MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
April 19, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:08 a.m., on Thursday, April 19, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman William Horne, Vice Chairman
Assemblywoman Francis Allen
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblyman Ed Goedhart
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman Harry Mortenson
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

Assemblywoman Susan Gerhardt (Excused)

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst

Risa Lang, Committee Counsel
Danielle Mayabb, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

Jane Neuffer, Staff Counsel, Administrative Office of the Courts, Carson City
Nancy Hart, representing Nevada Network Against Domestic Violence, Reno
Gary D. Woodbury, District Attorney, Elko County
Ben Graham, Legislative Representative, Nevada District Attorneys Association, Las Vegas

Chairman Anderson:
[Meeting called to order. Roll called.] We will open the hearing on Senate Bill 34.

Senate Bill 34: Makes various changes to provisions concerning protective orders. (BDR 15-656)

I have a letter from Michael Sprinkle on behalf of the Nevada Council for Prevention of Domestic Violence in support of S.B. 34 (Exhibit B). We will have it entered into the record.

Joan Neuffer, Staff Counsel, Administrative Office of the Courts, Carson City:
I am here to represent the Judicial Council of the State of Nevada (JCSN) in support of this bill. The first section of S.B. 34 clarifies provisions and makes them consistent with the current additional penalties imposed in a stalking and harassment order. This bill has to do with protecting children. It is a cleanup bill. It allows the penalties to be consistent with the stalking and harassment penalties for violation of protective orders. The second part clarifies that unless there is a district court order dealing with protection, the rural courts can entertain orders for protection. If Boulder City were to hear a request for a protective order, that court could entertain that order unless the district court has dealt with the issue or issued an order with respect to the request.

Assemblyman Carpenter:
As I understand this, the justice courts could still issue those orders, right?

Joan Neuffer:
That is correct. If one of those courts in the rural areas gets a request to issue protective orders for domestic violence, they can do that. The problem

occurred when, during the last session, A.B. No. 237 of the 73rd Legislative Session was passed and created this three-part test. One of the subsections of that test said that the justice court does not have jurisdiction if a party to the action is a party in another action pending in the district court. That was the problem. This bill fixes that problem and allows the rural court to continue to have control over that case unless the district court has another matter pending, and they are the better ones to decide those issues. The rural court can continue to provide the relief requested. It makes for a clearer standard for our rural courts.

Nancy Hart, representing Nevada Network Against Domestic Violence, Reno:
This bill is a cleanup bill for two provisions dealt with last session that had some missing pieces. We have written testimony from Sue Meuschke who could not be here today. [Read from written testimony (Exhibit C).]

Chairman Anderson:
Are there any questions? [There were none.] Is there anyone else who wants to be heard on S.B. 34? [There was no one.] Is there anybody in opposition to S.B. 34? [There was no one.] We will close the hearing on S.B. 34.

ASSEMBLYMAN CARPENTER MOVED TO DO PASS SENATE BILL 34.

ASSEMBLYMAN HORNE SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYWOMAN GERHARDT WAS ABSENT FOR THE VOTE.)

Let us open the hearing on Senate Bill 37.

Senate Bill 37: Makes various changes to provisions governing the testimony and evidence of a witness who is granted immunity in a criminal proceeding. (BDR 14-278)

Gary D. Woodbury, District Attorney, Elko County:
There are two types of immunity. One is called transactional immunity and that is the type of immunity that is provided for by Nevada statute. Presently, if a prosecutor determines that he wishes to grant a person immunity in exchange for the testimony of that person, we go before a court and ask the court to grant the immunity, and typically it would do so. The second type of immunity is called "use and derivative use immunity," or "use and fruits immunity." That would allow a prosecutor or a court to compel testimony and all that would have to be granted to the person testifying would be the right to not ever have that testimony used against him or any evidence developed derived from that

testimony. The statute in Nevada for transactional immunity was passed in the 1967 Legislature. At that time, the United States Supreme Court had determined that, in order to compel testimony and not violate the Fifth Amendment, there had to be transactional immunity. In 1972, the Supreme Court changed its mind and held that use and fruits immunity would be sufficient.

