

MEMORANDUM

To: Mr. Graeme Reid, Independent Expert on protection against violence and discrimination based on sexual orientation, and gender identity (IE SOGI)

From: Phillips Black, Inc.

Date: February 14, 2024

Re: Call for Input: Protection against violence and discrimination based on sexual orientation and gender identity, in relation to the human rights to freedom of expression, association and assembly.

Phillips Black, Inc. is a non-profit law firm dedicated to representing individuals facing the severest penalties under law. Phillips Black advocates for individuals who have been wrongfully convicted, those who were sentenced to life as juveniles, individuals who are facing the death penalty, and women and LGBTQ+ clients whose identities have been weaponized to obtain convictions and death sentences. Individual attorneys also engage in human rights advocacy in sub-Saharan Africa and the inter-American system, conduct research and publish scholarship on the topic of the criminalization of women and LGBTQ+ individuals, and provide consultation, training, and expert testimony concerning the representation of LGBTQ+ people in the criminal legal system.

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LGBTQ+ PEOPLE IN THE U.S. CRIMINAL LEGAL SYSTEM: VIOLENCE, DISCRIMINATION, AND RESTRICTIONS ON FREEDOM OF EXPRESSION, ASSOCIATION, AND ASSEMBLY

While gender identity and sexual orientation are no longer explicitly criminalized in the United States, pervasive discrimination against LGBTQ+ individuals in the criminal legal system infects every stage of the process from arrest, charging determinations, and prosecutor argument to conviction, sentencing, and incarceration. Consequently, this de facto criminalization suppresses the rights of LGBTQ+ people to freedom of expression, association, and assembly.

I. International human rights law prohibits discrimination on the basis of sexual orientation and gender identity, and affirmatively protects the rights of LGBTQ+ people to freedom of expression, association, and assembly.

States' legal obligations to safeguard the human rights of LGBTQ+ people are well established in human rights law and are guided by the fundamental principles of universality, equality, and non-discrimination, as framed by Article 1 of the Universal Declaration of Human Rights. Multiple treaty bodies have interpreted the open-ended provisions of many human rights instruments prohibiting all forms of discrimination against individuals to expressly proscribe discrimination on the basis of sexual orientation and gender identity.

The International Covenant on Civil and Political Rights ("ICCPR") is one such treaty. Articles 2 and 9 of the ICCPR, which the United States ratified in 1992, charge states to protect the rights of individuals without distinction of any kind and to protect the rights to liberty and security of all people, prohibiting arrest or detention on discriminatory grounds. Interpreting these provisions, the Human Rights Committee has repeatedly urged States Parties to guarantee equal rights to all individuals regardless of sexual orientation and gender identity and to address violence and discrimination against LGBTQ+ people.

Thus, international human rights law is clear: states must respect, protect, and fulfill the human rights of LGBTQ+ people in their jurisdiction, including those who are in contact with the criminal legal system.

II. In the United States, laws expressly criminalizing LGBTQ+ people on the basis of sexual orientation and gender identity have been ruled unconstitutional; however, discriminatory policies and practices in the criminal legal system result in the overrepresentation of LGBTQ+ people in carceral institutions.

In 2003, the United States Supreme Court held in *Lawrence v. Texas*, 539 U.S. 558 (2003), that a Texas law criminalizing consensual same-sex conduct between adults was unconstitutional. Yet in the twenty years since that decision, LGBTQ+ individuals continue to be discriminatorily targeted for arrest and subjected to disproportionately severe sentencing, thereby undermining their rights to freedom of expression, association, and assembly.

