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# THE FORENSIC PANEL

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Michael Welner, M.D., Chairman

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### Forensic Panel Chair's Testimony on False Confessions to NYS Justice Task Force Tackles Myths, Proposes New Solutions

[Dr. Welner Invokes Importance of Retraction, Videotaping, Miranda Reform and Tort Reform in Reducing Wrongful Convictions, Aiding Courts](#)



**New York** - In front of a New York State Justice Task Force subcommittee on false confessions, forensic psychiatrist Dr. Michael Welner testified to a stark lack of science informing the understanding of false confessions, but proposed a number of solutions to ensure the integrity of justice and protection of the vulnerable from confessing falsely. Speaking before a group of district attorneys, judges, policymakers, and representatives from The Innocence Project, Dr. Welner, Chairman of The Forensic Panel, drew from comprehensive study of the behavioral science literature, his experience in examining disputed confessions in over ten states and federal courts, and his research on exonerations to educate

subcommittee members about the state of the science of disputed confessions. The New York State Justice Task Force is a permanent task force created by the Chief Judge of the State of New York to examine the causes of wrongful convictions and recommend reforms.

Dr. Welner demonstrated how poor scientific methodology and an anti-police agenda among declared scholars in this novel area of scientific interest result in inflated perceptions of the prevalence of false confessions. These include false representations by The Innocence Project that the proportion of false confessions in wrongful conviction cases is 25 percent when that percentage is in actuality close to 10 percent. Dr. Welner challenged assertions of published academics such as Gisli Gudjonsson, Saul Kassin, Richard Ofshe, Richard Leo, and Steven Drizin that confirmed false confessions are "frequent," a "small but significant minority" of confessions, and "the tip of the iceberg." From studies of observed police interrogation, studies of interrogations in jurisdictions such as Salt Lake City, surveys of police officers, and the lack of history of false confessions elicited by correctional psychiatrists and more, Dr. Welner demonstrated the rarity of false confessions, though their exact incidence is unknown. "Is it one in a million interrogations? One in ten million interrogations? One in one hundred thousand? We do not know. But false confessions are tragic enough," he asserted. "Embellishment does not serve justice and takes away from the credibility of a legitimate concern."

Peter Neufeld, a co-founder of The Innocence Project, who was in attendance, countered that since one does not yet know the exact frequency of false confessions, "it is wrong to speak to their rarity just as it is wrong to say they happen frequently." But Neufeld did not deny Dr. Welner's charge that The Innocence Project has falsely inflated its numbers of false confessions. Neufeld additionally revealed, in his response to Dr. Welner, that The Innocence Project also classifies cases as false confessions even when their own exonerated clients are adamant that they never confessed – because, as Neufeld asserted, "some of our clients are not reliable with what they tell us."

"The Innocence Project finds their clients reliable enough to assert that they are innocent rather than freed by the good fortune of contradictory scientific evidence," Dr. Welner observed. "To then say that their clients are not reliable when they say they never confessed – well, either you trust your clients or you don't. Objectivity does not allow forensic science the liberty of changing a threshold of 'reliable' to suit the argument of the moment."

The Welner testimony reviewed the available evidence on what makes an individual vulnerable to a false confession. Suggestibility and compliance, naivete about the criminal justice system, and memory distrust are risk factors for false confessions under circumstances in which police questioning exploits these weaknesses; mental retardation is also a risk factor because of its high incidence of greater suggestibility, compliance, naivete, and memory distrust, according to Dr. Welner.

The presence of a mental illness or personality disorder, age alone, and general cognitive difficulties do not have support from any systematic research to reflect a risk. Added Dr. Welner, "Experience in casework teaches me that a sixteen year old gang member or teenager seeped in a culture that distrusts police, or with exposure to those in the criminal justice system are less vulnerable than even adults who are trusting of police prestige and authority. Emphasizing age per se, without more, as a risk factor is disingenuous and unsupported by research." Dr. Welner invoked his case experience assessing Guantanamo detainee Omar Khadr, and the account of a senior Canadian foreign ministry official who documented the admitted Al-Qaeda fighter Khadr, at age 17, to

employ “classic interrogation measures.”

At the same time, added Dr. Welner, he agrees with critics of police that Miranda warnings are often not understood by defendants, especially younger adolescents. He proposed adapting Miranda warnings to the developmental capabilities of adolescents, and training to officers to deliver and record Miranda waivers with full accounting of the suspect’s understanding.

In his testimony, Dr. Welner also reinforced that assessment of a disputed confession must account for the tremendous incentive on any defendant to retract a confession after arrest. That pressure may originate from recognizing the impact of one’s confession versus the rest of the evidence, or from pressure from other inmates, one’s family, or one’s attorney. “If we appreciate the authority of the police officer - even as an adversary - to elicit a confession, we as participants in justice cannot responsibly ignore that the authority of one’s own attorney, especially because of the trusted relationship, can provoke a retraction of a perfectly legitimate confession. **The key points of understanding about a disputed confession are the influences to a suspect’s decision to change from denying a crime to admitting it, and then from admitting a crime to retracting that admission.**” explained Dr. Welner.

