

Innocence Project Potential Revisions to S. 6

The Innocence Project provides the following comments and amendments to S. 6. These recommendations are based on the testimony provided and the questions raised by the committee.

1. Remedy for Noncompliance – Testimony was provided to the committee that while deception is used when necessary in Vermont, the statements procured are uniformly vetted for accuracy and corroboration with the facts of the case before being used against a person in court. A primary function of this bill is to provide an insurance that this check has happened. In cases of wrongful conviction, confessions inconsistent with the facts have continued to be admitted under existing judicial frameworks. Subsection (b) addresses this by allowing confessions to be used when procured through deceptive tactics after a demonstration that this type of check has happened and the defense is able to challenge its veracity. However, testimony was given that this section could be simplified. To that end, we have provided language changes in keeping with our recommendations in other states. *Notably: Utah and Indiana have both unanimously passed legislation which do not allow this leniency.*

2. Age Applicability and Potential Removal of Prohibition Language for Higher Ages – We encourage the committee’s interest in maintaining the age of 22 in the bill. Already, 404 cases of wrongful convictions involving false confessions have been revealed since 1989.

- Only 99 of these cases were of juveniles below the age of 18.
- 118 were juveniles between the age of 18 and 22.

During the hearing, the committee weighed the possibility of lowering the age but creating a type of check on the veracity of a confession if it is procured from a juvenile above the age of 18. This is the function of the section (b) as discussed. We have provided a language change below which would remove the policy statement that deception cannot be used against persons between the ages of 18-22 while maintaining the simplified check that a vetting of the confession has happened in subsection (b).

3. Standard of Proof – With the simplified the language governing how a court would way the admission of a statement, we recommend maintaining the “clear and convincing standard” in the bill. The state should require a court to be more than only 51% certain that a statement procured through the use of deception is still reliable given the known dangers of the tactic. With the assurances in testimony that the veracity of confessions is already confirmed in current practice, this should not be a change to cases going forward and ensures this standard is maintained.

As noted by testimony, this is a middle ground of standards but denotes the seriousness with which the legislature asks the courts to weigh the admission of statements procured through these tactics. Testimony was provided to the committee that the standard of proof in the bill was high compared to the national average. This is true when only taking into account laws that allow for courts to still consider the admission of confessions when deception is used. Utah and Indiana have now unanimously passed legislation that create a strict bar on confessions procured through deception. As well, California’s law has a far more extensive bar on numerous other tactics and

its definition of deception is not limited to specific actions as S. 6 is drafted. While S. 6 would have a stronger standard than Illinois, it would fit between the standards of other states.

Amendments

§ 5585a. DEFINITIONS

As used in this subchapter:

(1) “Custodial interrogation” means any interrogation:

(A) involving questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject; and (B) in which a reasonable person in the subject’s position would consider the person to be in custody, starting from the moment a person should have been advised of the person’s Miranda rights and ending when the questioning has concluded.

(2) “Deception” includes the knowing communication of false facts about evidence, knowing misrepresenting the accuracy of the facts, knowing misrepresentation of the law, or knowing communication of unauthorized statements regarding leniency.

(3) “Electronic recording” or “electronically recorded” means an audio and visual recording that is an authentic, accurate, and unaltered record of a custodial interrogation or, if law enforcement does not have the current capacity to create a visual recording, an audio recording of the interrogation.

(4) “Place of detention” means a building or a police station that is a place of operation for the State police, a municipal police department, county sheriff department, or other law enforcement agency that is owned or operated by a law enforcement agency at which persons are or may be questioned in connection with criminal offenses or detained temporarily in connection with criminal charges pending a potential arrest or citation.

(6) “Statement” means an oral, written, sign language, or nonverbal communication.

§ 5587. JUVENILES

(a) During a custodial interrogation of a person under ~~18~~ 22 years of age relating to the commission of a criminal offense or delinquent act, a law enforcement officer or government agent shall not employ threats, physical harm, or deception.

(b)(1) Any admission, confession, or statement, whether written or oral, made by a person under 22 years of age and obtained in violation of subsection (a) of this section shall be presumed to be involuntary and inadmissible in any proceeding.

(2) The presumption that any such admission, confession, or statement is involuntary and inadmissible may be overcome if the State proves by clear and convincing evidence that the admission, confession, or statement was:

(A) voluntary and not induced by a law enforcement officer's or government agent's use of threats, physical harm, or deception prohibited by subsection (a) of this section; and

(B) **Reliable** ~~.any actions of a law enforcement officer in violation of subsection (a) of this section did not undermine the reliability of the person's admission, confession, or statement and did not create a substantial risk that the person might falsely incriminate themselves.~~

Sec. 4. EFFECTIVE DATE

This act shall take effect on July 1, 2023.