative comments about sexual orientation to having their own sexual orientation disclosed in court against their will.[8]

The Eleventh Circuit Court of Appeals' decision in *Berthiaume* is instructive. In *Berthiaume*, the Eleventh Circuit reversed a jury verdict in favor of a police officer in a police misconduct case because the trial court refused to question venire members regarding any potential sexual orientation bias they may have had against the arrestee-plaintiff, a gay man. In finding that there was a reasonable possibility of sexual orientation bias, the court noted the historical legal and cultural disapproval of same-sex relationships, and observed that "despite the . . . recent shift in public attitudes toward greater tolerance, *Obergefell* itself is evidence that issues regarding homosexuality continue to be debated in our society. While some jurors are not biased based on sexual orientation, some realistically are." *Accord United States v Bates*, 590 F App'x 882, 886 (CA 11, 2014) ("[T]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive." (quoting *State v Ford*, 278 Mont 353; 926 P2d 245, 250 (1996)); *see also United States v Delgado-Marrero*, 744 F3d 167, 205 (CA 1, 2014) (stating that "evidence of homosexuality has the

[7] Mogul et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* (2011), pp 72, 74.

[8] Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014).

potential to unfairly prejudice a defendant"); *Neill v Gibson*, 263 F3d 1184, 1201 (CA 10, 2001) ("As the prosecutor knew, emphasizing that Neill was gay likely had a tremendous negative impact on jurors."); *United States v Yazzie*, 59 F3d 807, 811 (CA 9 1995) (stating that "evidence of homosexuality can be extremely prejudicial"); *United States v Ham*, 998 F.2d 1247, 1252 (CA 4, 1993) ("We accept without need of extensive argument that implications of . . . homosexuality . . . unfairly prejudice a defendant."). This conclusion is buttressed by countless court decisions allowing challenges for cause where jurors were unable to remain impartial due to their prejudice against LGBT people. *See, e.g.*, *State v Salmons*, 509 SE2d 842, 862 (W Va, 1998) ("The jurors were struck because they admitted they held prejudices against homosexuals. The trial court was not convinced by the statements from both jurors that they would be able to put aside their biases toward homosexuals."); *Multimedia WMAZ, Inc v Kubach*, 443 SE2d 491, 493, 493, 496 (Ga Ct App, 1994) (holding that the trial court did not abuse its discretion in removing for cause three jurors "who expressed bias against homosexuals").

Moral disapproval of LGBT people is deeply rooted in this country and in the State of Michigan. Despite changes in public attitudes over the years, there is "no doubt" that a litigant's sexual orientation "ha[s] the potential to unfairly prejudice jurors against him." *See Bates*, 590 F App'x at 887. Anti-LGBT bias is well-documented and can manifest in any matter.[9] For these reasons, this Court should hold that juror bias about a litigant's sexual orientation is potentially prejudicial.

[9] *See* Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014).

c. Sexual orientation was inextricably bound up with the conduct of the trial.

Courts must permit *voir dire* regarding a potential source of prejudice when such prejudice is "inextricably bound up with the conduct of the trial"—that is, when an issue to be resolved at trial necessarily brings the prejudice into focus for the jury. *See Ristaino*, 424 US at 597. For example, although courts are not constitutionally required to probe potential jurors for racial prejudice in all cases involving minority defendants, *see id.*, such *voir dire* must be conducted when racial issues are made salient by, for example, a defendant's assertion that he was framed in retaliation for his civil rights activism, *see Ham*, 409 US at 527.

The Eleventh Circuit's decisions in *Bates* and *Berthiaume* are instructive. In *Bates*, a criminal defendant argued that he did not exercise sole control over a computer used in the commission of a crime. *See Bates*, 590 F App'x at 887. The prosecution, in turn, intended to introduce into evidence pictures taken from the computer of the defendant "engaged in homosexual activity," for the purported purpose of showing that the defendant "wouldn't be sharing his computer with other people." *See id.* The Eleventh Circuit held that these circumstances "made it quite obvious that facts about [the defendant's] sexual activities were inextricably bound up with a central element of the charges against him." *See id.* Thus, the refusal of the court to probe for sexual orientation bias during voir dire was reversible error. *See id.* at 889. Likewise, in *Berthiaume*, the plaintiff alleged that he was wrongfully arrested for an alleged domestic battery against his former same-sex partner, and further alleged that the charging officer falsely stated that the dispute arose because the two were "trying to get back together." *See Berthiaume*, 875 F3d at 1358–59. On these facts, the Eleventh Circuit held that the plaintiff's sexual orientation was "inextricably bound up with the issues to be resolved at

trial," and thus the trial court's refusal to inquire about sexual orientation bias was reversible error. *See id.* at 1358, 1360.