At the hearing before the Senate Judiciary, a fellow from Las Vegas brought up the fact that he had never heard anybody complain about *Nevada Revised Statutes* (NRS) 178.572, which is the transactional immunity statute. The reason he has never heard the complaint is because prosecutors never use it. A problem that we face with respect to the transactional immunity statute is that we never know exactly what we are granting immunity for. Typically this comes up in homicide cases, and you find, when the police are questioning witnesses, that these witnesses are being extremely reluctant to say what went on. Sometimes it is not a question of whether or not they were involved in the homicide, but whether the underlying facts of the homicide concern a drug transaction, and they are very reluctant to talk about the drug transaction, and correspondingly very reluctant to talk about the homicide. If we were to go under the statute and before the court to request transactional immunity, we do not know what the court is granting because the immunity that is granted extends not only to one crime; it can extend to any crime that the testimony shows. There are ways to fix that, of course. You can, under our statute, fix the limits of the immunity that you are asking for, but it gets pretty murky. While prosecutors can limit the testimony they elicit from this person who has been granted immunity, the courts are loathe to limit cross-examination by defense counsel, and you can get yourself in a position where you have granted immunity from a drug transaction and wind up granting immunity for participation in the homicide. I would not suggest to you that that happens, but it is the explanation for why the transactional immunity statute is rarely used. I do not think we have ever used it. Mr. Graham asked me to determine the number of states that have this kind of immunity and which ones do not, and try to delineate them for you. The best I can do is suggest to you that the majority of the states do have the use and fruits immunity statute. That is what is provided in S.B. 37. The federal government obviously does because it was a United States Supreme Court decision; a minority of the states do not, and the ones that do not typically do not for a few reasons.

First, they hold that their individual state constitutions forbid it and that, while they have the equivalent of the Fifth Amendment immunity in their state constitution, in order to overcome that, you have to give transactional immunity to a person who might be involved in a crime in order to compel their testimony. Other states have held that the implementation of this use and derivative use

immunity is too complex. There is a United Supreme Court case that holds if another witness is exposed to the testimony and decides to either change his testimony or to come forward, that is a derivative use of the compelled testimony. It gets murky, but it gives us a fair chance to get the truth before the court in a way that is somewhat easier than some of the other methods we typically use now. It is a useful piece of legislation with respect to the question of whether this type of immunity is allowable under Nevada law. Nevada law already provides in NRS 199.090 granting use and derivative use immunity in cases of bribery and corruption and the Nevada Supreme Court has already interpreted that in a case called *Lucky v. State* [105 Nev. 807, 783 P.2d 457 (1989)]. Presumably, the Nevada Supreme Court, having already found that use and derivative use immunity under that statute is acceptable under our *Constitution*, they would also find it acceptable if we did it in a general fashion. There is an additional protection that is provided in this bill. If we want to go ahead and prosecute somebody who has testified and been given a grant of the use and derivative use immunity, this bill provides that we must show by clear and convincing evidence that we did not either use the testimony or derive any evidence that we are going to use from that testimony. It provides an additional protection that the United States does not. In a federal court, you only have to have a preponderance of the evidence, and it sometimes is a pretty difficult line to draw as to what is clear and convincing and what is a preponderance of the evidence. However, at least in the abstract, this bill offers a greater protection. I am asking you to pass S.B. 37 as it has been amended.

Assemblyman Horne:
Can you tell us why Nevada has the transactional immunity? You mentioned that other states had it because it was in their constitution or for other reasons. Is it in the *Constitution*, or is there another reason?

Gary D. Woodbury:
It was originally passed in 1967. At that time, the United States Supreme Court had said that in order to compel testimony, you had to give transactional immunity. Now, our Supreme Court has never held that—and our *Constitution* does not provide specifically—the immunity must be transactional. It seems that it would be allowed because of the use and derivative use immunity that is allowed in the other statute. I do not know beyond that why it is still in the Nevada statutes.

Assemblyman Horne:
If someone gives testimony on a drug case, but it is later determined that he was involved in a homicide, he would be immune from that? On a use and derivative use immunity, you have an independent source give you evidence of

that homicide and the involvement in the homicide. Would the testimony that the defendant gave under his immunity at any time be admissible?

Gary D. Woodbury:
Absolutely not. It would never be admissible under any circumstances except for a perjury charge, and that would be separate and independent of any homicide charge.

Assemblyman Horne:
So, if this is never being used, why would a defense attorney agree to allow their client to enter into a derivative immunity agreement?

Gary D. Woodbury:
It would not be up to the defense attorney. The prosecutor simply asks that a defendant be given the use and fruits immunity and the court imposes it.

Assemblyman Horne:
And the court would compel regardless if the person did not want to testify at all?

Gary D. Woodbury:
Absolutely.

Assemblyman Cobb:
This is not an issue where the witness has discretion, but the court would be compelling such testimony. Given those circumstances under Section 2, subsection 2, the burden is then on the individual who was compelled to testify to prove that—in any future prospective prosecution—the charges or any evidence brought forward was based on what the prosecution learned from that compelled testimony and not on the prosecution to prove that it came from an independent source. It seems like that is backwards.

Gary D. Woodbury:
It would be backwards if the bill provided it for the way you said it, but the bill does not do that. It provides just the opposite. The person who is proffering the evidence is required to show that it is from an independent source.

Assemblyman Cobb:
So, a witness in this section is the witness for the prosecution, not the witness who was compelled to testify?

Gary D. Woodbury:
Yes. The burden would never be on the witness who was compelled to testify.

