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Innocence Project
Testimony Supporting Senate Bill 6
House Judiciary Committee
Vermont General Assembly
April 5th, 2023

The Innocence Project submits this testimony in support of Senate Bill 6 which will help ensure no child in Vermont is wrongfully convicted. Senate Bill 6 builds on legislation passed in California, Delaware Illinois, Oregon, and Utah with the support of law enforcement and prosecutors. It takes up the call of the U.S. Supreme Court for the states to address the question of what makes a statement by a suspect in an interrogation room reliable. Most importantly, it is tailored to specifically address the unwarranted pressures that have continued to cause false confessions across the country.

Courts, national law enforcement organizations, officer training agencies, interrogation researchers, and even high-value detainee interrogators have all advocated against the use of the tactics covered by Senate Bill because of the risk they pose in producing false confessions and the proven reliability of other techniques. In *Illinois v. Perkins,* U.S. Supreme Court Justice Brennan wrote: *"the deliberate use of deception and manipulation by the police appears to be incompatible 'with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means.*[1] Leading law enforcement organizations, such as the International Association of Chiefs of Police, also agree that children are particularly likely to give false confessions during the pressure-cooker of police interrogations.[2] However, absent legislative action, the existing mechanisms of judicial review continue to give approval to clearly unreliable confessions leading to wrongful convictions.

The Hidden Danger of False Confessions
One of the most counterintuitive aspects of human behavior is the decision to self-incriminate, and, to do so falsely. However, the decision to falsely confess to a crime is often perfectly rational given certain circumstances of the interrogation: real or perceived intimidation by law enforcement; use of force or perceived use of force by law enforcement during the interrogation; compromised reasoning ability of the suspect due to exhaustion, stress, hunger, substance abuse, mental limitations, or limited education; fear that failing to confess will yield a harsher punishment; and deceptive interrogation techniques, such as untrue statements about the presence of incriminating evidence.

While there are some particularly vulnerable groups, including young people and people with cognitive deficits or mental illnesses, it is important to understand that mentally competent adults

[1] *Illinois v. Perkins*, 496 U.S. 292, 296-97; 303 (1990)

[2] https://www.theiacp.org/resources/document/reducing-risks

are capable of, and often do provide false confessions. We have discovered through DNA-based exonerations that false confessions are a frequent contributing factor to wrongful convictions, present in nearly 30% of our DNA exonerations. In homicide exonerations, they are the most common contributing factor. Expanding beyond DNA-based exonerations to cases of persons proven innocent through other methods, the National Registry of Exonerations records 397 cases nationally to date of false confessions and 267 of those were persons 25 years of age or younger.

False confessions are persuasive enough to overpower exculpatory evidence and have the ability to trump scientific certainty in the minds of fact-finders.[3] Fact-finders have found false confessions more convincing than even exculpating DNA evidence due to a strong tendency to believe statements that fly in the face of self-interest and the notion that confessions must be true if they contain accurate details about the crime, including non-public details that could have been known only to the perpetrator. This is compounded by the belief that law enforcement is always sufficiently trained and equipped to identify false confessions and would never, unintentionally or otherwise, cause them.

Exonerations, however, have provided new insight into the source of this sort of inside information. Given that the false confessor was actually innocent and had nothing to do with the crime, these non-public, held-back details most likely could not have originated with them. Rather, the more plausible interpretation is that the police contaminated the evidence by intentionally or inadvertently feeding the non-public details to the suspect during interrogation. Once the confession has been contaminated by the police, the internal control for determining the veracity of the "I did it" has been rendered worthless. In sixty-two of the first sixty-six false confession DNA exonerations, the police had contaminated the confession with inside information.[4] Law enforcement alone cannot be burdened with the responsibility of preventing false confessions. The courts also need sufficient measures to assess reliability which they currently lack.

Insufficiency of Other Safeguards

Over the last several decades, the prevalence of false confessions has helped spur the adoption of protections and tools for assessing the reliability of confessions. The Innocence Project has been a major proponent of laws to require the recording of interrogations. As of the end of 2022, 30 states, the District of Columbia, and the federal government all have laws, policies, or court orders requiring the recording of at least some interrogations.

