

June 27, 2013

Massachusetts Appeals Court  
John Adams Courthouse  
Suite 1200  
One Pemberton Square  
Boston, MA 02108

Re: *M. L. v. S. N.*, No. 2012-P-0621, Letter Expressing Views of Amicus Gay & Lesbian Advocates & Defenders (GLAD)

Dear Judges of the Massachusetts Appeals Court:

We are writing on behalf of Gay & Lesbian Advocates & Defenders (GLAD) in support of the plaintiff/appellant in *M.L. v. S.N.*, No. 2012-P-0621, as to one evidentiary issue raised by the case – specifically sexually explicit photographs of the plaintiff, who is a gay man, that the trial court admitted as evidence. We believe that such photographic evidence was unduly prejudicial, especially given deep societal prejudices against gay male sexuality, and was wrongfully admitted. For this reason alone, we submit that reversal is required.

Interest of Amicus Gay & Lesbian Advocates & Defenders (GLAD)

GLAD is a New England-based legal organization dedicated to ending discrimination on the basis of sexual orientation, gender identity and expression, and HIV status. GLAD has successfully litigated many cases, including before this Court and the Supreme Judicial Court, advancing the rights of lesbians and gay men in Massachusetts for 35 years, including *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309 (2003) (ruling that denying same-sex couples the ability to marry was unconstitutional) and *Shaw v. Secretary of EOHHS*, 71 Mass. App. Ct. 218 (2008) (MassHealth required to cover lipodystrophy-related medical procedure for a minor). GLAD has also authored a number of amicus briefs addressing the impact of ingrained prejudice and how it can affect the legal process in cases such as *Commonwealth v. Healy*, 393 Mass. 367 (1984) (murder with sexual overtones); *Healy v. Spencer*, 453 F.3d 21 (1<sup>st</sup> Cir. 2006), *cert. denied*, 549 U.S. 1268, 127 S.Ct. 1489 (2007) (same case on federal habeas review); *Sommi v. Ayer*, 51 Mass. App. Ct. 207 (2001) (same-sex couple; domestic violence issue); *John Doe, Sex Offender Registry Board No. 10800 v. Sex Offender Registry Board*, 459 Mass. 603 (2011) (validity of classification criteria). Through litigation, GLAD seeks to root out prejudice and bias against gay men and lesbians in our laws, judicial system, and political institutions.

Argument

At the trial in this action, the judge admitted into evidence for the jury's view numerous inflammatory and sexually explicit nude images of the plaintiff. Such sexually explicit photographs were unfairly prejudicial, particularly given the deep psychological and social

prejudices that exist in society against gay male sexuality. The photographs at issue depict the plaintiff in various sexual positions and states of arousal. Of most concern, a number of the photographs depict the plaintiff naked with an erection or in a position signaling his receptivity to being penetrated through anal sex. Given the enormous prejudicial effect of allowing the jury to view such photographs (as opposed simply to knowing that the plaintiff had posed for them), the trial court committed "palpable error" in admitting them as evidence. *See Commonwealth v. Bond*, 445 Mass. 821, 831 (2006). This Court should remand this case for retrial without admission of the photographs as evidence.

Massachusetts Guide to Evidence § 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Even assuming for sake of argument that the fact the plaintiff had posed for nude photos of himself was relevant to plaintiff's tort claims against defendant, the trial court still abused its discretion by allowing the introduction of the photographs themselves. Specifically, "trial judges must take care to avoid exposing the jury unnecessarily to inflammatory material that might inflame the jurors' emotions and possibly deprive the [party] of an impartial jury." *Commonwealth v. Berry*, 420 Mass. 95, 109 (1995).

