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SFA BILL ANALYSIS

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Senate Bills 468, 469, and 470 (as enrolled)
House Bill 4592 (as enrolled)
Sponsor: Senator Mike Rogers (Senate Bills 468 & 469)
Senator Shirley Johnson (Senate Bill 470)
Representative Larry Julian (House Bill 4592)
Senate Committee: Judiciary
House Committee: Criminal Law and Corrections

PUBLIC ACTS 249-251 of 1999
PUBLIC ACT 252 of 1999

Date Completed: 1-5-00

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.

Michigan law has provided 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 was suggested that Michigan should adopt use immunity in place of transactional immunity.

CONTENT

The bills amended various acts to delete provisions under which a witness could not be prosecuted for crimes about which he or she testified, if the witness had been granted immunity. Instead, the bills provide that if a witness is granted immunity, his or her truthful testimony and any information derived from it may not be used against the witness in a criminal case. The testimony may 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 may apply to a court for an immunity order, if the official or agency has statutory authority to issue a subpoena or compel testimony.

Senate Bill 468 amended Public Act 289 of 1968, which authorizes circuit courts to grant immunity. Senate Bill 469 amended 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 amended provisions of the Michigan Penal Code pertaining to prosecutions for bribery, conspiracy, prize fights, and prostitution. House Bill 4592 amended the Fire Prevention Code in regard to State Fire Marshal investigations. (The amended provisions of the Penal Code and the Fire Prevention Code do not refer to immunity, but pertain to proceedings in which a witness is ordered or compelled to testify or produce evidence. The bills deleted language under which the witness could not be prosecuted for crimes about which he had to testify or produce evidence. Under the bills, truthful testimony, evidence, or other truthful information that a witness is compelled to provide, and information derived from it, may not be used against the witness in a criminal case.)

A more detailed description of Senate Bill 468 follows.

Use Immunity

Previously, Public Act 289 of 1968 provided that in the case of any felony or a circuit court misdemeanor, the prosecuting attorney could 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 may 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 is to be tried as an adult for committing a specified juvenile offense.

As the law already provided, the bill requires the prosecutor's application to be accompanied by a verified statement setting forth the facts upon which the application is based. The bill also retains the existing 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. Under the bill, however, this requirement applies if the witness testifies "truthfully". In addition, as already required, a true copy of the immunity order must be delivered to the witness before he or she answers any questions; all questions of the witness and his or her answers must be transcribed at the judge's discretion; and a copy of the transcript must be delivered to the witness as soon as practicable after transcription.

Previously, under the Act, a person who had been granted immunity and was required to answer questions could not be prosecuted for any offense about which the answers may have tended to incriminate the witness. The bill deleted that provision.

Under the bill, truthful testimony or other truthful information compelled under the order granting immunity and any information derived directly or indirectly from that truthful testimony or other truthful information may 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 previously provided, a witness who fails or refuses to testify after being served with the immunity order is 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, may 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 is 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 must designate the person by name and address. The public official or agency must include a verified statement setting forth the facts upon which the application is based.

If the court determines that granting immunity is in the interests of justice, the court must enter an order granting immunity to the witness if he or she testifies truthfully or produces evidence in the investigation or proceeding concerning the investigation or subject of the proceeding. A true copy of the immunity order must be delivered to the witness before he or she answers any questions subsequently asked at the investigation or proceeding or is required to produce any evidence. The order applies until the court informs the witness that the immunity no longer applies.

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

Truthful testimony, evidence, or other truthful information compelled under the immunity order and any information derived directly or indirectly from that testimony, evidence, or information may 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 grants or permits immunity to a witness that is different in nature from the immunity authorized under the bill, the public official or agency may 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 (H.B. 4592)

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 give the law enforcement community an important tool to investigate crimes and bring offenders to justice. Prosecutors may offer use immunity to discover essential information, without sacrificing the opportunity to prosecute suspected criminals. Furthermore, because the extent of use immunity depends on the extent of information provided, use immunity may encourage witnesses to divulge more; that is, the more they reveal, the less that may 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 contributes to these efforts. The bills also are 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 the amended statutes also should contain confidentiality provisions.

Supporting Argument

Senate Bill 468 makes it clear that immunity may be granted in misdemeanor and juvenile cases, as well as in felony cases. Public Act 289 of 1968 had provided for immunity in "any case of a felony or a circuit court misdemeanor", and the law was 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 believed that immunity was not available in misdemeanor cases.

Supporting Argument

In a case decided last September, the Michigan Supreme Court held that a grant of immunity is not conditioned on the witness's giving truthful testimony (*People* v *McIntire*, 461 Mich 147). This opinion interpreted the provisions of the Code of Criminal Procedure concerning immunity in grand jury proceedings. Previously, a panel of the Court of Appeals had found that an obligation to provide truthful answers was an implicit condition of an immunity agreement under the Code. Thus, the Court of Appeals reasoned, a grant of immunity was void if the witness testified falsely. The Supreme Court disagreed, holding that the unambiguous language of the statute contained no requirement of truthful testimony. The bills rectify this statutory shortcoming. Under all of the bills, if a witness is granted use immunity or is compelled to testify or produce evidence, he or she must give *truthful* testimony or provide *truthful* information in order to be protected from the use of his or her testimony or information against the witness in a criminal case.

Opposing Argument

Use immunity might impede the success of some prosecutions. Since use immunity offers 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 might be better off "taking the fifth". Perhaps both types of immunity should be available under Michigan law.

Response: A defense attorney always can try to negotiate with the prosecutor for a broader 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 had been reluctant to apply for transactional immunity, then witnesses did not have the opportunity to cooperate with an offer of immunity in the first place.

Legislative Analyst: S. Lowe

FISCAL IMPACT

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

Fiscal Analyst: B. Bowerman

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