



**House Committee on Criminal Justice
March 11, 2021**

Testimony in Support of H.B. 8

Pierce Reed, Ohio Innocence Project

Good morning Chairman LaRe, Vice Chair Swearingen, Ranking Member Leland, and members of the committee. My name is Pierce Reed, and I am the program director for legislation, policy, and education for the University of Cincinnati College of Law's Ohio Innocence Project (OIP), an organization that investigates and litigates wrongful conviction claims here in Ohio.

In the past 18 years, the work of OIP has led to the release of 30 Ohioans, including three men who were sentenced to death, who collectively served almost 600 years in Ohio prisons for crimes they did not commit. Since 1989, there have been at least 85 exonerations in Ohio. And nationally, there are nearly 2,750 Americans who collectively served more than 24,500 years in prisons for crimes they did not commit.

In addition to the devastation that wrongful convictions cause to innocent people and their families, wrongful convictions also harm crime victims and their families. All of us suffer because wrongful convictions erode public faith in our legislatures and judicial systems.

House Bill 8 provides incremental, moderate change but is a significant step in preventing wrongful convictions of Ohioans from happening in the first instance. OIP urges the Criminal Justice Committee to report favorably on House Bill 8, which will help prevent wrongful convictions in Ohio and foster trust in our law enforcement officers.

OIP asks that the bill be passed by the Committee without additional amendments and with the same unanimity as it did in the 133rd General Assembly, when a similar bill received unanimous votes in both the House Criminal Justice Committee and on the floor of the House of Representatives, and when the same bill before you now passed unanimously in the Senate Local Governance Committee.

The Problem with the Status of Current Ohio Law

When the Ohio General Assembly passed S.B. 77, it created a statutory presumption that statements made during a recorded custodial interrogations would be deemed to have been made voluntarily. See R.C. 2933.81(B). But in *State v. Barker*, the Ohio Supreme Court held that presumption was unconstitutional as applied to juveniles because it offended constitutional due process protections that a legislature cannot abrogate. *State v. Barker*, 149 Ohio St.3d 1, 2016- Ohio-2708, ¶ 38. Although the Ohio Supreme Court limited the holding in *Barker* to juveniles, the Ohio Innocence Project believes the analysis used by the Court would be

applicable equally to adults. Thus, there is a clear need for a new law on recordation of custodial interrogations.

House Bill 8 Will Protect Both Innocent Ohioans and Law Enforcement Agents

Recording custodial interrogations helps prevent wrongful convictions by creating a clear record of the statements made during an interrogation, and the conditions that occurred during the interrogation process. A clear record of the interrogation allows superior law enforcement officers, prosecutors, defense counsel, judges, and jurors to ascertain the credibility of the statements made during the interrogation and the circumstances under which those statements were made. That record protects both individual Ohioans and law enforcement agents in Ohio.

OIP and its partners has actively sought input from law enforcement stakeholders about the scope of H.B. 8 and its financial impact on law enforcement agencies. OIP greatly values the work and expertise that law enforcement agents provide and believes that nothing in innocence work is antithetical to smart, constitutional policing. False claims of coercion or misconduct against police and other law enforcement agents undermine the work that innocence projects perform, and harm all of us. Recordings of interrogations help protect against false claims of coercion or misconduct against law enforcement agents, reduce the likelihood of ill-founded motions to suppress or unsupported civil rights claims, and increase public confidence in the work law enforcement agents do each day throughout Ohio.

As importantly, recordings of interrogations also help the courts and criminal justice personnel evaluate the veracity of claims of innocence by convicted people, particularly in cases in which there are claims of false confessions. False confessions are a vexing problem for the court system, government, and the public. Admittedly, it is hard to understand why someone would falsely confess to a horrific crime like murder or rape but under some circumstances any person can make a false confession. And some populations, including juveniles and people with disabilities, are susceptible to false confessions. In juveniles, we now know that the prefrontal cortex of the brain, which is responsible for judgment, problem-solving, and decision-making, is not fully formed and that juveniles therefore do not have good regulation of impulsive behaviors. Adolescents have difficulty weighing and assessing risks, they emphasize immediate rewards rather than long-term consequences, and they are vulnerable to external pressure. As both the United States Supreme Court and the International Association of Chiefs of Police recognize, these traits make adolescents particularly likely to respond to the fear and stress of interrogation by making involuntary or false statements. See, e.g., *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011); REDUCING RISKS: AN EXECUTIVE GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION (IACP 2018), available at: <https://www.theiacp.org/resources/document/reducing-risks>

