SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	AB 2644	**Hearing Date:**	June 28, 2022
Author:	Holden		
Version:	June 15, 2022		
Urgency:	No	**Fiscal:**	Yes
Consultant:	MK		

Subject: ***Custodial interrogation***

HISTORY

Source: Author

Prior Legislation: SB 203 (Bradford), Chapter 335, Stats. 2020
SB 395 (Lara) Chapter 681, Stats. 2017
SB 1052 (Lara) 2015-2016 vetoed

Support: California Attorneys for Criminal Justice; California Innocence Coalition: Northern California Innocence Project, California Innocence Project, Loyola Project for The Innocent; California Public Defenders Association; Ella Baker Center for Human Rights; Fresno Barrios Unidos; Friends Committee on Legislation of California Hillsides; National Association of Social Workers, California Chapter; National Center for Lesbian Rights; Pacific Juvenile Defender Center; Smart Justice California

Opposition: California Statewide Law Enforcement Association; Chief Probation Officers of California; L.A. Sheriffs Dept.; San Diego County Chiefs' & Sheriff's Association; Riverside County Sheriff's Office (unless amended)

Assembly Floor Vote: 41 - 25

PURPOSE

The purpose of this bill is to prohibit an officer from using threats, physical harm, deception, or psychologically manipulative interrogation tactics when questioning a person 25 years of age or younger about the commission of a felony or misdemeanor.

Existing federal law states that no person shall "be compelled in any criminal case to be a witness against himself." (U.S. Const. Amend. V.)

Existing federal law states that persons may not be compelled in a criminal case to be a witness against themselves. (Cal. Const., Art. I, Sec. 15.)

Existing law requires prior to a custodial interrogation and before the waiver of any *Miranda* rights, a youth 17 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. Prohibits waiver of the consultation. (Welf. and Inst. Code, § 625.6(a).)

Existing law requires the court, in adjudicating the admissibility of statements of a youth 17 years of age or younger made during or after a custodial interrogation, to consider the effect of failure to comply with the consultation requirement, as well as any willful violation in determining the credibility of a law enforcement officer. (Welf. and Inst. Code § 625.6(b).)

Existing law specifies that the consultation requirement does not apply to the admissibility of statements of a youth 17 years of age or younger if both of the following criteria are met:

a) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat; and

b) The officer's questions were limited to those questions that were reasonably necessary to obtain that information. (Welf. and Inst. Code § 625.6. (c).)

Existing law exempts probation officers from complying with the consultation requirement in their normal course of duties, as specified. (Welf. and Inst. Code, § 625.6 (d).)

Existing law provides that when a minor is taken into a place of confinement the minor shall be advised of the right to make at least two telephone calls, one completed to a parent or guardian, or a responsible relative, or employer and one to an attorney. (Welf. & Inst. Code § 627.)

Existing law requires the custodial interrogation of a juvenile suspected of committing murder to be electronically recorded in its entirety. (Welf. & Inst. Code § 626.8, see also Penal Code § 859.5.)

Existing law states that when a minor is taken into temporary custody before a probation officer, and it is alleged that the minor has violated a law defining a crime, the probation officer must advise the minor that anything the minor says can be used against him, and shall advise the minor of their constitutional rights, including the right to remain silent and the right to counsel. (Welf. & Inst. Code, § 627.5.)

This bill prohibits the use of threats, physical harm, deception, or psychologically manipulative tactics by law enforcement during an interrogation of a young person who is 25 years of age or younger.

This bill states that these limitations do not apply to interrogations where the office reasonably believed the information sought was necessary to protect life or property from imminent harm and the questions were limited to those reasonably necessary to obtain information related to that imminent threat.

This bill defines the following terms for purposes of these provisions:

a) "Deception" includes but is not limited to "the knowing communication of false facts about evidence, misrepresenting the accuracy of the fact, or false statements regarding leniency."

b) "Psychologically manipulative interrogation tactics" include but are not limited to:

    i) Maximization and minimization and other interrogation practices that rely on a presumption of guilt or deceit, as specified;

ii) Making direct or indirect promises of leniency, such as indicating the person will be released if they cooperate;

iii) Employing the "false" or "forced" choice strategy, where the person is encouraged to select one of two options, both incriminatory, but one is characterized as morally excusable; and,

This bill states that these provisions do not prohibit the use of a lie detector test as long as it is voluntary and not obtained through threats, physical harm, deception, or psychologically manipulative interrogation tactics, and the officer does not suggest that the lie detector results are admissible in court or misrepresent the lie detector results to the person.