To begin, LGBTQ+ people are arrested at higher rates than their heterosexual counterparts. Gay, lesbian, and bisexual individuals are 2.25 times more likely to be arrested,¹ and lesbian and bisexual women are four times more likely to be arrested than their heterosexual peers.²

LGBTQ+ people are also more likely to experience police violence, profiling, and harassment based on perceived sexual orientation and gender identity. One out of five transgender people who had police contact reported police harassment.³ That rate is even higher among trans people of color, with nearly 40% of Black trans individuals reporting police-inflicted harassment, 6% reporting physical assault, and 2% reporting sexual assault.⁴

Similarly, LGBTQ+ people face disproportionately high rates of incarceration. LGB people are incarcerated at three times the rate of straight people⁵ and one out of five (21%) transwomen reported a history of incarceration as compared to 5% of all adults.⁶ Nearly half (47%) of Black trans people have been incarcerated.⁷ Lesbian and bisexual women were also sentenced to longer periods of incarceration than straight women, where women having sex with women (WSW) were more likely to have a sentence longer than 20 years.⁸ Gay or bisexual men were more likely than straight men to have prison sentences longer than ten years.⁹

LGBTQ+ youth are especially overrepresented in the carceral system. Although LGBTQ+ youth only make up 10% of the population, they make up 20% of youth in the juvenile justice system.¹⁰ Nearly 40% of girls in juvenile correctional facilities identify as lesbian, gay, or bisexual.¹¹ LGB youth were significantly more likely to be stopped by police than their heterosexual peers.¹²

The reasons for the disproportionately high rates of arrest and incarceration of LGBTQ+ people are numerous, but three of the most significant pipelines funneling LGBTQ+ people into the criminal legal system include: (1) pervasive discrimination by governmental, social, and economic institutions; (2) laws with disparate impact; and (3) bias in policing.

First, LGBTQ+ people are particularly vulnerable to contact with the criminal legal system due to entrenched discrimination in nearly every sphere of

¹ Appendix A at 3.

² *Id.*

³ Appendix B.

⁴ *Id.*

⁵ *Id.*

⁶ Appendix C at 1.

⁷ Appendix B.

⁸ Appendix D.

⁹ *Id.*

¹⁰ Appendix B.

¹¹ Appendix A at 3.

¹² *Id.*

life, including housing,¹³ education,¹⁴ health care,¹⁵ and employment,¹⁶ and subsequently experience disproportionately high rates of homelessness, unemployment, and poverty. When LGBTQ+ people are unhoused or relying on underground economies for income or gender-affirming medications, they are more likely to encounter police and enter the criminal legal system, otherwise known as the “discrimination-to-prison” pipeline.¹⁷

Second, laws that criminalize HIV status,¹⁸ use of bathrooms corresponding to one’s gender identity,¹⁹ possession and provision of both prescribed and unprescribed hormone therapy and other gender-affirming medical treatment,²⁰ and underground economic work, such as sex work, are disproportionately applied to and have a disparate impact on LGBTQ+ people.²¹

Third, bias in policing, including profiling LGBTQ+ people based on perceived sexual orientation and gender identity, further exposes these communities to the criminal legal system. For example, LGBTQ+ individuals face potential arrest and harassment when identity documents do not match a person’s chosen name and gender identity or expression. Importantly, LGBTQ+ people, particularly transwomen of color, are more frequently stopped and frisked by police based on the assumption of participation in sex work as well as “the way they look, what they are wearing, and where they are standing, rather than on the basis of any observed illegal activity.”²² Laws that criminalize loitering for the purpose of prostitution are disproportionately applied to LGBTQ+ people to such an extent that they are frequently referred to as “Walking While Trans” laws.²³

III. Upon entering the criminal legal system, LGBTQ+ individuals face discrimination by the prosecution, judge, jury, and even their own lawyers.

Discrimination and stereotyping of LGBTQ+ individuals is pervasive throughout the legal system and is perpetuated by actors operating in the system, including prosecutors, judges, jurors, and defense lawyers. The bias

¹³ Appendix C at 6.

¹⁴ Appendix C at 5.

¹⁵ Appendix E.

¹⁶ *Id.*

¹⁷ *Id.* at 6 (individuals who had experienced homelessness were 2.5 times more likely to have been incarcerated; of transgender people in men’s prisons in California, nearly half (47%) reported being homeless at some point in their lives).

