

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.

SUPPLEMENTAL *AMICI CURIAE* BRIEF AFTER REMAND OF THE
AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, CRIMINAL DEFENSE
ATTORNEYS OF MICHIGAN & LAMBDA LEGAL DEFENSE AND EDUCATION FUND,
INC. IN SUPPORT OF DEFENDANT-APPELLANT

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INTERESTS OF AMICI CURIAE¹

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 *amicus 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.

Since its founding in 1976, Criminal Defense Attorneys of Michigan (“CDAM”) has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its bylaws, CDAM exists to “promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy,” “provide superior training for persons engaged in criminal defense,” “educate the bench, bar and public of the need for quality and integrity in defense services and representation,” and “guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws.” CDAM Bylaws, art 1, sec 2. Toward these ends,

¹ Pursuant to MCR 7.212(H)(3), counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund preparation or submission of this brief.

CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles relating to criminal law and procedure, and provides information to the state legislature regarding contemplated legislation. CDAM is often invited to file *amicus curiae* briefs by the Michigan appellate courts.

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 *amicus curiae* in the Eleventh Circuit Court of Appeals in *Berthiaume v Smith*, 27 Fla L Weekly Fed C 396; 875 F3d 1354 (CA 11, 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 F3d 471 (CA 9, 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 (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, ACLU of Michigan, and CDAM represent depend upon a fair and impartial judicial system to enforce their constitutional and other rights.

FACTS AND PROCEDURAL HISTORY

Jeffrey Six was convicted, following a jury trial, of Uttering and Publishing, MCL 750.249, and Receiving and Concealing Stolen Property, MCL 750.535(2)(b), more than \$1000, but less than \$20,000 on March 9, 2017. He appealed to this Court on May 4, 2017. One basis for Mr. Six's appeal was that the trial court erred, abused its discretion, and violated Mr. Six's federal and state constitutional rights to a fair and impartial jury by refusing to conduct voir dire regarding whether prospective jurors held any anti-LGBT bias. On January 21, 2020, this Court found Mr. Six's argument regarding lack of voir dire regarding anti-LGBT bias "potentially dispositive" and remanded back to the trial court for settlement of the record as to the trial court's basis for its ruling. *People v Six*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2020 (Docket No. 338238). On September 25, 2020, the remand hearing was held. The trial court stated that it refused to allow voir dire related to anti-LGBT bias because it believed that Mr. Six's defense, which was that his former same-sex partner, Gordon Orsette, had committed the crime for which he was charged was "very convoluted" and "essentially irrelevant." T 9/25/2020 p 22:13-14. The trial court stated, "...my motivation was to keep the case focused... and not to go off on social tangents, that... I didn't think were important to this case." T 9/25/2020 p 25:7-14. Mr. Six and the People of Michigan have filed supplemental briefs after remand in this matter on November 30, 2020 and December 14, 2020, respectively. On

January 5, 2021, this Court granted *amici curiae* leave to file this Supplemental *Amici Curiae* Brief.²

SUMMARY OF ARGUMENT

Juror voir dire is a critical safeguard to protect a litigant’s right to receive a fair trial and an impartial jury. Preventing anti-LGBT juror bias ensures LGBT litigants have the same equal access to justice as their non-LGBT peers. The Michigan Supreme Court has “long recognized the importance of a voir dire that allows the court and the parties to discover hidden bias that would render a potential juror incompetent.” *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). Voir dire is the only safeguard defendants have to ensure their right to an impartial jury. *Id.* at 618. As such, “a trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges.” *People v Taylor*, 195 Mich App 57, 59; 489 NW2d 99 (1992)(internal citation omitted).