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This bill provides that the limitations on interrogation in this bill do not become operative until July 1, 2024

This bill provides that within two hours of a minor being takin into custody at a juvenile hall or any other place of confinement, the probation officer must immediately notify the public defender.

COMMENTS

1. Need for This Bill

According to the author:

> Current law requires that a youth 17 years of age or younger consult with legal counsel in person, by telephone, or by video conference prior to a custodial interrogation and before waiving any of the above-specified rights. However, simply protecting youth under 18 from improper interrogation methods that increase the risk of a false confession is not in line with bodies of research that indicate that a young person's brain is not fully developed until the age of 25.
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> California has taken steps to allow individuals at the age of 25 to be considered youths in the juvenile court system. In fact, in 2017, the Legislature approved and Governor Brown signed AB 1308 (Stone), which requires the Board of Parole Hearings to conduct youth offender parole hearings for offenders that are 25 years of age or younger.
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> While AB 1308 took an important step in recognizing individuals that are age 25 as those eligible to participate in youth offender parole hearings, the fact is, that recognition comes only after the person is incarcerated. This proposal recognizes that since the brain is not fully developed at the age of 25, these individuals should be shielded from improper interrogation methods as well.

2. Custodial Interrogations and the *Miranda* Rule

"*Miranda* warnings" are a series of admonitions that are typically given by police before interrogating a suspect of a crime. The purpose of *Miranda* warnings is to advise people that have been arrested of their constitutional right against self-incrimination. They are the product of the landmark Supreme Court decision *Miranda v. Arizona* (1966) 384 U.S. 436. In deciding that case, the Supreme Court imposed specific, constitutional requirements for the advice an officer must provide prior to engaging in custodial interrogation and held that statements taken without these warnings are inadmissible against the defendant in a criminal case. Specifically, the Court held that prior to any questioning, the suspect must be warned that he has a right to remain silent, that any statement made may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. (*Id*. at p. 444.)

In order for *Miranda* warnings to apply, an individual must be subjected to "custodial interrogation." A suspect is "in custody" if a reasonable person in a similar situation would not feel free to end the interrogation and leave. (*Miranda*, *supra*, 384 U.S. at p. 444.) Custody does not require a person to be at the police station, or in handcuffs, or in the back of a police car, but rather that the police have deprived the suspect of his or her freedom of action in some significant way. (*Ibid*.) An "interrogation" is "any words or actions on the part of officers (other than those normally attendant to arrest and custody) that the officer should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) Such questioning can be in the form of an officer asking the suspect direct questions, or it can be indirect in the form of comments or actions by the officer that the officer should know are likely to produce an incriminating reply. (*Ibid*)

3. Particular Concerns for Interrogation of Youth.

A growing body of research indicates that adolescents are less capable of understanding their constitutional rights than their adult counterparts, and also that they are more prone to falsely confessing to a crime they did not commit. (Luna, *Juvenile False Confessions*: *Juvenile Psychology, Police Interrogation Tactics, And Prosecutorial Discretion* (2018) 18 Nev. L.J. 291, https://scholars.law.unlv.edu/nlj/vol18/iss1/10/ [as of March 31, 2021].) Research suggests that "[b]ecause adolescents are more impulsive, are easily influenced by others (especially by figures of authority), are more sensitive to rewards (especially immediate rewards), and are less able to weigh in on the long-term consequences of their actions, they become more receptive to coercion." (*Id.* at p. 297, *citing* various scientific journals.) The context of custodial interrogation is believed to exacerbate these risks.

The U.S. Supreme Court has recognized the susceptibility of youth as well. In *J.D.B. v. North Carolina* (2011) 564 U.S. 261, the Court said:

> A child's age is far "more than a chronological fact." It is a fact that "generates commonsense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.
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> Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults"; that they "often lack the experience, perspective, and judgment to

> recognize and avoid choices that could be detrimental to them"; that they "are more vulnerable or susceptible to … outside pressures" than adults; and so on. Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." Describing no one child in particular, these observations restate what "any parent knows"—indeed, what any person knows—about children generally. (*Id*. at p. 272, citations omitted.)

