

Senate Fiscal Agency  
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**SFA****BILL ANALYSIS**

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Senate Bills 468 through 471 (as reported without amendment)  
Sponsor: Senator Mike Rogers (Senate Bills 468 & 469)  
Senator Shirley Johnson (Senate Bills 470 & 471)  
Committee: Judiciary

Date Completed: 4-15-99

## **RATIONALE**

Since participants in a crime are sometimes the best, if not the only, witnesses to the crime, it may be necessary for prosecutors to offer immunity to an accomplice to compel his or her testimony. Otherwise, the witness could exercise his or her constitutional privilege against self-incrimination and refuse to testify. A witness who has been granted immunity must answer questions within the subject of the investigation, or be held in contempt of court. If the witness does answer, the scope of his or her immunity will vary, depending upon the jurisdiction.

Current Michigan law provides for what is called "transactional" immunity, which means that the witness may not be *prosecuted* for an offense to which his or her testimony relates. Other jurisdictions provide for "use" or "derivative" immunity, which means that the compelled testimony and evidence derived from it may not be *used* in the prosecution of the witness for a related offense. Under use immunity, the witness still may be prosecuted for the crime to which his or her testimony relates, but the evidence against the witness must come from an independent source. In order to facilitate the prosecution and conviction of offenders, it has been suggested that Michigan should adopt use immunity in place of transactional immunity.

## **CONTENT**

**The bills would amend various acts to delete provisions under which a witness may not be prosecuted for crimes about which he or she testifies, if the witness has been granted immunity. Instead, the bills provide that if a witness were granted immunity, his or her testimony and any information derived from it could not be used against the witness in a criminal case. The testimony could be used, however, for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the immunity order. Senate Bill 468 also provides that a public official or agency could apply to a court for an immunity order, if the official or agency had statutory authority to**

### **issue a subpoena or compel testimony.**

Senate Bill 468 would amend Public Act 289 of 1968, which authorizes circuit courts to grant immunity. Senate Bill 469 would amend Chapter 7 of the Code of Criminal Procedure to replace immunity from prosecution with use immunity, in provisions concerning pretrial proceedings and grand juries. Senate Bill 470 would amend provisions of the Michigan Penal Code pertaining to prosecutions for bribery, conspiracy, prize fights, and prostitution. Senate Bill 471 would amend the Fire Prevention Code in regard to State Fire Marshal investigations.

A more detailed description of [Senate Bill 468](#) follows.

### **Use Immunity**

Currently, Public Act 289 of 1968 provides that in the case of any felony or a circuit court misdemeanor, the prosecuting attorney may apply at the preliminary examination or at the trial for an order granting immunity to any person who might give testimony concerning the violation charged. The bill provides, instead, that a prosecuting attorney could apply to the following, as applicable, for an order granting immunity to a person who might give testimony concerning the violation charged or alleged in the petition:

- The examining magistrate at a preliminary examination.
- The trial judge at a trial for a felony or misdemeanor.
- The judge at an adjudication for a juvenile alleged to have committed a violation of the law, or a probable cause hearing or trial in a case in which the juvenile was to be tried as an adult for committing a specified juvenile offense.

Like current law, the bill would require the prosecutor's application to be accompanied by a verified statement setting forth the facts upon which the application was based. The bill also would retain

the current provision that, if the judge determines that it is in the interest of justice to grant immunity, he or she must enter an order granting immunity to the witness if the witness appears before the court and testifies. In addition, as currently required, a true copy of the immunity order would have to be delivered to the witness before he or she answered any questions; all questions of the witness and his or her answers would have to be transcribed at the judge's discretion; and a copy of the transcript would have to be delivered to the witness as soon as practicable after transcription.

Under the Act, a person who has been granted immunity and is required to answer questions may not be prosecuted for any offense about which the answers may have tended to incriminate the witness. The bill would delete that provision.

Under the bill, testimony or other information compelled under the order granting immunity and any information derived directly or indirectly from that testimony or other information could not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

As currently provided, a witness who failed or refused to testify after being served with the immunity order would be guilty of contempt.

#### Application by Agency or Official

The bill provides that a public official or agency authorized by a State statute to issue a subpoena or otherwise compel the testimony of a witness or the production of evidence in an investigation or proceeding authorized by the statute, or authorized to seek a subpoena or compelled testimony or production of evidence from a court, could apply to the court required to issue the subpoena or compel the testimony or production of evidence or otherwise to the circuit court of the county in which the investigation or proceeding was conducted, for an order granting immunity to a person who might give testimony or produce evidence concerning the investigation or subject of the proceeding.

The application would have to designate the person by name and address. The public official or agency would have to include a verified statement setting forth the facts upon which the application was based.