He joined other police critics and defense advocates who called for interrogations to be videotaped entirely. Dr. Welner went even further, however, and called for videotapes to be installed in police cars, in police stations, and in holding cells to capture as much of the interaction between suspects and police, and suspects and other influences, as possible. Dr. Welner also underscored the importance of taping telephone conversations that the suspect has after arrest, in order to capture his account of his experiences at the time of his arrest and the influence of others who might compel him to retract.

Finally, Dr. Welner implored the court to compel defense attorneys who challenge confessions to produce for the court’s private review the notes of their discussions with the defendant about the circumstances of their decision to confess at the time that the court receives a defense motion to suppress the confession statements. “If we want to identify coerced confessions, or false confessions, as well as frivolous complaints of police abuse, courts should require all parties to put their cards on the table and afford full transparency to the judge and the case record,” challenged Dr. Welner. A judge who is charged with decisions on the admissibility of a confession can review this evidence without self-incriminating disclosure to the prosecution.

Citing his own research on documented cases of false confessions, Dr. Welner cautioned the judges and lawmakers in attendance of the need to scrutinize confessions elicited by false claims of a failed polygraph, and false claims of statements by third parties and other suspects, as well as threats of the death penalty. However, Dr. Welner said that he did not endorse a ban on the use of ploys of false evidence. “If we are videotaping interviews in their entirety, we will have a full accounting of what went on in the interrogation room,” he noted. Those interrogations in which vulnerabilities and police interrogation approaches yielded false confessions will be exposed. On the other hand, creative police interrogation that elicits true confessions because of the ethical persistence and cleverness of the interrogator will not be discouraged.

Dr. Welner compared consideration of false confessions by expert witnesses to insanity defenses. For the latter, when a defendant puts one’s mental state at issue, the court affords both defense and prosecution the opportunity to interview and examine the defendant. Likewise, when expert witnesses are consulted by defense to challenge the vulnerability of a suspect in confession, both sides should have the opportunity to examine the suspect on the salient topic of his mental state and diagnosis at the time of his decision to confess – and to retract – and to probe psychosocial background and risk factors that make the suspect more vulnerable and less vulnerable. And **just as mental health promotes videotaping for police interrogation, courts should mandate videotaping interviews by expert witnesses as a precondition to experts testifying at a disputed confession proceeding.**

Dr. Welner has consulted to both prosecution and defense on disputed confessions and has declined to testify on behalf of both sides as well. His testimony has been used, in previous proceedings, to exclude Dr. Gudjonsson, Dr. Kassin, and Dr. Ofshe. According to Dr. Welner, courts who give an unregulated open door to expert witness testimony on police-induced false confession enable broad generalizations about police practice that have no relevance to the case itself. He added that such experts invoke expertise in the ability to use “logical analysis,” “narrative analysis,” and other seeming techniques to “analyze” confessions when no such methodology exists. “It is a sham that has been nevertheless published in peer reviewed journals,” notes Dr. Welner, comparing the coterie of colleagues suggesting commonplace false confessions to the recovered memory controversy and how enthusiastic psychologists once professed to be able to identify repressed experiences of abuse and published extensively on their own recommended methodologies. That trend in the 1990’s collapsed in humiliation for the behavioral sciences when innocent families were disintegrated by false allegations of sexual abuse elicited by false memory “experts” and their acolytes. At the same time, Dr. Welner praised Drs. Gudjonsson, Kassin, Leo, and Ofshe for calling attention to false confessions. “Rare though they are, false confessions must not be ignored, and sometimes are.”

The subcommittee specifically asked Dr. Welner how, in today’s budgets, the policy reforms proposed by Dr. Welner could be implemented. Dr. Welner had a straightforward response – tort reform. Dr. Welner cited his experience in examining the previously exonerated, who file claims for millions and even tens of millions of dollars. “How much does a person need once his freedom has been restored? When one exoneree tells me he needs four million dollars, I have to ask why we could not direct even half of those monies, two million, to pay for upgrades in recording? We have to decide what our priorities are as a nation. Is it to use a limited amount of money to bring wealth to the aggrieved? Or should it be that we make sure that people who were wronged have what they need, and we focus more of our resources on optimizing a system so it does not happen again?”

Dr. Welner added that when he attempted to study the false confession sample from exoneration cases, prosecutors’ offices were reluctant to share information with him because of exposure to civil litigation by those they had incarcerated. “Without that information, we cannot learn what we must to prevent miscarriages of

justice. Until we take the fear that forces people to cover themselves, we won't get the information we need. If South Africa could use amnesty to reintegrate its society, we can create a modified financial amnesty to encourage police to be fully forthcoming."

Dr. Welner challenged the New York Justice Task Force and legislatures in other states to act boldly, with concessions from police, prosecutors, and defense attorneys, to advance the law in preventing miscarriage of justice. "Videotaping interrogations alone will not reduce miscarriages of justice," he asserted, citing the experience of England, where interrogation reforms have been praised but have failed to lower the rate of disputed confessions. "The subcommittee can act with an appreciation for the bigger picture and enact the reforms I have proposed. Everyone wants justice; we may disagree how to get there, but we will only get there from accountability at each corner of the justice system."

To access the Power Point presentation of Dr. Welner's testimony, Wrongful Convictions - Confessions: Myths, Facts, and Solutions, please [click here](#)