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NO PRIDE, ALL PREJUDICE:
ADDRESSING LGBTQ+ BIAS IN CAPITAL PUNISHMENT SENTENCING

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I. INTRODUCTION

On January 3, 2023, the Missouri Department of Corrections executed Amber McLaughlin.[2] It was the first execution of 2023 in the United States and the first known execution of a transgender person.[3] After McLaughlin was convicted of murder following the death of her ex-girlfriend in 2003, the jury could not agree as to whether the death penalty should be imposed.[4] Although the jury deadlocked, the trial

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[2] Dakin Andone, *Missouri carries out first known execution of an openly transgender person for 2003 murder*, CNN (Jan. 3, 2023, 11:21 PM), https://www.cnn.com/2023/01/03/us/amber-mclaughlin-missouri-execution/index.html.

[3] *Id.*

[4] Lydia Wheeler, *First Transgender Person Executed Under Rare Missouri Law (1)*, BLOOMBERG LAW (Jan. 3, 2023, 3:56 PM),

judge made the final decision and sentenced McLaughlin to death.[5] Missouri is one of two states that allows the trial judge to impose death sentences if a jury fails to reach a verdict.[6] On December 12, 2022, in a final attempt to stop McLaughlin's execution, a petition of clemency was filed that included her lifelong mental health issues.[7] Missouri Governor Mike Parsons ultimately denied the petition and ordered the execution to move forward as planned.[8] After being held on death row at Potosi Correctional Center, an all-male prison, Amber McLaughlin—or Scott McLaughlin, according to court documents—was executed at 6:51 p.m. on January 3, 2023, at the Eastern Reception, Diagnostic, and Correctional Center in Bonne Terre, Missouri.[9]

The execution of Amber McLaughlin sparked heavy discussion surrounding the discriminatory use of the death penalty for LGBTQ+ defendants. There are many instances of prosecutors and juries acting biasedly toward LGBTQ+ defendants during both criminal trials and death penalty sentencings.[10] Unfortunately, the criminal justice system is not afraid to use a defendant's sexuality to demonize him or her to entice juror bias.[11] According to a national study performed by

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https://news.bloomberglaw.com/us-law-week/missouri-to-execute-first-transgender-person-under-unique-law.

[5] *Id.*

[6] *Id.*

[7] *Missouri Set to Execute Amber McLaughlin on January 3 in First U.S. Execution of a Transgender Person*, DEATH PENALTY INFORMATION CENTER (Dec. 27, 2022), https://deathpenaltyinfo.org/news/missouri-set-to-execute-amber-mclaughlin-on-january-3-in-first-u-s-execution-of-a-transgender-person.

[8] Andone, *supra* note 2.

[9] Andone, *supra* note 2.

[10] *Discriminatory Use of Death Penalty Against Gays Raises Concerns Globally and in the U.S.,* DEATH PENALTY INFO. CTR. (Apr. 3, 2019), https://deathpenaltyinfo.org/news/discriminatory-use-of-death-penalty-against-gays-raises-concerns-globally-and-in-the-u-s.

[11] *IN THE KILLING FIELDS OF THE STATE: Why Abolition of The Death Penalty Is A Queer Issue*, AMERICAN FRIENDS SERVICE COMMITTEE, https://www.prisonpolicy.org/scans/death-penalty-brief.pdf (last visited Apr. 25, 2023).

Lambda Legal in 2012, 19 percent of individuals reported that they had heard judges, lawyers, and other court employees make anti-LGBTQ+ statements.[12] Furthermore, 16 percent of respondents reported "[t]hat their own sexual orientation or gender identity was raised when it was not relevant."[13] Alas, this occurs far too often in the judicial system.

This paper is separated into five sections. Section one will outline specific instances of LGBTQ+ bias in the criminal justice system and discuss anti-LGBTQ+ statements made during both criminal trials and sentencings. Section two will examine the decisions of *Pena-Rodriguez v. Colorado* and *Buck v. Davis* and discuss whether the decisions should expand to encompass biases surrounding sexuality. Section three will discuss professional misconduct by examining relevant rules from the Model Rules of Professional Conduct and the Model Code of Judicial Conduct. Section four will discuss whether the rules surrounding discrimination and bias based on sexual orientation are analogous to the *Pena-Rodriguez* and *Buck* holdings. Section four will also examine how Federal Rule of Evidence 403 could be used by defense counsel to exclude prejudicial statements from being introduced into evidence. Section five will propose a solution to help eliminate anti-LGBTQ+ statements made by prosecutors at trial and jurors during sentencing by extending the holdings of *Pena-Rodriguez* and *Buck* to include bias based upon sexual orientation, applying relevant sections of the Model Rules of Professional Conduct and the Model Code of Judicial Conduct, and using Federal Rule of Evidence 403 as a safeguard to exclude evidence of a defendant's sexual orientation when introduced for prejudicial reasons.

