

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 718

INTRODUCER: Criminal Justice Committee and Senators Book and Stewart

SUBJECT: Gay and Transgender Panic Legal Defenses

DATE: March 30, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Jones	CJ	Fav/CS
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 718 creates the “Gay and Transgender Panic Legal Defense Prohibition Act.” The bill prohibits a nonsexual advance or the perception or belief, even if inaccurate, of the sex, sexual orientation, gender identity, or gender expression, from being used as a defense to a criminal offense or to justify the conduct of an individual who commits a criminal offense, or to mitigate the severity of a criminal offense during sentencing.

The bill provides legislative findings and defines the terms “gay and transgender panic legal defense,” “gender expression,” and “sexual orientation.”

The bill is effective July 1, 2021.

II. Present Situation:

In a criminal case, the prosecution must prove every element of the crime charged, beyond a reasonable doubt. However, there are circumstances in which the defendant’s conduct may have caused the alleged crime, but she or he is not criminally culpable based on certain legal defenses.

Affirmative Defenses

An affirmative defense is any defense that assumes the charges to be correct but raises other facts, which if true, would establish a valid excuse or justification or a right to engage in the

conduct in question.¹ In addition to the affirmative defenses listed below, some criminal offenses contain affirmative defenses specific to those crimes.²

Justifiable Use of Force

A person charged with a criminal offense in which force was used, such as battery or murder, may argue at trial that he or she was justified in using such force. Chapter 776, F.S., contains a variety of provisions for the instances in which a person is justified in using force.

Florida law provides that a person is justified in using or threatening to use force against another to defend himself or herself or another against the other's imminent use of unlawful force or the commission of forcible felony.³ There is no duty to retreat prior to using or threatening such force. A person is likewise justified to use or threaten to use force to defend his or her home⁴ or property,⁵ with certain exceptions.

However, this defense is not absolute. This affirmative defense is not available to a person who is in the process of attempting to commit, committing, or escaping after the commission of a forcible felony and is precluded from claiming a justifiable use of force.⁶ It is also generally not available to a person who initially provokes the use or threatened use of force against himself or herself, with exceptions.⁷

A person who uses justifiable force, as authorized under Florida law, is immune from criminal prosecution and civil liability for such conduct, unless the person against whom the use or threat of use of force is a law enforcement officer performing his or her official duties.⁸ Immunity from criminal prosecution includes immunity from being arrested, detained in custody, and charged or prosecuted.⁹

Insanity Defense

In Florida, it is an affirmative defense to criminal prosecution that, at the time of the commission of a criminal offense, the defendant was insane.¹⁰ Insanity is established when:

- The defendant had a mental infirmity, disease, or defect; **and**
- Because of this condition, the defendant:
 - Did not know what he or she was doing or its consequences; **or**
 - Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.¹¹

¹ *Herrera v. State*, 594 So.2d 275, 277 (Fla. 1992).

² For example, *see* s. 817.5685(5), F.S., relating to unlawful possession of the personal identification information of another; s. 893.101, F.S., relating to controlled substances; and s. 910.006(4), F.S., relating to maritime crime.

³ Section 776.012, F.S.

⁴ Section 776.013, F.S.

⁵ Section 776.031, F.S.

⁶ Section 776.041(1), F.S.

⁷ Section 776.041(2), F.S.

⁸ Section 776.032, F.S.

⁹ *Id.*

¹⁰ Section 775.027(1), F.S.

¹¹ *Id.*

The defendant has the burden of proving the defense of insanity by clear and convincing evidence.¹²

Entrapment

Entrapment occurs when a law enforcement officer, a person engaged in cooperation with a law enforcement, or a person acting as an agent of a law enforcement officer, for the purposes of obtaining evidence, induces or encourages, and as a direct result, causes another person to engage in criminal conduct.¹³ A person who is prosecuted for such crime must be acquitted if he or she proved by a preponderance of the evidence that his or her criminal conduct occurred as a result of entrapment.¹⁴

Necessity Defense

The necessity defense, sometimes referred to as the justification offense, that there may be circumstances under which a crime would be justified and the conduct declared not criminal.¹⁵

The essential elements of the defense of necessity are that:

- The defendant reasonably believed that his or her action was necessary to avoid an imminent threat of death or serious bodily injury to himself or herself or others;
- The defendant did not intentionally or recklessly place himself or herself in a situation in which it would be probable that he or she would be forced to choose the criminal conduct;
- There existed no other adequate means to avoid the threatened harm except the criminal conduct;
- The harm sought to be avoided was more egregious than the criminal conduct perpetrated to avoid it; and
- The defendant ceased the criminal conduct as soon as the necessity or apparent necessity for it ended.¹⁶

Coercion or Duress

The defense of coercion or duress allows a defendant to avoid liability because coercive conditions negate a conclusion of guilt even though the defendant acted knowingly or willingly.¹⁷ To be entitled to the defense of duress, these six elements must be demonstrated:

- The defendant reasonably believed that a danger or emergency existed that he did not intentionally cause;
- The danger or emergency threatened significant harm to himself or herself or another person;
- The threatened harm must have been real, imminent, and impending;
- The defendant had no reasonable means to avoid the danger or emergency except by committing the crime;
- The crime must have been committed out of duress to avoid the danger or emergency; and

¹² Section 775.027(2), F.S.

¹³ Section 777.201, F.S.

¹⁴ *Id.*

¹⁵ *Knight v. State*, 187 So.3d 307, 309 (Fla. 5th DCA 2016), citing *Marrero v. State*, 516 So.2d 1051, 1054 (Fla 3d DCA 1987).

¹⁶ *Id.*

¹⁷ *Tyler v. State*, 131 So.2d 811, 812 (Fla. 1st DCA 2014), citing *Dixon v. U.S.*, 548 U.S. 1, 7 (2006).