A voir dire process that fails to adequately assess whether potential jurors have any prejudice that would impact their decisions fails to protect a litigant’s right to a fair trial and impartial jury. See *Ham v South Carolina*, 409 US 524, 527; 93 S Ct 848; 35 L Ed 2d 46 (1973); *Dellinger v United States*, 472 F2d 340, 367 (CA 7, 1972). 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; 101 S Ct 1629; 68 L Ed 2d 22 (1981). In determining whether there is a “reasonable possibility” of prejudice,

² *Amicus Curiae*, Criminal Defense Attorneys of Michigan, was not included in the order signed by this Court on January 5, 2021. However, pursuant to MCR 7.312(H)(2), “[a] motion for leave to file an amicus curiae brief is not required if the brief is presented by.... the Criminal Defense Attorneys of Michigan.”

courts must consider whether there is (1) a “potentially prejudicial issue” that (2) is “inextricably bound up with the conduct of the trial.” *Berthiaume*, 875 F3d at 1358.

Jeffrey Six’s experience at trial meets these standards. The trial court conducted its own voir dire without questions related to anti-LGBT bias and did not permit any questions regarding anti-LGBT bias to be asked of potential jurors. Because there was no questioning as to this issue, there was no way for the defense to intelligently exercise challenges for cause or peremptory challenges against potential jurors who may have held anti-LGBT biases. The trial court’s restriction on voir dire in this case prevented the development of facts that would allow the defense to select an impartial jury. Juror bias about the defendant’s sexual orientation is potentially prejudicial, and in this case, it was inextricably bound up in the evidence to be presented at trial due to Mr. Six’s former same-sex relationship being central to his defense. Because there was a reasonable possibility of anti-LGBT bias prejudicing the jury, the trial court was required to permit specific questioning regarding anti-LGBT bias in order to ensure Mr. Six’s right to a fair and impartial trial.

On appeal, this Court found Mr. Six’s voir dire argument potentially dispositive, and remanded the case to the trial court to articulate its reasons for denying voir dire concerning anti-LGBT bias. The trial court explained that it did not allow this questioning because it found Mr. Six’s defense “essentially irrelevant” and believed that this voir dire may “confuse the jury.” T 9/25/2020 p 22:14; p 25:8.

Now with the benefit a settled record, the Court should find that the trial court’s reasoning is unsupported by the record and its refusal to allow questioning about anti-LGBT bias during voir dire was an unconstitutional abuse of discretion that failed to protect Mr. Six’s right to an impartial jury.

ARGUMENT

I. THE VOIR DIRE CONDUCTED AT TRIAL WAS INSUFFICIENT TO UNCOVER POTENTIAL ANTI-LGBT BIAS.

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. While judges have broad discretion to determine the scope and method of voir dire, "[i]t is imperative, in securing the rights of the parties to an impartial jury, for the court to allow the elicitation of enough information so that the court itself can make an independent determination of a juror's ability to be impartial." *Tyburski*, 445 Mich at 620. There is a reasonable possibility that anti-LGBT bias may influence the jury and *voir dire* is the only tool that the defendant has to root it out. "[I]t remains the case that '[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive.'" *United States v. Bates*, 590 F App'x 882, 886 (CA 11, 2014) (quoting *State v. Ford*, 278 Mont. 353, 362; 926 P.2d 245 (1996)). "While some jurors are not biased based on sexual orientation, some realistically are." *Berthiaume*, 875 F 3d at 1359. Bias based on sexual orientation can influence jurors' decisions and this prejudice can manifest in any type of case. Lambda Legal, *Jury Selection and Anti-LGBT Bias: Best Practices Guide to Voir Dire on LGBT Issues* (2015), available at <http://www.lambdalegal.org/sites/default/files/jury-selection-dec2015_final.pdf> (accessed January 17, 2021).

A trial court that conducts its own voir dire "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." *Tyburski*, 445 Mich at 619 (internal citations omitted). A court's discretion to determine the scope and method of voir dire is constrained 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. *Ristaino v Ross*, 424 US 589, 595; 96 S Ct 1017; 47 L Ed 2d 258 (1976). Where there is a “potentially prejudicial issue” that is “inextricably bound up with the conduct of the trial,” the court is obligated to inquire of the jury regarding the specific potential sources of bias. *Berthiaume*, 875 F3d at 1358. Here, Mr. Six’s same-sex relationship and his sexual orientation were sources of potential prejudice among jurors and were inextricably bound up in the conduct of the trial.