II. USING SEXUALITY AS AN AGGRAVATING FACTOR

A. SEXUALITY BROUGHT INTO COURT BY WITNESS TESTIMONY

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[12] Todd Brower et al., *Jury Selection and Anti-LGBT Bias: Best Practices in LGBT Bias*, LAMBDA LEGAL (Dec. 2015), https://legacy.lambdalegal.org/sites/default/files/publications/downloads/jury-selection_08-31-17.pdf.

[13] *Id.*

Stanley Lingar was sentenced to death for the 1985 murder of a high school teenager.[14] Lingar's homosexuality was brought into the trial during its punishment phase by David Smith, his partner.[15] Lingar's attorneys objected to the testimony on the grounds of it being prejudicial and irrelevant, but the trial judge ultimately overruled the objection.[16] After he was convicted and sentenced to death, Lingar appealed the sentence because he believed that Smith's testimony was unfairly prejudicial.[17] In its ruling, the Supreme Court of Missouri held that evidence of Lingar's homosexuality was relevant because "[i]t tends to explain [Lingar's] desire to force a young man not only to remove his clothing but also to see him masturbate."[18] The Court also pointed out that the testimony exposing Lingar's homosexuality showed the circumstances of the teenager's murder were "[o]utrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind."[19]

In the 1990s, Wanda Allen received a death sentence after she was convicted of killing her girlfriend.[20] In 1988, Allen allegedly shot and killed her girlfriend during a dispute in front of a police station in the Village, Oklahoma.[21] Allen attempted to claim self-defense at trial, but the testimony to corroborate her claim was deemed inadmissible by the judge.[22] At trial, the prosecution called the decedent's mother as a witness, and she testified that Allen was the "man" in the homosexual relationship.[23] On appeal, Allen argued that the evidence regarding the mother's observations should not have been admitted because "[i]t was used to show [Allen] was the aggressive person in the relationship, while the decedent was

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[14] State v. Lingar, 726 S.W.2d 728, 730 (Mo. 1987).
[15] *Id.* at 739.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* (citing MO. REV. STAT. § 565.032.2(7) (1986)).
[20] Allen v. State, 871 P.2d 79, 86 (Okla. Crim. App. 1994).
[21] *Id.*
[22] *Id.* at 92.
[23] *Id.* at 95.

more passive."[24] The Court of Criminal Appeals of Oklahoma held that the trial court did not err in admitting the mother's observation of the relationship because it was a lay witness's opinion.[25] The Court reasoned that the probative value of the mother's testimony did not substantially outweigh its prejudicial effect.[26] Wanda Allen was ultimately executed on January 12, 2001, at the Oklahoma State Penitentiary.[27]

In the infamous case of *Rhines v. State*, Charles Rhines was sentenced to death because the jury believed that a gay man would enjoy life in prison with other men.[28] At trial, the State presented evidence of Rhines's homosexuality.[29] Although the jurors stated during *voir dire* that they could be impartial about Rhines's sexual orientation, several jurors later stated in interviews that Rhines's sexuality was brought up during jury deliberation—and not in a good way.[30] In his writ for habeas corpus, Rhines detailed some of these statements, including, "[R]hines might enjoy a life in prison where he would be among so many men," and, "If he's gay, we'd be sending him where he wants to go."[31] Even with these prejudicial statements, the Supreme Court of the United States denied Rhines's writ of habeas corpus, and he was executed on November 4, 2019.[32]

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Bobby Ross Jr., *Wanda Jean Allen executed Two-time killer dies by lethal injection*, THE OKLAHOMAN (Jan. 12, 2001, 12:00 AM), https://www.oklahoman.com/story/news/2001/01/12/wanda-jean-allen-executed-two-time-killer-dies-by-lethal-injection/62163226007/.
[28] Brief for American Civil Liberties Union of South Dakota et. al. as Amici Curiae Supporting Plaintiff-Appellant at 1, Rhines v. Young, 899 F.3d 482 (2018) (No. 18-2376).
[29] State v. Rhines, 548 N.W.2d 415, 442 (S.D. 1996).
[30] Petition for Writ of Habeas Corpus at 3, Rhines v. Young 140 S. Ct. 8 (2019) (No. 19-6477).
[31] *Id.*
[32] *In the Case of Rhines v. Young, Evidence Shows Some Jurors May Have Voted for Death for Charles Rhines Because They Believed he Would Enjoy Life in Prison with Other Men*, ACLU SOUTH DAKOTA (Mar. 25, 2019), https://www.aclusd.org/en/cases/rhines-v-young.