As in *Bates* and *Berthiaume*, Mr. Six's sexual orientation was inextricably bound up with the issues to be resolved at trial. First, Mr. Six's defense was that the fraudulent act was committed by his former same-sex partner, Mr. Orsette. In support of this defense, Mr. Six offered relevant testimony regarding the nature of his relationship with Mr. Orsette, stating that Mr. Orsette was "very . . . controlling," and that Mr. Six obtained a personal protection order against Mr. Orsette in order to protect himself. Second, to impeach Mr. Six's credibility, the prosecutor repeatedly and gratuitously questioned Mr. Six about other same-sex sexual relationships he had while being in a relationship with Mr. Orsette: "*Q.* Let me ask you now, who's Brad Jacobson? . . . *Q.* What about Brad Sobieski? . . . *Q.* Who's Robert Elswick? . . . *Q.* What about Tarek Beydoun, who's that?" There is no question that the issues involved in this case necessarily brought Mr. Six's sexual orientation into focus for the jury.

As in *Berthiaume*, the trial court and parties knew that this case involved "former partners of the same sex," and that Mr. Six's sexual orientation "would be [a] central fact[] at trial and [was] inextricably bound up with the issues to be resolved at trial." *Berthiaume*, 875 F3d at 1358. Recognizing this, Mr. Six's counsel requested that the court question potential jurors about sexual orientation bias, but the court refused. This refusal was an unconstitutional deprivation of Mr. Six's constitutional rights to due process and an impartial jury. This Court should reverse and remand for a new trial that safeguards Mr. Six's constitutional rights.

II. THE TRIAL COURT'S FAILURE TO QUESTION JURORS REGARDING POTENTIAL SEXUAL ORIENTATION BIAS WAS AN ABUSE OF DISCRETION.

Michigan courts have long held that when *voir dire* is conducted by the trial court, "the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441, 447 (1994) (citing *Fedorinchik v Stewart*, 289 Mich 436; 286 NW 673 (1939)). For example, Michigan courts have held that when a court conducting *voir dire* refuses to ask prospective jurors relevant questions about their attitudes towards self-defense, *see People v Taylor*, 195 Mich App 57; 489 NW2d 99 (1992), their past sexual victimization, *People v. Jones*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2008 (Docket No. 273051), p. 3, or their financial interest in the case, *Fedorinchik v Stewart*, 289 Mich 436, 438; 286 NW 673, 674 (1939), *voir dire* is inadequate to provide for the intelligent exercise of challenges. *See also Donaldson v MacDonald-Blazo Associates, Inc.*, 34 Mich App 50; 190 N.W.2d 705 (1971) (finding voir dire insufficient where court refused to ask jurors questions about a film shown to the venire panel); *cf. White v Haque*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 334084), p. 9 (finding voir dire insufficient where court restricted questions regarding prospective juror's pending lawsuit); *People v Mumford*, 183 Mich App 149, 155; 455 NW2d 51, 54 (1990) (finding voir dire insufficient where court restricted questions regarding the credibility of testimony offered in exchange for sentencing consideration).

The Michigan Court of Appeals' decision in *People v. Rodriguez* is instructive, unpublished per curiam opinion of the Court of Appeals, issued March 18, 1997 (Docket No. 183425). There, the defendant, who was charged with felonious assault and possession of a firearm, sought to present an insanity defense. *See id.* at 1. But the trial court prohibited counsel

from eliciting the views of prospective jurors regarding such a defense during voir dire. *See id.* This, the Court of Appeals held, was an abuse of discretion:

> The trial court's decision . . . denied defendant the opportunity to develop a factual basis to intelligently exercise his peremptory challenges. It is easy to imagine a potential juror who has antagonistic feelings toward or is skeptical about the mental health professions. Therefore, once the court ruled that defendant could [present an insanity defense], it also had an obligation to allow defendant to question the potential jurors about this matter."

See id. at 2.

Likewise, the possibility that a juror would have "antagonistic feelings" towards Mr. Six's defense—that the fraudulent act was committed by his same-sex partner—is far from remote. Indeed, *voir dire* has often unearthed evidence of anti-LGBT animus by potential jurors. Potential jurors have, when questioned during *voir dire*, opined that lesbian, gay, and bisexual people "are morally wrong."[10] One juror revealed that same-sex relationships "made her feel sick."[11] Said another: "I just don't like queers."[12] One prospective juror, when probed about his sexual orientation bias, confessed: "I hope I would be able to see past [the defendant's sexual orientation], but I can't guarantee you that, no."[13] These sentiments, clearly evidencing antagonistic feelings towards lesbian, gay, and bisexual people, would not have come to light but for specific questions relating to sexual orientation bias during *voir dire*. Such information is crucially important for counsel in deciding whether to exercise peremptory challenges and challenges for cause.

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[10] *See* Shay, *supra* note 5, at 427.

[11] *See* Shay, *supra* note 5, at 427 n 139.

[12] *See* Shay, *supra* note 5, at 428.

[13] *See id.*

The trial court's failure to question jurors regarding sexual orientation bias was an abuse of discretion, as it deprived defense counsel of the ability to intelligently exercise peremptory challenges and challenges for cause. This Court should reverse.

CONCLUSION

For the reasons stated herein, amici respectfully requests that this Court reverse and remand for a new trial, on the grounds that the trial court's refusal to allow questioning about sexual orientation bias during *voir dire* was unconstitutional and an abuse of discretion.

Respectfully submitted,

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