A. Jury bias regarding Mr. Six’s sexual orientation was potentially prejudicial because LGBT people continue to face discrimination and bias in their public lives.

Here, it is uncontested that sexual orientation can be a potentially prejudicial issue at trial. The People of Michigan agree with Mr. Six, that in some cases sexual orientation can be a source of potential prejudice among jurors. “To be clear, the People do not take the position that trial courts should never be required to question potential jurors about bias toward sexual orientation. Put another way, sexual orientation *can* be a potential source of prejudice in a criminal trial, as defendant posits in his analysis of, what he titles, the ‘First *Ristaino* Factor.’”³ The majority of this Court previously found that Mr. Six’s argument regarding lack of voir dire was potentially dispositive. Additionally, while the dissent reasoned that Mr. Six’s sexual orientation was not inextricably bound up in the conduct of trial and as such the circumstances of Mr. Six’s case did not require voir dire on anti-LGBT bias, the dissent found that “as a distinct group subject to a history of discrimination, a defendant’s LGBT status implicates the same considerations as would membership in a distinct ‘racial or ethnic’ group. As such, the standards mandated by the Supreme Court regarding voir dire as it relates to membership in such racial or ethnic groups are

³ Plaintiff-Appellee’s Supplemental Brief After Remand, Dkt. No. 106, p 21 (internal footnote omitted).

applicable.” *Six* (TUKEL, J., dissenting) unpub op at 3. For these and the following reasons, this Court should find anti-LGBT bias is a source of potential prejudice among jurors.

Until the mid-20th century, same-sex intimacy was widely condemned as immoral, and was often criminalized. See *Obergefell v Hodges*, 576 U.S. 644, 661; 135 S Ct 2584; 192 L Ed 2d 609 (2015); *Lawrence v Texas*, 539 US 558, 578-79; 123 S Ct 2472; 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.*

Courts have found that sexual orientation is a potentially prejudicial issue in the context of jury selection. In *Berthiaume*, the Eleventh Circuit said, “[g]iven the long history of cultural disapprobation and prior legal condemnation of same-sex relationships, the risk that jurors might harbor latent prejudices on the basis of sexual orientation is not trivial.” *Berthiaume*, 875 F3d at 1359. 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.” *United States v Bates*, 590 F App’x 882, 887 (CA 11, 2014).

Moral disapproval of LGBT people is deeply rooted in this country and in the State of Michigan and this disapproval manifests in anti-LGBT policymaking, victimization, and discriminatory treatment in all aspects of an LGBT person’s life. Nationally, in recent years, legislators have introduced bills in numerous states that would constrict, not expand, equality for lesbian, gay, bisexual, and transgender people. Molly Sprayregen, *226 bills target LGBTQ Americans this year. One organization is behind a lot of them* LGBTQ Nation (Feb. 18, 2020), <<https://www.lgbtqnation.com/2020/02/226-bills-target-lgbtq-americans-year-one-organization->

[behind-lot/](#) (accessed January 17, 2021) (describing bills introduced in various states that would allow for adoption agencies to use religious beliefs to refuse same-sex couples, prohibit transgender youth from participating in sports, and prohibit doctors from providing transgender youth with medically necessary gender-affirming health care); see, e.g., *Barber v Bryant*, 193 F Supp 3d 677, 687 (SD Miss 2016), rev'd 860 F3d 345 (CA 5, 2017) (describing Mississippi's HB 1523, which "grants special rights" to those who "disapprov[e] of lesbian, gay, [and] transgender" people based on religious beliefs, which passed in 2016, the year of Mr. Six's trial).