B. SEXUALITY BROUGHT INTO COURT BY PROSECUTORIAL STATEMENTS

There also have been instances of anti-LGBTQ+ statements made by the prosecutors trying the case. In *Neill v. Gibson*, the prosecutor was not afraid to speak about the defendant's sexuality. Neill was on trial for murder charges stemming from a bank robbery that occurred in Geronimo, Oklahoma.[33] Johnson, Neill's boyfriend, was the co-defendant.[34] During the trial, the prosecutor commented that Neill was a "[v]owed homosexual. He had a gay lover he didn't want to lose."[35] Later at trial, the prosecutor instructed the jury:

> I don't want to import to you that a person's sexual preference is an aggravating factor. It is not. But these are areas you consider whenever you determine the type of person you're setting in judgment on . . . . The individual's homosexual. He's in love with Robert Grady Johnson. He'll do anything to keep his love, anything.[36]

The jury went on to convict Neill of four counts of first-degree murder and sentenced him to death.[37]

Neill appealed the verdict for a plethora of reasons, one being prosecutorial misconduct regarding the comments on his homosexuality.[38] After Neill used all of his appeals, he filed for habeas relief.[39] The writ was denied, and Neill appealed to the Court of Appeals for the Tenth Circuit.[40] In its reasoning, the Court stated that, "[i]n considering whether the prosecutor's remark rendered the trial fundamentally unfair, this court considers the prosecutor's remark 'in context, considering the

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[33] Neill v. Gibson, 278 F.3d 1044, 1049 (10th Cir. 2001).
[34] *Id.* at 1050.
[35] *Id.* at 1060 (quoting Trial tr. Vol. V at 1283).
[36] *Id.* at 1061 (quoting Trial tr. Vol. V at 1287).
[37] *Id.* at 1049.
[38] *Id.* at 1060.
[39] *Id.* at 1049.
[40] *Id.*

strength of the State's case and determining whether the prosecutor's challenged remarks plausibly could have tipped the scales in favor of the prosecution.'"[41] While the Court did not condone the prosecutor's statements, it held that Neill did not have a valid prosecutorial misconduct claim because "[t]he improper remarks did not result in a fundamentally unfair trial."[42] Jay Neill was later executed on December 12, 2002, at the Oklahoma State Penitentiary.[43]

In *Burdine v. Johnson*, Burdine's attorney fell asleep during the trial and made anti-LGBTQ+ statements during his closing argument.[44] The jurors stated they heard the prosecutor say, "Sending a homosexual to the penitentiary certainly isn't a very bad punishment for a homosexual."[45] Specifically, jurors claimed they were urged to sentence Burdine to death because "[s]ending [Burdine] to prison would be like setting a kid loose in a candy store."[46] The jury ultimately convicted Burdine of capital murder.[47] Because his attorney was asleep for much of the trial, Burdine appealed based on ineffective assistance of counsel.[48] After exhausting all his appeals, Burdine sought habeas corpus relief.[49] The United States District Court of the Southern District of Texas granted the habeas corpus relief and vacated the capital murder conviction.[50] At his retrial, Burdine accepted a plea deal that kept him off death row.[51]

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[41] *Id.* at 1061 (quoting Rojem v. Gibson, 245 F.3d 1130, 1142–43 (10th Cir. 2001)).
[42] *Id.* at 1061.
[43] Joan W. Howarth, *The Geronimo Bank Murders: A Gay Tragedy*, 17 L. & SEXUALITY 39, 39–40 (2008).
[44] Richard Goldstein, *Queer on Death Row*, THE VILLAGE VOICE (Mar. 13, 2001), https://www.villagevoice.com/2001/03/13/queer-on-death-row/.
[45] *Id.*
[46] *Id.*
[47] Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001).
[48] *Id.* at 336.
[49] *Id.*
[50] *Id.* at 350.
[51] Lisa Teachey, *Burdine strikes deal to stay off death row*, CHRON (June 19, 2003), https://www.chron.com/news/houston-texas/article/Burdine-strikes-deal-to-stay-off-death-row-2129530.php.