Chairman Anderson:
Reasonable doubt is the lowest level of evidence, then clear and convincing, and then preponderance?

Ben Graham, Legislative Representative, Nevada District Attorneys Association, Las Vegas:
The highest is reasonable doubt.

Chairman Anderson:
Reasonable doubt is the highest, then the next lowest is clear and convincing, and then next is preponderance?

Ben Graham:
That is a civil burden.

Chairman Anderson:
Clear and convincing thus becomes the bottom that is usually acceptable in the criminal area?

Ben Graham:
It is a notch below reasonable doubt.

Chairman Anderson:
But it is really the floor.

Ben Graham:
At trial, yes.

Chairman Anderson:
I heard the preponderance referred to and had to check. I thought maybe I was misinterpreting something because I thought that was a civil standard and not a criminal one. I wanted to make sure I was not on the wrong page.

Ben Graham:
There was a beautiful question from the Vice Chairman as to how this happened. It happened because the Supreme Court said you have to have full and complete immunity. Nevada followed along and adopted the Supreme Court decision. A few years later, the Supreme Court said use or transactional immunity is okay.

Full transactional immunity is used from time to time in this State. From time to time we will get a murder case in which, frequently, a young person has been killed. They have been killed by a boyfriend or significant other and the public

will say, "How on earth is the mother not held liable at all? She must have known something that was going on." Probably the State has developed evidence which could lead to culpability to a certain degree on the part of the mother. From time to time, we have to find that the really bad guy is the perpetrator. The mother of this child has liability and culpability, but in order to make certain we can prosecute the really bad guy, we will give the mother total and complete transactional immunity. Then she would testify and is never held accountable for anything, the way our statutory scheme is now. If this bill were enacted, I would anticipate that it is not going to open the floodgates to anything. As Mr. Woodbury has indicated, the United States Supreme Court said it was constitutional back in the 1960s. Our Supreme Court said it was constitutional under the *Nevada Constitution*. If we were to use this use and derivative immunity, I think there would be cases where people would be held accountable for their criminal conduct, but absolutely not based upon anything they testified to.

Chairman Anderson:
I can see where somebody might be concerned that giving evidence at trial could implicate them in another criminal event. Let us say a kid breaks into a car, sees a gang shooting across the street, and recognizes the individuals. He is subsequently arrested for stealing the vehicle. In the course of that investigation, they place him at the general scene of the murder; thus, immunity is going to be offered to him. He asks the authorities how they are going to protect him on the street. This gang has been around for some time. The reality is that you are not going to give this kid lifetime immunity from the people who are going to try to hurt him. He is trying to protect himself. He would rather go to jail for stealing the car than testify at trial. Would you use immunity in this kind of a case?

Ben Graham:
He is an independent witness to a crime that he was not involved in. We have to try to assure him. People are afraid to show up and testify, but this would not be applicable in that fact pattern.

Chairman Anderson:
Let us say that someone is the newest member of a gang. He is brought along to some event, and in the course of that event, a murder takes place—or maybe some lesser crime than murder, but a felony act nonetheless. You are going to give him immunity and compel him to testify, even though it is not in his best interest or his desire to do so. He does not want to say that he was at the scene and part of the group. Then he invokes his Fifth Amendment right.

I am trying to understand how this is going to play out. The person testifying has to worry about the reality of the world in which he lives and not just his Fifth Amendment right to not have to testify against himself.

Gary D. Woodbury:
The fact is that we already can compel his testimony. We would simply grant him total immunity and require his testimony. This bill does not change that fact at all. If we want him to testify, we can indeed force him to testify. The only thing this bill would change is if he had involvement, we could force him to testify. The transactional immunity statute is clear.

Chairman Anderson:
If he is part of the group, then he is part of the crime.

Gary D. Woodbury:
He would be, but if we choose to give him transactional immunity, we can force him to testify. That is to say, we do not care what his participation in the crime was; we want him to testify and he will testify. This statute does not change that at all, or even impact it in any significant way. The only thing that it would change is if he got on the witness stand and testified that he did have some participation in the crime. If we could develop independent evidence of that beyond the testimony or whatever was derived from the testimony, then we could prosecute him, but this statute does not impact his problems on the street in any way.

Chairman Anderson:
Let us say he indicates somebody else within the gang was also there, and that person is not given transactional immunity. That person then testifies against the first man. Now you have corroborated the initial story, but you have also found a witness against the first man. Are you precluded from using any of the information that has been given you? Is it kind of like the "fruit of the poison tree" doctrine in that you cannot use any of the information to convict the first man of any part in the crime?

Gary D. Woodbury:
I cannot use it. If the first man testifies, or any person testifies, with a grant of use and derivative use immunity, we cannot use your testimony nor anything derived from that testimony against the person who testified. We could use it against the person they are testifying against. We are then required to show a totally independent source of the information if we decide we want to prosecute the person we have given immunity to.