LGBT people experience high rates of homophobic and transphobic violence, with serious emotional, physical, financial, and social impacts. Mr. Six's trial and pre-trial conferences occurred during a period of record hate crimes against lesbian, gay, bisexual, and transgender people, with 1,036 incidents of hate violence reported. Nat'l Coal. of Anti-Violence Progs., *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016*, (2017), p 25, available at <<http://tinyurl.com/y29fw5c6>> (accessed January 17, 2021). In 2016, LGBT people were more likely than any other demographic group to be the target of hate crimes. Haeyoun Park and Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, New York Times (June 16, 2016), available at <<https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html>> (accessed January 17, 2021). Reported incidents of anti-LGBT hate crimes have continued to increase over the last several years. The most recent statistics from the FBI indicate that 1,393 incidents of anti-LGBT hate crimes were reported in 2019. Federal Bureau of Investigations, *2019 Hate Crime Statistics*, (2019), Table 8, available at <<https://ucr.fbi.gov/hate-crime/2019/resource-pages/tables/table-8.xls>> (accessed January 17, 2021) (adding total incidents of hate crimes motivated by sexual orientation bias and gender identity bias to reach 1,393). This targeted

violence shows that LGBT people continue to be subjected to disparate and biased treatment based on their sexual orientation and/or gender identity.

LGBT people also continue to face discriminatory treatment from law enforcement. Interactions between LGBT people and the police often involve harassment and violence perpetuated against LGBT people. Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, The Williams Institute (2015), p 6-11, available at <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>> (accessed January 17, 2021). In many communities, lesbian, gay, and bisexual young people continue to be stopped by police more frequently than their heterosexual peers. A 2011 study found that lesbian, gay, and bisexual youth were 53% more likely to be stopped by police, 60% more likely to be arrested 18 before age 18, 90% more likely to have had a juvenile conviction, and 41% more likely to have had an adult conviction than heterosexual youth—even when controlling for race, socioeconomic status, and criminal behavior. Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49, 51, 53 (2011). Gay men are still targeted by lewd conduct “stings.” See Jordan Blair Woods, *Don’t Tap, Don’t Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 *J Gender Race & Just* 545, 551–53 (2009); see, e.g., *People v Moroney*, No. 4LG03026 (Cal. Super. Ct. Apr. 29, 2016) (explaining that police “intentionally targeted” gay men even though there was “lewd conduct involv[ing] both heterosexual and homosexual activity”). Discriminatory law enforcement is often fueled by purposeful as well as implicit bias. In a 2008 study, 62% of police chiefs surveyed believed that being gay constitutes “moral turpitude,” and 56% viewed it as a “perversion.” Christy Mallory et al., *Discrimination Against*

Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity: 2000 to 2013, The Williams Institute (2013), p 2 available at <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Law-Enforcement-SOGI-Nov-2013.pdf>> (accessed January 17, 2021); see also Christine M. Anthony et al., *Police Judgments of Culpability and Homophobia*, *Applied Psych Crim Just* 9 (2005) (32% of officers believe gay men are “disgusting”). Research shows that when LGBTQ people do report violence to police, they have experienced discriminatory treatment, hostility, and in some instances, physical violence. Because of this, for some LGBT people who have experienced homophobic or transphobic violence, the criminal legal system is not a safe or viable option. Lambda Legal, *Hate Crimes*, available at <<https://www.lambdalegal.org/criminal-justice-initiatives/hate-crimes>> (accessed January 19, 2021).

These examples of how LGBT people experience bias in society are present in Michigan and provide a context to understand the potential jury pool. The State’s “legal landscape reflects a history of state laws and policies that limit protections for LGBT people or discriminate against them.” Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan*, (2019), p 13, available at <<http://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-MI-Apr-2019.pdf>> (accessed January 17, 2021). Michigan’s Elliott-Larsen Civil Rights Act (“ELCRA”), MCL 37.2101 *et seq.*, still does not explicitly prohibit discrimination on the basis of sexual orientation, despite efforts to amend the law to include these categories for more than two decades.⁴ Unfortunately, as in the rest of the