III. THE SAFEGUARDS USED TO PREVENT BIAS BASED ON SEXUAL ORIENTATION NEED TO BE UNIFORMLY RECOGNIZED AND FIRMLY APPLIED.

As the above cases have proven, there is obvious discrimination against members of the LGBTQ+ community throughout the criminal justice system. While there are many safeguards in place to prevent bias based on sexual orientation, these safeguards are often overlooked. Some of these safeguards include the holdings of *Pena-Rodriguez* and *Buck v. Davis*, Model Rule of Professional Conduct 8.4(g), Model Code of Judicial Conduct Rule 2.3, and Federal Rule of Evidence 403.

A. THE HOLDINGS OF *PENA-RODRIGUEZ* AND *BUCK*

There has been discussion about the application of *Pena-Rodriguez v. Colorado* and *Buck v. Davis* to LGBTQ+ bias. In *Pena-Rodriguez*, a jury found the Hispanic defendant to be guilty on numerous charges.[52] After the verdict, two jurors disclosed to the defense attorneys that another juror expressed anti-Hispanic bias during deliberations.[53] The case was appealed after the defendant's motion for a new trial based on alleged juror misconduct was denied.[54] The trial court denied the motion because the jurors could not impeach their verdict.[55] The Supreme Court of Colorado affirmed the trial court's decision, saying that "[t]he court could find no 'dividing line between different types of juror bias or misconduct,' and thus no basis for permitting impeachment of the verdicts in petitioner's trial."[56]

In *Pena-Rodriguez*, the Supreme Court of the United States reversed the Supreme Court of Colorado's decision and held:

[52] Pena-Rodriguez v. Colorado, 580 U.S. 206, 212 (2017).
[53] *Id.*
[54] *Id.* at 214.
[55] *Id.*
[56] *Id.*

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[57]

In a similar case, Duane Buck was convicted of capital murder and sentenced to death after his defense counsel presented an expert during the punishment hearing who testified that the defendant was statistically more likely to be violent in the future because he was African American.[58] After he tried to appeal his conviction and petitioned in federal court for a writ of habeas corpus, the Supreme Court of the United States granted certiorari.[59] In *Buck v. Davis*, Buck raised an ineffective assistance of counsel claim because the defense counsel allowed the expert's prejudicial testimony.[60] The Supreme Court of the United States agreed with Buck and concluded that he had proven ineffective assistance of counsel and was entitled to post-conviction relief.[61] In the Court's holding, Chief Justice Roberts stated, "Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle."[62]

Although both *Pena-Rodriguez* and *Buck* are centered around racial discrimination, the holdings from each could be expanded to include other biases, such as sexual orientation or gender identity. Using both holdings in conjuncture could help overturn death sentences based on bias either imposed by the jury or introduced by the attorneys at trial.

B. THE MODEL CODES OF PROFESSIONAL AND JUDICIAL CONDUCT

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[57] *Id.* at 225.
[58] Buck v. Davis, 580 U.S. 100, 104 (2017).
[59] *Id.* at 105.
[60] *Id.* at 110.
[61] *Id.* at 128.
[62] *Id.* at 123.

While the holdings of *Pena-Rodriguez* and *Buck* could help to reduce the number of prejudicial death sentences, the Model Rule of Professional Conduct 8.4(g) and Model Code of Judicial Conduct 2.3 could deter or penalize an attorney or judge for introducing prejudicial evidence at trial.

i. MODEL RULE OF PROFESSIONAL CONDUCT RULE 8.4

The Model Rules of Professional Conduct emphasize that the legal profession is self-governing.[63] The Rules are "[r]ules of reason" and are not binding authority unless they have been adopted by the individual states.[64] As of April 2023, every state except California has adopted the ABA Model Rules of Professional Conduct.[65] When discussing professional misconduct, the Model Rules of Professional Conduct state:

> It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, *sexual orientation*, gender identity, marital status or socioeconomic status in conduct related to the practice of law.[66]

Under the Model Rules, discriminatory conduct includes "[h]armful verbal or physical conduct that manifests bias or prejudice towards others."[67] The Rules make it clear that

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[63] MODEL RULES OF PRO. CONDUCT Scope (10) (AM. BAR ASS'N 2023).
[64] MODEL RULES OF PRO. CONDUCT Scope (14) (AM. BAR ASS'N 2023).
[65] *Alphabetical List of Jurisdictions Adopting Model Rules*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alphaliststateadoptingmodelrules/(Mar. 28, 2018).
[66] MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023) (emphasis added).
[67] MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2023).

violations of Rule 8.4(g) "[u]ndermine confidence in the legal profession and the legal system."[68]

In the case of *Allen v. State*, the jury already was aware that Wanda Allen was homosexual because the evidence showed that the decedent was her girlfriend at the time.[69] The decedent's mother's testimony discussing how Allen was the "man" in the relationship was not only irrelevant but also prejudicial.[70] The Oklahoma Criminal Court of Appeals held that, because the testimony came from a lay witness, the statement was allowed into evidence.[71] While the statement was admitted into evidence, the prosecutor should have been held responsible under Model Rule of Professional Conduct 8.4(g). Here, the prosecutor engaged in conduct that they reasonably should have known was discrimination based on sexual orientation when they allowed the decedent's mother to testify to the "gender roles" between the decedent and the defendant. The prejudicial testimony was elicited by the prosecutor; therefore, the prosecutor should have been reprimanded under Model Rule of Professional Conduct 8.4(g).