Sexual images are generally understood to inherently qualify as inflammatory. For example, in *Commonwealth v. Darby*, 37 Mass. App. Ct. 650 (1994), *review denied* 419 Mass. 1105 (1995), this Court found that a picture of the defendant sitting on a couch with an erect penis, even if relevant, was "grossly offensive and inflammatory." *Id.* at 654 (finding error in admitting the photograph and ordering retrial). Likewise, in *Commonwealth v. Prashaw*, 57 Mass. App. Ct. 19 (2003), *review denied* 439 Mass. 1102 (2003), this Court found that sexually explicit depictions, such as the two photographs of the defendant naked in a sexually provocative pose, inherently have a prejudicial effect and that the risk was great that the photographs unduly swayed the jury. *Id.* at 26.

Such inherently prejudicial effect is only compounded in this case by society's deep, psychological prejudice and disgust regarding gay male sexuality. Social psychologists have described this feeling of disgust as deeply visceral and nonrational, yet it can have a profound effect in shaping moral judgments of disfavored, minority groups, and specifically against gay men.<sup>1</sup> As one legal commentator concluded, "the 'moral emotion' of disgust may explain why public sentiments about homosexuality are so strong, negative, and pervasive."<sup>2</sup> *See, e.g., People of Territory of Guam v. Shymanovitz*, 157 F.3d 1154, 1161 (9th Cir. 1998) (recognizing that "in

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<sup>1</sup> *See, e.g.,* Paul Rozin, Jonathan Haidt, & Clark R. McCauley, "Disgust," in *Handbook of Emotions* 637, 642 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2000). Copies of all articles not cited in a legal journal are attached as an addendum in the order they are cited in this letter for the convenience of the Court.

<sup>2</sup> Richard E. Redding, "It's Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust," 15 *Duke J. of Gender Law & Pol.* 127, 185 (2008). *See also* William N. Eskridge, *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, Faculty Scholarship Series, paper 1514; and Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 *Nw. U. L. Rev.* 1543 (2005).

our society homosexuality . . . is often equated with indecency, perversion, and immorality"), *disapproved on unrelated grounds by United States v. Curtin*, 489 F.3d 935 (9th Cir. 2007); *State v. Brown*, 98-1987, 2000 WL 278548 (Iowa Ct. App. Mar. 15, 2000) ("Evidence of homosexuality is viewed by some courts as generally being extremely prejudicial").

This case presents a high risk that disgust-based prejudice infected the jury's decision-making, given the graphic depictions of gay male sexuality. Numerous psychological studies and research have shown that not only does sexual behavior lead to feelings of disgust, but, in particular, gay male sexual behavior leads to heightened reactions of disgust.<sup>3</sup> For example, studies have shown that disgust is greater for two men who engage in anal sex than for a man and woman who do the same, or for a gay man who engages in a "one-night stand" as opposed to a straight man who does the same.<sup>4</sup> Moreover, individuals show even greater disgust toward the male who is being penetrated than the male who is the penetrator.<sup>5</sup> Additional studies show that even inducing feelings of disgust by entirely unrelated means, such as by adding a noxious odor to a room, can cause individuals to evaluate gay men more negatively. In comparison, the studies did not find the same effect on participants' evaluations of other disfavored minority groups such as African-Americans.<sup>6</sup> In other words, disgust exerts a stronger negative effect on moral attitudes towards gay men than other disfavored minority groups.

What is further disturbing is that such feelings of disgust are not only subconscious but can inhibit an individual's rational decision-making process. Social psychologists have demonstrated that moral judgments are not made through rational thought processes but rather through intuitive, emotional, and unconscious mechanisms.<sup>7</sup> In particular, reactions to social taboos are especially based upon disgust rather than reason.<sup>8</sup> This emotion-driven judgment leads to the phenomenon of "dumbfounding," where a person maintains a "confused inability to explain one's position,"<sup>9</sup> a clear sign that a person's (or juror's) ability to make an unbiased decision based upon the facts has been compromised. As one scholar described, while "disgust

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<sup>3</sup> Redding, at 186.