⁴ In 2018, the Michigan Civil Rights Commission adopted an interpretive statement that “sex” as defined by ELCRA included protections for people on the basis of sexual orientation and gender identity. Michigan Civil Rights Commission, Resolution as Interpretive Statement 2018-1 Regarding the Meaning of “Sex” in the Elliott-Larsen Civil Rights Act (May 21, 2018) available at <https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf>

country, discrimination remains and impacts LGBT people in Michigan in a variety of areas including employment, housing, and public accommodations. *Id.* at 27. In response to a 2012 survey in Michigan, “55% of respondents reported experiencing some form of discrimination or harassment based on their sexual orientation, 19% reported experiencing some form of discrimination or harassment based on their gender expression, and 16% reported experiencing some form of discrimination based on their gender identity.” *Id.* at 28 (citing Michigan Dep’t of Civil Rights, *Report on LGBT Inclusion Under Michigan Law with Recommendations for Action* (January 28, 2013), p 47, available at http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf) (accessed January 17, 2021).

In Michigan, 46 instances of hate crimes motivated by sexual orientation or gender identity were reported to the FBI in 2019 alone. Federal Bureau of Investigation, *2019 Michigan Hate Crime Incidents per Bias Motivation and Quarter by Agency* (2019), Table 13, available at <https://ucr.fbi.gov/hate-crime/2019/tables/table-13-state-cuts/michigan.xls> (accessed January 17, 2021) (adding number of incidents based on sexual orientation to number of incidents based on gender identity to reach 46). However, Michigan State Police did not begin to collect data on hate crimes based on gender identity until mid-2019. Michael Gerstein, *Michigan State Police Adds Gender Identity Hate Crime Category*, Michigan Advance (July 9, 2019) available at <https://www.michiganadvance.com/2019/07/09/michigan-state-police-adds-gender-identity->

(accessed January 17, 2021). This allowed the Michigan Department of Civil Rights to begin processing complaints of discrimination based on sexual orientation and gender identity. *Id.* On December 7, 2020, the Michigan Court of Claims ruled that discrimination based on sexual orientation was not prohibited under the ELCRA, while discrimination based on gender identity was prohibited. *Rouch World, LLC and Uprooted Electrolysis, LLC v Mich Dep’t of Civil Rights*, No. 20-000145-MZ (Mich. Ct of Claims, Dec. 7, 2020) available at https://www.michigan.gov/documents/ag/20201207_Rouch_World.Opin_and_Ord_710225_7.pdf (accessed January 17, 2021).

[hate-crime-category/](#)> (accessed January 17, 2021). Thus, this data likely underreports the number of hate crimes in Michigan that were based on an individual's gender identity.

For these reasons, this Court should find that juror bias about a litigant's sexual orientation is potentially prejudicial.

B. Mr. Six's former same-sex relationship and his sexual orientation were inextricably bound up in the evidence to be presented at 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. Here, Mr. Six's former same-sex relationship and thus his sexual orientation were issues known to be a potential source of prejudice among jurors and were inextricably bound up with the facts the jury would need to decide. As this Court noted, "The issue of the defendant's intimate relationship with a significant witness was discussed during several... motion hearings. The witness and the defendant, both male, at one time were in an intimate relationship. The defense frequently noted the tumultuous nature of the relationship including the issuance of PPO's." *Six*, unpub op at 3. Furthermore, despite recognizing that in cases of sexual assault or domestic violence, the sexual orientation of the parties is a central fact, the trial court disregarded Mr. Six's intimate relationship with Mr. Orsette and the tumultuous nature of the relationship, issues that would be raised during the trial. T 9/25/2020 p 24:8-15. ("Now, if this had been a sex assault case, involving same sex actors[,], or a domestic violence case, involving a same sex relationship, or partnership, or marriage[,], uhm, you know, obviously, that would have made, I would have made a different call, because, then, the orientation of the parties, or one party or the other, is, is a sort of central fact in the case. But that was not the case here.").