While the Model Rules are not a mechanism for having evidence excluded at trial, Rule 8.4 can be used to reprimand attorneys who engage in discriminatory conduct at trial. Imposing a stricter application of Rule 8.4(g) would serve as a deterrent for prosecutorial misconduct.

ii. MODEL RULE OF JUDICIAL CONDUCT 2.3

Just as the Model Rules of Professional Conduct regulate the legal profession, the Model Code of Judicial Conduct regulates judicial conduct. The Code guides judges on how to "[m]aintain the highest standards of judicial and personal conduct" when dealing with other attorneys, judicial staff, and parties before the court.[72] Cannon Two of the Model Code of Judicial Conduct provides:

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[68] MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2023).
[69] Allen, 871 P.2d at 86.
[70] *Id.* at 95.
[71] *Id.*
[72] MODEL CODE OF JUD. CONDUCT Preamble (3) (AM. BAR ASS'N 2020).

> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, *sexual orientation*, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others."
>
> (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.[73]

In *Burdine v. Johnson,* the prosecutor deliberately stated that "[s]ending a homosexual to the penitentiary certainly isn't a very bad punishment for a homosexual."[74] If Rule 2.3(C) of the Model Code of Judicial Conduct was strictly enforced by judges, the prosecutor would not have been allowed to make such a highly prejudicial statement in front of the jury.[75] Moreover, the exception provided in Rule 2.3(D) did not apply to the prosecutor because his statement was not a legitimate reference to a relevant issue in the case.

Judges should not be immune from discipline when they allow prejudicial evidence based on a defendant's sexual orientation. Judges should be held to higher expectations than attorneys because judges make the final decision as to whether evidence is admitted or excluded.

C. FEDERAL RULE OF EVIDENCE 403

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[73] MODEL CODE OF JUD. CONDUCT r. 2.3(C)–(D) (AM. BAR ASS'N 2020) (emphasis added).

[74] Richard Goldstein, *Queer on Death Row*, THE VILLAGE VOICE (Mar. 13, 2001), https://www.villagevoice.com/2001/03/13/queer-on-death-row/; Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001).

[75] MODEL CODE OF JUD. CONDUCT r. 2.3(C) (AM. BAR ASS'N 2020).

In many cases, Federal Rule of Evidence 403 is the last resort attorneys use to prevent evidence from being admitted. Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[76] In fact, most of the attorneys in the cases cited above used this rule as a last resort in their bids to prevent prejudicial, anti-LGBTQ+ statements from being admitted into evidence.

To evaluate proffered evidence under Rule 403, the court must compare the probative value of the evidence against the risks provided in the rule.[77] Specifically, the evidence must be excluded if the risks *substantially outweigh* the probative value of the relevant evidence.[78] In the context of bias based on sexual orientation, the main risk that should be evaluated is unfair prejudice. Under Rule 403, "unfair prejudice" is defined as "[a]n undue tendency to suggest decision on an improper basis, such as anger, sympathy, or fear."[79]

If evidence is not excluded under Federal Rule of Evidence 403, a court should consider whether to administer a limiting instruction to the jury.[80] A limiting instruction allows a judge to "instruct[] the jury to consider a piece of evidence for a specific purpose and ignore it for any other purpose."[81] In the case of *State v. Lingar*, a limiting instruction could have been used to limit testimony relating to Lingar's sexuality to only the victimology and to ignore the testimony for all other purposes.[82] This would have meant the jury could not have used the testimony to find that the circumstances of the murder met the statutory standards to impose the death penalty.[83]

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[76] FED. R. EVID. 403.
[77] *703.2 Prejudice, Confusion, Waste of Time [Rule 403]*, NORTH CAROLINA PROSECUTORS' RESOURCE ONLINE, https://ncpro.sog.unc.edu/manual/703-2 (Mar. 21, 2021).
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] FED. R. EVID. 105; *Limiting Instructions*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/limiting_instructions (June 2020).
[82] Lingar, 726 S.W. 2d at 739.
[83] *Id.*