Similarly, people with intellectual disabilities are at risk for false confession. In a study of nearly 250 known cases of false confessions that led to wrongful convictions, approximately 25% of the person making the false confession had some form of cognitive impairment. See Schatz, *Interrogated with Intellectual Disabilities: The Risk of False Confession*, 70 Stanford Law Review 643 (2018). Not surprisingly then, organizations like the International Association of Chiefs of Police consider the recording of interrogations to be one of the best juvenile interrogation practices for law enforcement agencies. Reducing Risks at p. 12.

By passing House Bill 8, the Ohio General Assembly can mandate that all Ohio law enforcement agencies follow that best practice, thereby preventing wrongful convictions of juveniles and others, and protecting law enforcement from false claims of misconduct.

House Bill 8 Should Be Passed Without Amendment

Beginning in early 2018, OIP, the Ohio Public Defender's Office, and the Innocence Project in New York City began meeting with law enforcement stakeholders, including the Buckeye Sheriffs' Association and the Ohio Chiefs of Police Association, to discuss the need for this bill. The responses provided by those stakeholders were incorporated into the version of the bill now before this Committee, which was introduced in the House of Representatives in October 2019 by Representative Phil Plummer and Representative Thomas West. The expertise of the cosponsors in the House include expertise in both law enforcement and mental health.

At no point in the extensive discussions leading to the introduction of the bill did a law enforcement stakeholder raise the need for an exception based on "good faith" or "the interests of justice." Instead, specific exceptions to the bill's mandate to record were incorporated into the bill based on articulable needs of law enforcement personnel.

The Ohio Prosecuting Attorneys Association first raised the suggestion that there be an exception based on "good faith," "interests of justice," or "totality of circumstances" in the House Criminal Justice Committee. However it is framed, the proposed exception is so vague that it was described in the inimitable language of Leader Seitz as a "sweeping," "loosey-goosey," "garbage bag exception" during Mr. Tobin's opposition testimony before the House Criminal Justice Committee on November 17, 2019. Despite Leader Seitz's suggestion that OPAA better articulate a specific concern that could be framed as more clear and narrow exception, OPAA did not offer one until November 2020 in the midst of lame duck. Once again, OIP and OPD agreed to an additional amendment, which now appears in H.B. 8 as the sixth exception.

Proponents of this bill agreed to limit the scope of the bill to limited circumstances: "custodial" interrogations that occur in a place of detention for suspects in homicide and sexual assault cases. To address any cost concerns, agencies have the option to use audiovisual or audio-only equipment. Proponents agreed to limit remedies for non-compliance, which will result only in a cautionary jury instruction and may be considered when a judge is ruling on a motion to suppress statements made during an interrogation. Proponents agreed to a number of good cause exemptions, such equipment failure or a suspect's refusal to cooperate if recorded. And at the specific request of the Ohio Prosecuting Attorneys' Association, proponents agreed to specify that the failure to record an interrogation shall not be the sole basis of suppressing a confession or statement from being admitted into evidence.

But there is no showing that there is a need for a good faith exception in this bill. The bill is intended to mandate recording so that there is uniform practice throughout the state. Law enforcement agents need clarity in the mandate to record. The vagueness of the good faith or totality of circumstances exception is not helpful to those agents. It is also not helpful to Ohio's taxpayers because there likely will be extensive litigation over any good faith exception incorporated into the bill.

The exceptions currently in the bill are sufficient to protect the interests of Ohioans and all interested stakeholders. OIP urges the Committee not to include additional exceptions based on unsupported and poorly articulated allegations that the failure to do so will create a miscarriage of justice. This bill, as it appears before you, will help prevent the miscarriage of justice that occurs in a wrongful conviction case and the trauma endured by victims of the crimes and the innocent people who are wrongfully convicted of those crimes.

The Ohio Innocence Project respectfully asks for your support and vote in favor of this bipartisan, common sense, fiscally-sound bill, without additional amendment.

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