More recently, a second wave of protections has begun to be adopted first in the form of requiring the presence of a parent/guardian or by going further in requiring the presence of an attorney. However, as discussed below, these protections are not a panacea for solving the issue of false confessions. While they may mitigate their likelihood, they do not provide any protections against the use of false confessions once they have occurred.

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[3] See generally Saul M. Kassin, Why Confessions Trump Innocence, 67 AM. PSYCHOLOGIST 431 (2012).

[4] Brandon L. Garrett, Contaminated Confessions Revisited, 101 VA. L. REV. 395, 404 (2015).

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Furthermore, there is increasing data on the potential negative impact of relying on interested adults as a stopgap for false confessions. A recent study published by the National Association of Criminal Defense Lawyers found that the inclusion of parents in custodial interrogations can in actuality be dangerous.[5] Directly pertinent to the discussion of Senate Bill 6, the report found that only 62% of the parents studied knew that police are allowed to use deception during interrogations and the parents themselves were susceptible to deception and manipulation. Furthermore, the study found that parents can have limited understanding the constitutional rights and legal, financial, and other conflicts of interest that can often lead them to endanger a child's rights rather than protect them. Despite any safeguards already in place, the existence of the deceptive tactics covered by Senate Bill 6 necessitates policy protection through oversight of the admissibility of confessions.

The Failure to Evaluate Coerced Confessions

Proponents of interrogation methods addressed by Senate Bill 6 can mistakenly believed the Courts to be rife with sufficient judicial mechanisms to evaluate the veracity of a statement. However, this is not the case. We see throughout wrongful convictions that existing procedural remedies and tests of voluntariness are not sufficient to prevent false confessions elicited through deceptive tactics from being entered as evidence. Each of the hundreds of false confession proven by subsequent exoneration were determined reliable under existing voluntariness tests. While reliability is the lynchpin of admissibility for eyewitness testimony, and *Daubert* and Federal Rule of Evidence 702 mandate a reliability finding as a threshold for forensic expert testimony to be admissible, the U.S. Supreme Court has held there is no constitutional reliability requirement for the admissibility of confessions.

In *Colorado v. Connelly*, the U.S. Supreme Court held that the Due Process Clause merely requires a showing of voluntariness, and the protection is limited to excluding statements secured through unduly coercive police interrogation.[6] In *Connelly*, the Court did not address the question of a statement's reliability. In fact, the Court invited states to enact statutes to restrict a confession's admissibility to those deemed reliable, writing: *"A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum."*[7]

The duty remains for Vermont and other states to establish rules for assessing the reliability of statements when and if they are procured through deceptive means as Senate Bill 6 would accomplish.

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[5] Hayley M. D. Cleary. "Ten Reasons why Parent Involvement Isn't Enough to Protect Adolescent Suspects during Custodial Police Interrogations." https://psycnet.apa.org/record/2022-36262-001

[6] Colorado v. Connelly, 479 U.S. 157, 169–70 (1986).

[7] "A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum."
See id.

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Assessing Statement Reliability

Despite their well-known prevalence, judges and juries continue to believe false confessions often in spite of little corroborating - and even contradictory - evidence and send innocent people to prison. There needs to be a change in the legislative oversight of interrogations tactics; if not, courts will continue to routinely admit false and fabricated confessions which will be received by the fact finder as the most persuasive evidence of guilt.

Senate Bill 6 would finally answer the call and provide what criteria the courts should weigh in determining the reliability of a confession if certain tactics are proven to have been used. While law enforcement agency policies have already largely moved away from these tactics, these policies cannot guarantee uniformity of treatment or provide judicial scrutiny. With the widespread electronic recording of custodial interrogations, the court is in a much better position to review the objective record, ignore the swearing contest, and determine whether the non-public details originated with the accused or with the police.

Senate Bill 6 moves Vermont legislatively in the direction law enforcement has already headed. While this legislation does not contemplate an absolute ban, avoiding these deceptive techniques not only mitigates the risk of false confessions but also provides investigators with more efficient and evidence-based ways to get reliable information from suspects. At a time when police-community relations are suffering tremendously, affirming that our criminal legal system is not dependent on a need for deceit would go a long way towards helping to repair public trust in the criminal legal system.

The Innocence Project thanks Senator Sears and the Joint Justice Oversight Committee for their leadership on this critical issue and we strongly urge this committee to pass Senate Bill 6.

Respectfully submitted,

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