IV. HOW BIAS BASED UPON SEXUAL ORIENTATION *SHOULD* BE HANDLED IN THE CRIMINAL JUSTICE SYSTEM.

A. THE HOLDINGS OF *PENA-RODRIGUEZ* AND *BUCK* SHOULD BE EXTENDED TO INCLUDE BIAS BASED ON SEXUAL ORIENTATION.

While the holdings of *Pena-Rodriguez* and *Buck* speak to racial bias during criminal trials and sentencings, the holdings should be expanded to include sexual orientation bias. The problem is that current precedent provides for different levels of scrutiny for race and sexual orientation when determining whether a law is constitutional.[84] Race is considered a suspect class and is subject to strict scrutiny.[85] As it currently stands, sexual orientation is subject to a standard of review somewhere between rational basis and intermediate scrutiny.[86] As discussed in *Lawrence v. Texas*, constitutional issues involving sexual orientation are subject to "[r]ational basis [review] with a bite."[87] Some argue that heightened scrutiny for sexual orientation is desperately needed.[88]

To prove a law is constitutional under the strict scrutiny test, the government must identify a compelling government interest and prove that the means chosen by the government are narrowly tailored to achieve that interest.[89] If a law fails strict scrutiny, it is considered unconstitutional.[90] By comparison, a law is considered unconstitutional under the rational basis test if the law serves no legitimate government interest, or if the law is not rationally related to achieving a legitimate government

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[84] Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005).
[85] *Id.*
[86] *Id.*
[87] *Id.* at 2796; Lawrence v. Texas, 539 U.S. 558 (2003).
[88] *See* Smith, *supra* note 84.
[89] Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1245–46 (2010).
[90] *Id.* at 1246.

interest.[91] Due to the lower level of scrutiny given to laws involving sexual orientation, it is easier for prejudicial laws to be upheld.[92]

On January 20, 2021, the day of President Joe Biden's inauguration, President Biden signed an Executive Order to prevent discrimination based on gender identity or sexual orientation.[93] In the order, President Biden stated that "[i]t is the policy of [his] Administration to . . . combat discrimination on the basis of . . . sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of . . . sexual orientation."[94]

It is only a matter of time until strict scrutiny is expanded to include sexual orientation as a suspect class. To be considered a suspect class, the following factors are considered: (1) whether the class has been subjected to discrimination; (2) whether they exhibit "[o]bvious, immutable, or distinguishable characteristics that define them as a discrete group"; and (3) whether they are a minority or politically powerless.[95] It can be argued that all these factors apply to the LGBTQ+ community.

As to the first factor, members of the LGBTQ+ community have been, and still are, subject to discrimination in society and the judicial system. This year marks the twentieth anniversary of the landmark case of *Lawrence v. Texas*, in which the Supreme Court of the United States held that it was unconstitutional to criminalize sexual conduct between consenting, same-sex couples.[96] Additionally, the landmark decision of *Obergefell v. Hodges*, which allowed same-sex couples to marry across all states, was decided just eight years ago.[97] The decisions of *Lawrence* and *Obergefell* put into perspective the extent of discrimination that members of the LGBTQ+ community have faced throughout history.

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[91] Studicata, *Constitutional Law: Standards of Review (Rational Basis, Intermediate Scrutiny, & Strict Scrutiny)*, YOUTUBE (May 19, 2022), https://www.youtube.com/watch?v=tVMbLtP7VSk.
[92] *See* Smith, *supra* note 84.
[93] Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021).
[94] *Id.*
[95] Lyng v. Castillo, 477 U.S. 635, 638 (1986).
[96] Lawrence v. Texas, 539 U.S. 558 (2003).
[97] Obergefell v. Hodges, 576 U.S. 644 (2015).

In Tennessee, the LGBTQ+ community faces a prejudicial law that could go into effect on July 1, 2023.[98] Proposed by Tennessee State Senator Jack Johnson, Senate Bill 3 makes it a criminal offense for a person to engage in an "adult cabaret performance . . . on public property; or in a location where the adult cabaret performance could be viewed by a person who is not an adult."[99] While the bill does not specifically catalog drag shows as "adult cabaret performances," many interpret the bill to include drag shows under this provision under Section 1: "[m]ale or female impersonators who provide entertainment that appeals to a prurient interest."[100] Drag shows are an imperative symbol of the LGBTQ+ community.[101] Many individuals use drag to explore their sexual orientation or gender identity.[102] Putting restrictions on drag performances is not only discriminatory; it also attempts to silence an entire community.