¹⁸ Appendix F.

¹⁹ Movement Advancement Project, *Bans on Transgender People Using Bathrooms and Facilities According to Their Gender Identity*, available at https://www.lgbtmap.org/equality-maps/nondiscrimination/bathroom_bans.

²⁰ Appendix G; Appendix H.

²¹ Appendix I.

²² Appendix J at 3.

²³ *See, e.g.*, New York Civil Liberties Union, *NYCLU Statement on the Repeal and Seal of the Walking While Trans Ban* (Feb. 2, 2021), available at <https://www.nyclu.org/en/press-releases/nyclu-statement-repeal-and-seal-walking-while-trans-ban>

against an individual’s actual or perceived sexual orientation and gender identity and expression chills the individual’s freedom of expression and freedom to associate.

A. Prosecutors weaponize LGBTQ+ identities to obtain convictions and severe sentences, including the death penalty.

Prosecutors often use harmful stereotypes as aggravating evidence, such as claiming a defendant is a “man hating lesbian” or a “gender-bending deviant” to inflame jurors into convicting and to secure death sentences.²⁴ For instance, in the capital case of Wanda Jean Allen, the prosecutor “focused on perceived gender transgressions as a reason for death” by portraying her as the “man” in her “homosexual relationship.”²⁵

These tactics are also used to minimize mitigating evidence, such as in the case of Aileen Wournos where prosecutors minimized the brutality she suffered as a prostitute portraying her as a “money hungry lesbian” with a “voracious appetite for money and sex.”²⁶

B. Uninformed or biased defense attorneys harm their LGBTQ+ clients.

Defense attorneys can also harm and discourage their clients from freely expressing or associating themselves with their community by failing to advocate for their clients on issues related to gender identity, expression, and sexual orientation, including utilizing the correct name and pronoun.²⁷ In one study, over 50% of transwomen and nonbinary individuals reported discrimination by their defense attorneys on the basis of gender identity and sexuality.²⁸

C. Juries and judges discriminate against LGBTQ+ people, leading to higher rates of conviction and harsher sentences.

Judges and jurors also discriminate on the basis of sexual orientation and gender identity by relying on harmful stereotypes, misinformation, and blatant dehumanization of LGBTQ+ individuals. For instance, transgender individuals are harmed by judges who refuse to use correct pronouns and names both in-court and in formal court rulings.²⁹ In 2020, the Fifth Circuit Court of Appeals rejected a transgender prisoner’s motion to be addressed by their proper pronouns and cited to other cases similarly rejecting requests to use correct pronouns, characterizing instances where courts have ruled differently as doing so “purely as a courtesy.”³⁰

²⁴ Appendix K at 1057-59.

²⁵ *Id.* at 1059.

²⁶ *Id.* at 1060-61.

²⁷ Appendix C at 20.

²⁸ Appendix L at 25.

²⁹ Appendix C at 19.

³⁰ *United States v. Norman Varner*, 948 F.3d 250, 254-58 (5th Cir. 2020) (citing *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993)).

Additionally, jurors are more likely to convict or vote for harsher punishments for LGBTQ+ people on the basis of their sexual orientation and gender identity.³¹ In fact, a 2009 study found that “mock jurors were more likely to convict a gay defendant,” finding them less credible and more culpable than heterosexual defendants.³²

IV. While incarcerated in jails and prisons, both pre-trial and post-sentencing, LGBTQ+ people face exceptionally high rates of violence, harassment, and discrimination on the basis of gender identity and sexual orientation, which infringes upon their freedom of expression and association.

LGBTQ+ prisoners face dehumanizing and violent conditions on the basis of their sexual orientation and gender identity. They are routinely deprived of gender- and identity-affirming provisions and punished for finding unsanctioned ways to meet their needs.³³ When disciplined, they are subjected to the most severe measures at a higher rate than the general population.