- The harm the defendant avoided outweighs the harm caused by committing the crime.¹⁸

Gay and Transgender Panic Defenses

According to a Gallup report, 5.6 percent of U.S. adults identify as lesbian, gay, bisexual, or transgender.¹⁹ Crimes based on a person's sexual orientation or gender identity accounted for 19.4 percent of hate crimes in the U.S., in 2019.²⁰

The term "homosexual panic" was first coined in 1920 by a psychiatrist who saw a pattern in his patients that self-identified as heterosexual but were attracted to members of the same sex.²¹ The Diagnostic and Statistical Manual of Mental Disorders, the official list of psychiatric disorders published by the American Psychiatric Association, listed "homosexual panic disorder" in its 1952 edition, but it has not appeared in the manual since then.²² In the 1960's, criminal defense attorneys began using the idea of gay panic to explain why their male clients who were accused of murdering men should be found not guilty.²³

Although there is no officially recognized "gay panic" or "trans panic" defense, it is often used to bolster claims of insanity, diminished capacity, provocation, and self-defense. The "gay panic" defense refers to defense strategies that rely on the notion that a criminal defendant's conduct should be excused or justified if his or her actions were in response to a homosexual advance.²⁴ The "trans panic" defense refers to defense strategies in which a criminal defendant claims that the discovery of the victim's biological sex was so upsetting that he or she panicked and lost self-control.²⁵

In 2013, the American Bar Association adopted a resolution urging federal, tribal, state, local, and territorial governments to take action to curtail the availability and effectiveness of "gay panic" and "trans panic" defenses.²⁶ Eleven states and the District of Columbia have enacted

¹⁸ *Stannard v. State*, 113 So.2d 929, 932 (Fla. 5th DCA 2013), quoting *Driggers v. State*, 917 So.2d 329, 330 (Fla. 5th DCA 2005).

¹⁹ Jones, Jeffrey, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP, (February 24, 2021), available at <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx> (last visited March 24, 2021).

²⁰ U.S. Dep't of Justice, *2019 Hate Crime Statistics*, available at <https://www.justice.gov/hatecrimes/hate-crime-statistics> (last visited March 24, 2021).

²¹ Lee, Cynthia, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 482 (2008), available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1796&context=faculty_publications (last visited March 24, 2021).

²² *Id* at 483.

²³ *Id* at 475.

²⁴ *Id* at 475.

²⁵ Lee, Cynthia, *The Trans Panic Defense Revisited*, 57 Am. Crim L. Rev. 1411 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481295 (last visited March 24, 2021). Click "Download this Paper" to access the article.

²⁶ American Bar Association, *Resolution 113A*, (August 2013), available at <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/aug-13-gay-panic.authcheckdam.pdf> (last visited March 24, 2021).

laws prohibiting the use of “gay panic” and “trans panic” defenses.²⁷ Several other states have bills prohibiting the defenses pending before their legislatures.²⁸

Bills prohibiting the defenses in federal criminal proceedings was also introduced in the 115th Congress (2017-2018)²⁹ and the 116th Congress (2019-2020).³⁰ The bills have not yet been reintroduced in the 117th Congress.

III. Effect of Proposed Changes:

The bill provides that the act may be cited as the “Gay and Transgender Panic Legal Defense Prohibition Act.”

The bill provides legislative findings that gay and transgender panic legal defenses, which continue to be raised in proceedings, characterize the sexual orientation and gender expression or gender identity as objectively reasonable excuses for the loss of self-control, and thereby illegitimately attempt to mitigate the responsibility of a perpetrator for harm done to a lesbian, gay, bisexual, or transgender individual.

The bill prohibits a defendant from using a gay or transgender panic legal defense to justify a criminal offense or mitigate the severity of a criminal offense during sentencing when such conduct is based on a nonviolent sexual advance or the perception or belief, even if inaccurate, of the sex, sexual orientation, gender identity, or gender expression of an individual.

The bill defines the following terms:

- “Gay and transgender panic legal defense” means a legal strategy that asks a judge or jury to find that the victim’s sexual orientation or gender identity is the cause of the defendant’s reaction and commission of a criminal offense.
- “Gender expression” or “gender identity” means gender-related identity, appearance, or behavior, regardless of whether such gender-related identity, appearance, or behavior is different from that traditionally associated with a person’s physiology or assigned sex at birth.
- “Sexual orientation” means an individual’s actual or perceived heterosexuality, homosexuality, or bisexuality.

The bill is effective July 1, 2021.

²⁷ The LGBT Bar, *LGBTQ+ “Panic” Defense Legislation Map*, available at <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/gay-trans-panic-defense-legislation/> (last visited March 24, 2021). The states that have enacted laws include: California, Colorado, Connecticut, Hawaii, Illinois, Maine, Nevada, New Jersey, New York, Rhode Island, and Washington.

²⁸ *Id.* States where legislation has been introduced include: Florida, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, New Hampshire, New Mexico, Oregon, Pennsylvania, Texas, Vermont, Virginia, and Wisconsin.

²⁹ See Gay and Trans Panic Defense Prohibition Act of 2018, S. 3188, 115th Cong. (2017-2018), and Gay and Trans Panic Defense Prohibition Act of 2018, H.R. 6358, 115th Cong. (2017-2018).

³⁰ See Gay and Trans Panic Defense Prohibition Act of 2019, S. 1721, 116th Cong. (2019-2020), and Gay and Trans Panic Defense Prohibition Act of 2019, H.R. 3133, 116th Cong. (2019-2020).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by article VII, s. 18 of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 900.06 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 30, 2021:

The committee substitute removes the descriptor “violent” in reference to the defendant’s reaction in the definition of “gay and transgender legal defense.”

- B. **Amendments:**

None.