On top of legislative and judicial discrimination, members of the LGBTQ+ community face societal discrimination as well. According to data from the 2017 National Crime Victimization Survey, members of the LGBTQ+ community were "[n]early four times more likely than non-LGBT people to experience violent victimization."[103] While some discriminatory actions are as obvious as the above example, sometimes discrimination is implicit. According to the National Institutes of Health, implicit bias is defined as "[a]

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[98] Kimberlee Kruesi & Jeff McMillan, *As Tennessee, others target drag shows, many wonder: Why?*, AP NEWS (Mar. 2, 2023), https://apnews.com/article/drag-queens-tennessee-bill-legislation-3ed2ddd0e8231819ade5d0c8b9f4c30a.

[99] S.B. 0003, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

[100] *Id.* at § 1.

[101] Kiana Shelton, *The Joy of Drag*, PSYCHIATRIC TIMES (June 29, 2022), https://www.psychiatrictimes.com/view/the-joy-of-drag.

[102] *Id.*

[103] *LGBT people nearly four times more likely than non-LGBT people to be victims of violent crime*, UCLA WILLIAMS INST. (Oct. 2, 2020), https://williamsinstitute.law.ucla.edu/press/ncvs-lgbt-violence-press-release/.

form of bias that occurs automatically and unintentionally, that nevertheless affects judgments, decisions, and behaviors.[104]

In relation to the third factor in determining whether a group is considered a suspect class, the LGBTQ+ community is a minority in the United States. According to a 2022 Gallup study, only 7.1 percent of the United States population identified as LGBTQ+.[105] Given the analysis of the factors from *Lyng v. Castillo*, the LGBTQ+ community should be considered a suspect class and therefore subject to a strict scrutiny analysis when constitutional issues surrounding sexual orientation arise.[106]

The second factor set forth in *Lyng* is more difficult to evaluate when discussing sexual orientation.[107] The second factor states that the class must have "[o]bvious, immutable, or distinguishable characteristics that define them as a discrete group."[108] It can be argued that the distinguishable characteristic of same-sex couples is the fact that they are sexually attracted to those of their same sex.[109] Furthermore, the process of transitioning from one sex to another sex is a distinguishable characteristic of transgender persons. While this argument is not as strong as the other two, the full analysis of the three factors shows that sexual orientation should be considered a suspect class.

Essentially, the only delay with extending the holdings of *Pena-Rodriguez* and *Buck* is the different levels of scrutiny applied to race and sexual orientation. Once sexual orientation

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[104] *Implicit Bias*, NATIONAL INSTS. OF HEALTH, https://diversity.nih.gov/sociocultural-factors/implicit-bias#:~:text=What%20is%20implicit%20bias%3F,retaining%20a%20diverse%20scientific%20workforce (last visited Apr. 26, 2023).

[105] Jeffery M. Jones, *LGBT Identification in the U.S. Ticks Up to 7.1%*, GALLUP (Feb. 17, 2022), https://news.gallup.com/poll/389792/lgbt-identification-ticks-up.aspx.

[106] *Lyng*, 477 U.S. at 638.

[107] *Id.* at 638.

[108] *Id.*

[109] Brett Parker, *What Level of Legal Scrutiny Should Sexual Orientation-Based Classifications Receive*, STANFORD POLITICS (Jan. 19, 2015), https://stanfordpolitics.org/2015/01/19/level-legal-scrutiny-sexual-orientation-classifications/.

is considered a suspect class like race and gender, the inclusion of sexual orientation bias will follow.

B. USING A STRICTER APPLICATION OF THE MODEL RULES TO SERVE AS A DETERRENT TO PREVENT PREJUDICIAL EVIDENCE BASED ON SEXUAL ORIENTATION FROM BEING ADMITTED AT TRIAL.

As mentioned above, the Model Rules of Professional Conduct and Model Code of Judicial Conduct are not mechanisms for excluding evidence at trial; however, the rules can be used to reprimand judges and attorneys who engage in discriminatory conduct at trial.[110]

Any lawyer who violates Model Rule of Professional Conduct 8.4 is subject to discipline.[111] If an attorney is sanctioned by a disciplinary board, the attorney could be subject to censure, suspension, or disbarment.[112] A censure, or a public reprimand of an attorney's violation of the Model Rules, is the lowest level of discipline an attorney can receive.[113] An attorney's law license also can be suspended for a period of time if the professional misconduct is serious enough to warrant that level of punishment.[114] If the disciplinary board finds that the violation of the Model Rules gives rise to disbarment, an attorney's state bar license is revoked, and the attorney will no longer be able to practice law.[115]