If the court determined that granting immunity was in the interests of justice, the court would have to enter an order granting immunity to the witness if he or she testified or produced evidence in the investigation or proceeding concerning the investigation or subject of the proceeding. A true copy of the immunity order would have to be delivered to the witness before he or she answered any questions subsequently asked

at the investigation or proceeding or was required to produce any evidence. The order would apply until the court informed the witness that the immunity no longer applied.

All questions of the witness and his or her answers would have to be transcribed. A true and certified copy of the transcript would have to be delivered to the witness as soon as practicable after transcription.

Testimony, evidence, or other information compelled under the immunity order and any information derived directly or indirectly from that testimony, evidence, or information could not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

If the statute authorizing the public official or agency to issue a subpoena or compel testimony granted or permitted immunity to a witness that was different in nature from the immunity authorized under the bill, the public official or agency could apply for an order granting immunity under the bill as an alternative to the immunity granted or permitted under that statute.

MCL 780.701 et al. (S.B. 468)  
767.6 & 767.19b (S.B. 469)  
750.125 et al. (S.B. 470)  
29.7 (S.B. 471)

#### **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

#### **Supporting Argument**

Michigan's immunity statutes were enacted at a time when transactional immunity was considered necessary to protect a witness's constitutional right against self-incrimination. In 1972, however, the United States Supreme Court upheld use immunity as constitutionally acceptable (*Kastiger v United States*, 406 U.S. 441). Unlike use immunity, transactional immunity is of limited worth to prosecutors. Since a witness who has transactional immunity may not be prosecuted at all for a crime about which he or she testifies, some criminals may escape punishment altogether. In fact, if a crime involves multiple participants, an accomplice who cooperates and confesses might be treated more harshly than one who runs away and then is granted immunity. By providing for use immunity, the bills would give the law enforcement community an important tool to investigate crimes and bring offenders to justice. Prosecutors could offer use immunity to discover essential information, without sacrificing the opportunity to prosecute suspected criminals. Furthermore, because the extent of use immunity would depend on the extent of information provided, use immunity could encourage witnesses

to divulge more; that is, the more they revealed, the less that could be used against them in a prosecution.

### **Supporting Argument**

In recent years Michigan has enacted numerous measures designed to identify, apprehend, and prosecute dangerous felons and protect citizens. This package of bills would contribute to these efforts. The bills also would be consistent with a 1995 law that enables prosecutors to petition for investigative subpoenas. Under Public Act 148 of 1995, when a prosecutor seeks an investigative subpoena, he or she also may apply to the court for an order granting immunity to anyone whom the prosecutor intends to require to testify. Public Act 148 provides that no testimony or other information compelled under an immunity order may be used against the person in any criminal case, except for impeachment purposes, in a perjury prosecution, or for otherwise failing to comply with the immunity order. Thus, Michigan law already contains provisions for use immunity.

**Response:** Public Act 148 also prohibits the disclosure of immunity petitions and immunity orders, and it evidently is common practice in Federal courts to keep immunity petitions under seal. Since an immunity application can contain sensitive information, and disclosure of this information could reveal the prosecutor's strategy and jeopardize the prosecution, perhaps Senate Bill 468 also should contain confidentiality provisions.

### **Supporting Argument**

Senate Bill 468 would make it clear that immunity could be granted in misdemeanor and juvenile cases, as well as in felony cases. Public Act 289 of 1968 provides for immunity in "any case of a felony or a circuit court misdemeanor", and the law is entitled, "An act to authorize circuit court judges to grant immunity...". As a result, according to previous testimony before the Senate Judiciary Committee, some judges believe that immunity is not available in misdemeanor cases.

### **Opposing Argument**

Use immunity could impede the success of some prosecutions. Since use immunity would offer less protection than transactional immunity does, defense attorneys might advise their clients not to cooperate with an offer of use immunity. Instead of testifying at all, criminal defendants could be better off "taking the fifth". Perhaps the bill should make both types of immunity available under Michigan law, rather than entirely replacing transactional immunity with use immunity.

**Response:** A defense attorney always could try to negotiate with the prosecutor for a broader

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agreement not to prosecute. Furthermore, an immunity order may be obtained without a witness's cooperation, and if he or she refuses to testify, the witness may be held in contempt of court. Also, if prosecutors currently are reluctant to apply for transactional immunity, then witnesses do not have the opportunity to cooperate with an offer of immunity in the first place.

Legislative Analyst: S. Lowe

### **FISCAL IMPACT**

The bills would have an indeterminate impact on the criminal justice system. The extent to which the bills would affect convictions cannot be estimated.

Fiscal Analyst: B. Bowerman