1. The record establishes that Mr. Six's sexual orientation was explicitly an issue front and center for the jury.

There were multiple instances during the trial where Mr. Six's sexual orientation was front and center for the jury. Mr. Six's defense at trial was that he was in an intimate same-sex relationship with an abusive partner, Gordon Orsette, and that Mr. Orsette committed the crime for which Mr. Six was charged. Mr. Six testified regarding the controlling and abusive nature of his five-year relationship with Mr. Orsette. T 3/8/2017 p 21:7-22:1. He explained that Mr. Orsette had been the one who overpaid Mr. Six's driver's responsibility fee. T 3/8/2017 p 16:8-10. This act led to the issuance of the refund check from which Mr. Six's charges of Uttering and Publishing and Receiving and Concealing Stolen Property stemmed. T 3/8/2017 p 18:6-25. When Mr. Orsette explained to Mr. Six that he had overpaid the fee by thousands of dollars, Mr. Six believed him because of the knowledge that he had of Mr. Orsette's personal and professional affairs due the nature of their relationship. T 3/8/2017 p 16:13-17, 21:10-19, 25:19-25. Mr. Six testified that Mr. Orsette was in the parking lot as Mr. Six went into a store to cash the refund check and that he called Mr. Orsette from the store to ask whether the large fee the store was charging to cash the check was acceptable to Mr. Orsette because, "[i]t was his money." T 3/8/2017 p 19:9-20:9. He then cashed the check and provided all the money directly to Mr. Orsette. T 3/8/2017 p 20:11-18. It would have been impossible, and extremely prejudicial, for Mr. Six to present his defense without discussing Mr. Orsette and the nature of their relationship.

The trial court was aware that this defense would be raised at trial. T 3/6/2016 p 4:24-5:2. The trial court knew that Mr. Six would be testifying in his own defense and was well-aware of Mr. Six's theory of the case and what his testimony would entail. T 3/6/2016 p 12:2-16:2; T 9/25/2020 p 22:5-18. Additionally, Mr. Orsette had been subpoenaed by the People to testify at

trial. T 5/25/2016 p 13:25-14:4, 15:7-12; T 3/6/2017 p 100:14-17. While Mr. Orsette invoked his Fifth Amendment rights and did not testify at trial, the trial court knew prior to trial that Mr. Orsette may be called to testify as well. T 3/6/2017 p 99:20-101:24; T 3/7/2017 p 70:22-72:13. In addition, trial counsel requested that the court allow voir dire on anti-LGBT bias to determine whether any jurors that may harbor such biases. The court was on notice that the issues in this case necessarily would bring Mr. Six's sexual orientation into focus for the jury.

In *Ham*, the U.S. Supreme Court held that jury voir dire as to racial bias was required because the defendant, a civil rights activist, was to present his defense that he was framed because of his civil rights activism. While Mr. Six's defense was not that he was prosecuted because of his sexual orientation or activism related to his sexual orientation, as in *Ham*, his theory of defense was that his abusive former same-sex partner was the person who committed the alleged crime. The veracity of this defense was a question of fact for the jury to decide, exactly as in *Ham*. 409 US 524. Mr. Six could not present his defense without explaining to the jury his relationship with Mr. Orsette. It is the central explanation as to why Mr. Orsette would have the access needed to be able to have committed the crime, which Mr. Six was on trial for committing. 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." *Berthiaume*, 875 F3d at 1358.

2. Under the theory of defense, the history of an abusive intimate relationship related to Mr. Six's sexual orientation.

In order to present his theory of defense, Mr. Six testified regarding his intimate relationship with Mr. Orsette and the abusive history of it. Mr. Six had obtained a protective order against Mr. Orsette, which was current at the time of trial T 3/8/2017 p 21:22-22:1. The

trial court was aware of this history and that Mr. Six's testimony would include facts about the relationship. T 9/25/2020 p 8:5-13. (Mr. Serra: "...during that conference I explained to the Judge my theory of the case. That Mr. Six was involved in a same-sex relationship with Gordon Orsetti (phonetic), who wanted to keep that relationship a secret. And Mr. Orsetti was abusive. And it was Mr. Orsetti who did the actual fraud, in this case, and set it up to look like Mr. Six had done it.")