If the Model Rules of Professional Conduct were used more frequently to penalize professional misconduct, attorneys would be less likely to make prejudicial statements or to introduce prejudicial evidence at trial. Further, the Model Rules could impose stricter punishments, such as suspensions, for attorneys who engage in prejudicial and discriminatory acts based on sexual orientation. The Model Rules of Professional

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[110] MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2023).
[111] MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 1 (AM. BAR ASS'N 2023).
[112] 31 C.F.R. § 10.79(c) (2011).
[113] *Discipline, Sanction, Disqualification*, LAW SHELF, https://lawshelf.com/coursewarecontentview/discipline-sanction-disqualification (last visited Apr. 26, 2023).
[114] 31 CFR § 10.79(b) (2011).
[115] LAW SHELF, *supra* note 113.

Conduct should be stricter when discrimination or prejudice of any class is involved in the alleged misconduct.

Similarly, judges should not be immune from reprimand when they blatantly allow attorneys to introduce and use prejudicial evidence based on a defendant's sexual orientation. Like attorneys, judges also are subject to sanctions when they violate the Model Code of Judicial Conduct.[116] As with the Model Rules of Professional Conduct, there should be stricter enforcement of the rules against judges when discrimination or prejudice is involved due to their status and decisional role in proceedings.

C. USING FEDERAL RULE OF EVIDENCE 403 AS A SAFEGUARD TO PREVENT PREJUDICIAL EVIDENCE OF A DEFENDANT'S SEXUAL ORIENTATION FROM BEING ADMITTED AT TRIAL.

Federal Rule of Evidence 403 was created as a safeguard to prevent prejudicial evidence from being used in the judicial system, but it does not always work that way in reality. If courts looked at proposed evidence through the lens of Rule 403 more often, an abundant amount of prejudicial evidence based on bias would be excluded from trial. Far too often, evidence is admitted because a judge has deemed it relevant without thoroughly examining the evidence.

On appeal, a defendant can argue that evidence should have been excluded under the safeguards of Rule 403. If an appellate court believes the evidence should have been excluded, the court likely will overturn the verdict and remand the case back to the trial court with instructions to exclude the evidence. If this occurs, either Model Rule of Professional Conduct 8.4 or Model Code of Judicial Conduct 2.3 could be used to punish the attorney who introduced the prejudicial evidence or the judge who admitted the prejudicial evidence into the record.

If every other evidentiary mechanism to exclude prejudicial evidence is denied by the court, Federal Rule of Evidence 403 should serve as a safeguard the defendant can rely

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[116] MODEL RULES FOR JUD. DISCIPLINARY ENF'T r. 6 (AM. BAR ASS'N 2018).

on. Often, the probative value of the defendant's sexuality is substantially outweighed by the danger of unfair prejudice but is still admitted into evidence.[117] Judges should examine prejudicial evidence carefully to determine whether the evidence should be excluded under Rule 403.

V. CONCLUSION

It is no surprise that the death penalty is arbitrarily imposed, especially when the defendant is part of a marginalized community. The LGBTQ+ community is one of the many marginalized communities that are overlooked during criminal trials and sentencing. While there are safeguards in place to discourage and prohibit the use of prejudicial evidence based on sexual orientation, many of these safeguards are frequently ignored by attorneys and judges.

On the other hand, these safeguards are rarely overlooked when the marginalized community is a class protected by the Equal Protection Clause of the Fourteenth Amendment, such as race and gender. However, the courts have yet to make a unanimous decision as to whether sexual orientation should also be considered a suspect class under the Equal Protection Clause.[118] Although the Biden Administration has vowed to make sexual orientation and gender identity a suspect class, it has yet to happen officially.[119]

If sexual orientation is not recognized as a suspect class under the Equal Protection Clause, the Model Rules of Professional Conduct and Model Code of Judicial Conduct should be used as deterrents to prevent the introduction at trial of prejudicial evidence based on sexual orientation. Preventing anti-LGBTQ+ statements from being made on the witness stand would eliminate the possibility that the jury will rely on those prejudicial statements when rendering its verdict. If anti-LGBTQ+ statements continue to be made during trial and sentencing, defense counsel can object to the evidence under Federal Rule of Evidence 403. Although the evidence should never get to a Rule 403 challenge, this rule can be used as the

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[117] FED. R. EVID. 403.
[118] Smith, *supra* note 84.
[119] Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 25, 2021).

final safeguard to prevent the admission of prejudicial evidence based on sexual orientation at trial or sentencing. Regardless, a change must be made. Evidence of a defendant's sexual orientation should no longer be used at trial or sentencing for the sole purpose of demonizing him or her to entice juror bias.