In light of this susceptibility, this bill would explicitly prohibit the use of threats, physical harm, deception, or psychologically manipulative interrogation tactics when questioning a minor or a youth 25 years or younger about commission of a crime.

And while *J.D.B. v. North Carolina*, *supra*, involved the interrogation of a 13-year old (546 U.S. at p. 265), other Supreme Court decisions have recognized that part of the brain responsible for executive functioning is not fully developed until around the age of 25, causing the youth to not fully appreciate the seriousness or consequences of his or her actions. (See *Miller v. Alabama* (2012) 567 U.S. 460, 471-473, citing *Graham v. Florida* (2010) 560 U.S. 48, 68-71 and *Roper v. Simmons* (2005) 543 U.S. 551, 569-570; see also *People v. Caballero* (2012) 55 Cal.4th 262, 268-269.) Limiting these tactics to young people under the age of 25 is consistent with that precedent.

4. The Danger of False Confessions

In re Elias V. (2015) 237 Cal.App.4th 568, a case involving the coerced confession of a 13 year old, extensively discussed the danger of false confessions:

> The danger of false confessions is real. Studies conducted after *Miranda* was decided estimate that between 42 and 55 percent of suspects confess in response to a custodial interrogation. (Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psych Sci. in the Public Interest 33, 44.)[fn.] Estimates of false confessions as the leading cause of error in wrongful convictions range from 14 to 25 percent, and as will be discussed . . . , a disproportionate number of false confession cases involve juveniles. Recent research has shown that more than one-third (35 percent) of proven false confessions were obtained from suspects under the age of 18. (Drizin & Leo, *The Problem of False Confessions in the Post-DNA World* (2004) 82 N.C.L.Rev. 891, 902, 944-945, fn. 5 (False Confessions).)

This bill prohibits the use of techniques to scare or intimidate a person by repetively asserting the person is guilty despite the denials or exaggerating the magnitude of the charges or the strength of the evidence, including suggesting the existence of evidence that does not exist. These types of behaviors can be more likely to illicit false confessions. The bill also prohibits misrepresenting lie detector results or suggesting that the results are admissible in court.

5. Argument in Support

The California Innocence Coalition supports this bill stating:

> According to the Center on Wrongful Convictions of Youth (CWCY), false confessions are one of the leading causes of wrongful convictions, accounting for

roughly 25% of all convictions that were later overturned based on DNA evidence. Juries view a confession as a significant piece of direct evidence of one's guilt, yet struggle with understanding how someone might falsely implicate themselves or another in criminal conduct.

The reality is that law enforcements' use of deceptive interrogation methods, such as threats, physical harm, deception, or psychologically manipulative tactics as defined in AB 2644, create an incredibly high risk for eliciting a false confession from anyone, and particularly youth. Research indicates that a person's brain is not fully developed until the age of 25 and that deceptive interrogation methods increase the risk of a false confession even for those older than 18.

Freed and exonerated people throughout the state of California and nationally feel the pain of this injustice. Johnny Williams, Ricky Davis, and Bob Fenenbock are just a few Californians that have been wrongfully convicted due to a false confession or statements made during an interrogation where deception was use by law enforcement. These men collectively lost nearly 60 years of their lives wrongfully convicted, which also deprived the victims and their families of justice for so long.

AB 2644 focuses on protecting youth from these techniques, recognizing the particular vulnerabilities of youth and their need for immediate protection as well as the egregious nature of deceptive interrogation tactics. AB 2644 closely follows newly enacted laws in Illinois, the first state to pass legislation that prohibits police officers from using deceptive interrogations tactics on youth, and similar law passed in Oregon. We believe that this bill protects the integrity of our justice system by ensuring that factually innocent youth are not unjustly incarcerated from deceptively coerced confessions and that the guilty are held accountable for their actions.

6. Argument in Opposition

The California Statewide Law Enforcement Association opposes this bill stating:

While we understand the author's intention in creating safeguards around the questioning of persons taken into custody, this legislation goes too far by prohibiting the use of longstanding interrogation practices, which are only used when an investigator is reasonably certain of the suspect's involvement in the issue under investigation. By limiting the scope of what members of law enforcement are permitted to discuss with suspects, investigations will grind to a halt.

The courts have long established that physical abuse of the suspect, threats of harm, denial of rights, and making false guarantees of leniency are unacceptable and can render a confession inadmissible. Placing further limitations on law enforcement's means to question suspects will only interfere with timely resolutions of investigations.

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