Decades of research have found that LGBT communities experience intimate partner violence ("IPV") at similar or elevated rates to heterosexual or cisgender people and that LGBT people face unique barriers to seeking help. See Xavier Guadaalupe-Diaz, *An Exploration of the Difference in Help-Seeking of LGBQ Victims of Violence by Race, Economic Class and Gender*, 9 *Gay & Lesbian Issues and Psychology Rev* 15 (2013); Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research*, The Williams Institute (November 2015) available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/IPV-Sexual-Abuse-Among-LGBT-Nov-2015.pdf> (accessed January 17, 2021). Survivors of same-sex intimate partner violence face the same range of dynamics of intimate-partner violence, which may include physical violence; verbal abuse, such as coercion, threats, and intimidation; sexual violence; emotional abuse; financial abuse; psychological abuse; economic abuse; and isolation. See Mikel L. Walters, Jieru Chen, & Matthew J. Breiding, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation*, National Center for Injury Prevention and Control (2013), p 17, available at https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf (accessed January 17, 2021).

Specific barriers for LGBT survivors include lack of knowledge of existing resources and a general lack of sufficient resources specific to or affirming of LGBT survivors of IPV, fear of homophobia and/or transphobia among service providers, and low levels of confidence in law enforcement and the courts. See Brown & Herman, earlier, at 16-18. When faced with IPV among LGBT people, police officers and trial courts commonly employ assumptions and stereotypes about who is the victim and who is the abusive partner in a particular relationship. For example, there is a common mistaken belief regarding IPV that the physically larger or more dominant partner is always the perpetrator of the violence. See Satoko Harada, *Additional Barriers to Breaking the Silence: Issues to Consider When Representing a Victim of Same-Sex Domestic Violence* 41 U Balt L F 150, 153 (2011). An assessor may misidentify an abusive partner if they view a partner who presents in a more stereotypically masculine manner as an abusive partner, and a partner who presents in a more stereotypically feminine manner as a victim. See Sharon Stapel & Virginia M. Goggin, *Lesbian, Gay, Bisexual, Transgender, and Queer Victims of Intimate Partner Violence*, in *Lawyer's Manual on Domestic Violence: Representing the Victim* (Rothwell Davis et al., eds., 6th ed. 2015), p. 244 available at <<http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/DV-Lawyers-Manual-Book.pdf>> (accessed January 17, 2021). There is a tendency to assume that there is no power differential within same-sex couples in the way that it is often believed to exist within different-sex couples. Haranda, at 161.

According to the Center for Disease Control and Prevention (“CDC”), 26% of gay men, 37.3% of bisexual men, 43.8% of lesbian women, and 61.1% of bisexual women have experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime. Matthew J. Breiding, et al., *Intimate Partner Violence in the United States — 2010*, National

Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2014), p 2 available at

https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf

(accessed January 17, 2021). In Michigan in 2014-15, 4.7% of all intimate partner violence that was reported was among same-sex couples. Rebecca Stone & Jason Rydberg, *Intimate Partner Violence in Michigan: An Analysis of Michigan Incident Crime Reports (MICR) for 2014 and 2015*, (Michigan State University 2017), Table 5, Michigan Justice Statistics Center, School of Criminal Justice.

Here, Mr. Six's defense was that his abusive former same-sex partner was the person who committed the crime for which he was on trial. In order to effectively present his defense, he provided testimony through direct and cross-examination concerning his sexual orientation, his relationship to Mr. Orsette, and the abusive nature of that same-sex relationship with Mr. Orsette. Mr. Six's same-sex relationship and sexual orientation was "inextricably bound up" with the facts to be presented at trial, because he could not have presented his defense without submitting this information to the jury. As such, the trial court erred in refusing to allow Mr. Six to question the jury venire regarding potential anti-LGBT bias. In order to ensure an impartial jury, the court was required to allow questioning of prospective jurors regarding anti-LGBT bias.

CONCLUSION

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

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Respectfully submitted,

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