<sup>4</sup> Heflick, Nathan, "EWWW.... Anal Sex if Icky!" *Psychology Today*; T. Andrew Caswell, Jennifer Bosson, Roger S. Giner-Sorolla, Vanessa Hettinger, & Jeremy Singh (2011). Pissed off or grossed out? Distinct elicitors of moral anger vs. disgust by homosexual behavior. Poster presented at the Society for Personality and Social Psychology, San Antonio, TX.

<sup>5</sup> Heflick, *Psychology Today*.

<sup>6</sup> Yoell Inbar, David A Pizarro, & Paul Bloom, *Disgusting Smells Cause Decreased Liking of Gay Men*, *Emotion* Vol. 12, 1 (2011) 23–27.

<sup>7</sup> See, e.g., Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *Psychol. Bull.* 814 (2001).

<sup>8</sup> Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 *J. Applied Soc. Psychol.* 191 (2001).

<sup>9</sup> Haidt and Hersh, at 209.

for gays and lesbians is now relatively unacceptable socially . . . . [t]hat does not mean that it has stopped influencing the way people really think."<sup>10</sup>

The trial court failed to give careful consideration to the unique ways that society condemns and is disgusted by gay male sexuality. Even outside the gay male context, this Court has noted that, in introducing nude photos of a female defendant posing “in a sexually provocative way,” with some objects, the “prejudicial effect was depicting the defendant as ‘a lewd [woman] and to lead the jury to believe that a [woman] of [her] character would be likely to commit the crime charged’.” *Prashaw, supra* at 22, 24-25 (quoting *Comm. v. Ellis*, 321 Mass. 669, 670 (1947)). This Court also noted that it was easy to imagine “that the purpose and effect of the introduction of the pictures was so that the jury, appalled by the defendant’s posing in such a manner, might be swayed to perceive the defendant as not of good moral character . . . .” *Id.* at 25; *see also Comm. v. Jaundoo*, 64 Mass. App. Ct. 56, 63 (2004) (graphic display of pornographic materials “could only inflame the jury against the defendant as a generally lewd person”).

Therefore, it follows that allowing the photographs in this case to be viewed by the jury would have created even more of a risk of an adverse impact in unduly and unfairly swaying the jury. As this Court stated in *Jaundoo, supra*, given the showing of prejudicial error it cannot be said “with fair assurance . . . that the judgment was not substantially swayed by the error.” *Jaundoo, supra* at 64 (quoting from *Kotteakos v. U.S.*, 328 U.S. 750, 765, 66 S. Ct. 1239 (1946)). Given the deep psychological and subconscious prejudicial effect of such photographs, their admission constituted palpable error, requiring reversal.<sup>11</sup>

## Conclusion

This Court has held that sexually explicit photographs are inherently prejudicial, even in cases involving only one or two photographs. *See Darby*, 37 Mass. App. Ct. at 656; *Prashaw*, 57 Mass. App. Ct. at 26. In this case, not only were numerous such photographs introduced, but those photographs depicted aspects of gay male sexuality that have been shown scientifically to invoke a deep, psychological, and negative reaction of disgust. Such feelings of disgust infected the jury and its deliberations of the factual determinations at issue. For these reasons alone, the judgment below should be reversed and the case remanded for retrial without introduction of the sexually explicit photographic evidence.

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<sup>10</sup> Martha Nussbaum, *The Politics of Disgust: From Disgust to Humanity*, 2 (2010).

<sup>11</sup> It is also worth noting that, during deliberations, the jury asked a question about the giving of consent during sex. In responding to that question, the trial judge told the jury that this was not a question of law but a question the jury was going to have to decide for themselves on all the circumstances. In describing those circumstances, the trial judge spoke of there being a “lifestyle” in which the parties participated. Too often in the past, the word “lifestyle” has been used in connection with the gay male community to suggest immoral and profligate sexual behavior. Its appearance – inadvertent or otherwise – in some of the final words spoken by the judge to the jury could well have added to the prejudice created by the admission of the challenged photographs.

Respectfully submitted,

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