A. Violence & Harassment:

LGBTQ+ prisoners whose identity is known to staff and other prisoners report being subjected to humiliation, threats, and physical retaliation on the basis of their sexual orientation and gender identity.³⁴ Nearly three-quarters (70%) of LGBTQ+ respondents to one study reported verbal harassment by staff³⁵ and more than a third reported physical assaults; for indigenous prisoners, that number was nearly half.³⁶

In a 2015 study, 1 in 5 transgender prisoners reported having been sexually assaulted, almost six times higher than rates reported by the general prison population.³⁷ Half those victims were assaulted more than once and 37% endured unwanted touching.³⁸

Transgender women in male prisons are especially vulnerable to sexual assault by other prisoners. A federal survey showed 40% of transgender women prisoners were sexually assaulted in 2014.³⁹ When transgender prisoners reported feeling threatened, the institutional response routinely punished the victim, often by placing them in solitary confinement.

³¹ See, e.g., *Patrick v. State*, 246 So.3d 253, 263-64 (Fla. 2018) (granting post-conviction claim where trial counsel failed to seek removal of a juror who expressed homophobic views during voir dire); Petition for a Writ of Habeas Corpus at 7, *In re Rhines*, 140 S. Ct. 488 (2019) (No. 19-6479) (internal citation omitted); *Commonwealth v. Delp*, 672 N.E.2d 114, 115 (juror admitting he found defendant guilty based on homosexuality).

³² Appendix M at 177.

³³ Appendix N.

³⁴ Appendix L at 29-30.

³⁵ *Id.* at 39.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Appendix O.

Because of this pervasive violence and harassment, some LGBTQ+ prisoners conceal their gender identity and/or sexual orientation while in the carceral system. This has a profound impact on mental health, particularly for those with lengthy sentences.⁴⁰

B. Discrimination:

In one survey, 70% of LGBTQ+ prisoners said they've faced discrimination while incarcerated, including discrimination in health care and housing.⁴¹ Specifically, prisoners are routinely denied continuity of pre-incarceration gender-affirming medical care. In one study, the majority of respondents who had been incarcerated for at least a year took doctor prescribed hormones prior to arrest.⁴² While in custody, close to 40% lost access to hormone therapy.⁴³

Moreover, while the 2013 Prison Rape Elimination Act (PREA) forbids prisons from assigning transgender prisoners to gender-specific prisons "solely based on their external anatomy," prisons and jails routinely violate this policy.⁴⁴ Federal prison policies concerning the housing of transgender and gender non-confirming individuals also change depending upon the presidential administration – under the Obama administration, BOP housing determinations took into account a person's gender identity and expression, but under the Trump administration, BOP policy all but mandated housing determinations based on sex assigned at birth.⁴⁵

C. Explicit restrictions on expression and association

Prisons use solitary confinement, a form of torture,⁴⁶ as a mechanism to silence and control LGBTQ+ prisoners, particularly transgender women and cisgender gay men.⁴⁷ In one study, 85% of LGBTQ+ respondents report having been subjected to solitary confinement.⁴⁸

Solitary confinement is also weaponized to punish prisoners for consensual sexual and romantic same-sex relationships, even non-sexual contact such as hand holding;⁴⁹ they also risk losing essential lifelines to community and family via phone privileges.⁵⁰

Transgender and gender-variant prisoners who have been misclassified according to their external anatomy may need access to gendered uniforms, undergarments, and items not offered at their facility. Possession of certain

⁴⁰ Appendix L at 29-30.

⁴¹ Appendix C at 28.

⁴² Appendix P.

⁴³ *Id.*

⁴⁴ *Id.* at 23.

⁴⁵ Appendix Q; Appendix R.

⁴⁶ Appendix S.

⁴⁷ Appendix L at 39.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 32-33.

⁵⁰ *Id.* at 53.

gendered items, for example, a bra, can result in severe punishments such as solitary confinement.⁵¹

⁵¹ Appendix N.