Assemblyman Horne:
I am concerned about this change and what it does. The witness is compelled to give testimony for something and is given immunity, but he does not get the benefit of the bargain if you find an independent source of information, and now this person may be prosecuted for that very crime. I disagree when you say that it does not change the situation at all because the person has still placed himself in jeopardy under this. You are saying that you will not prosecute him as long as you do not find somebody else who can give you some independent information about his participation in the crime. Now this person has cooperated with authorities and it means absolutely nothing.

Mr. Graham mentioned the mother who may have had a lesser role in the crime perpetrated against her child. You say you want to get the real bad guy, but yet you find an individual source and you say, "Thanks for your help, mom, but now we have this individual source, so we are going to prosecute you anyway." It does not seem fair. This person really did not get the benefit of their bargain. It seems like if you kept things the same—depending on your case—you could negotiate either transactional immunity or the derivative immunity. You have that choice, but now you take that away. It is this or nothing.

Gary D. Woodbury:
There is no bargain made. There is no agreement by the testifying person saying that, if they cooperate they will receive certain benefits.

Assemblyman Horne:
The benefit is not being prosecuted. That is what immunity is.

Gary D. Woodbury:
I can compel their testimony now with the use of the statute as it presently exists simply by agreeing that I will give them total immunity.

Assemblyman Horne:
Under this, yes, you could do that, but it is under transactional immunity. Then it is done even if you get an independent source. So, you see the difference. If you can compel it now and it is transactional, there is no harm later. You do not believe this to be a benefit of the bargain. What we are saying is that if you force somebody to get up on the stand, we are not later going to slap them down for things they have testified to. Even though you are not using that testimony, you are using the independent source. It is like you want your cake and to eat it too. You want to be able to compel them and possibly prosecute them later. That seems patently unfair.

Gary D. Woodbury:
That would be a philosophical point of view you might have. The fact is, if one commits a crime, he is subject to the penalties that the Legislature and the Executive Branch impose. It is not a question of us doing something we should not be doing. What we are asking you to do is to make the prosecution of a person who has committed a crime available to us. This is not the way it usually works. The statute, as it presently exists, is rarely used. What typically happens is that we do not tell them they have the right to refuse to testify; they go ahead and testify, but sometimes the courts get nervous and get them an attorney, but not usually. Sometimes they get charged with the offense based on the evidence we have. We give them a plea bargain agreement of some sort and, as a part of that, they must testify truthfully. I totally reject the proposition that we are not being fair to these people. If you are a participant in a crime, under the rules that we all operate by, you ought to be prosecuted for it or at least be amenable to prosecution. It is not like a contract where we have negotiating parties. You pass the law, and these people violate the law. Now the question is how far do we have to go in order to not prosecute? To get one prosecution, we give up another prosecution. If you do not want people prosecuted under those circumstances, do not pass the law.

Assemblyman Goedhart:
About eight or ten years ago, the dairy I was on had a big flood and we had some green water run off the dairy. That triggered a federal investigation. My brother was the target of a federal grand jury investigation that was convened in California. I was made to testify in front of a grand jury. They said if I did not testify that I would be held in contempt. At the same time, they said that if they found out that I was guilty of anything based on what I said under direct order to testify, and if they can corroborate that through an independent source, then they could use that information and I could be brought up on certain charges. It seemed that if I was not allowed to exercise my Fifth Amendment right, I was theoretically opening myself up to prosecution. It did not seem fair to me at the time, and it does not seem fair to me today.

Gary D. Woodbury:
Was this a federal grand jury?

Assemblyman Goedhart:
Yes.

Gary D. Woodbury:
You misunderstood what they told you. It is not corroborating your testimony. It has to be under federal law, and under this prospective bill it has to be from a totally independent source. It cannot be derived from the testimony in any way,

shape, or form. The rules are extremely draconian in that respect. There are a vast number of federal cases that limit the ability of the United States government, and under this statute the...

Assemblyman Goedhart:
That is just the way it played out when I was going through that process. My attorney was telling me that they can do this under these statutes.

Gary D. Woodbury:
They can, but they cannot use your testimony and they cannot use anything derived from your testimony. That is not even a close question of law. It may be that ...

Chairman Anderson:
Other questions? [There were none.] There are examples in recent cases where you could have utilized this tool and have not been able to do so?

Ben Graham:
There are a small handful of cases in Clark County primarily concerning physical abuse leading to the death of children.

Chairman Anderson:
I have some concern about the issues regarding the Fifth Amendment. I need to get that clarified for myself. You are currently prevented from using this derivative immunity because of the earlier federal position and our change in the State law?

Gary D. Woodbury:
We are currently prohibited from going to a court and asking for use and derivative use immunity in order to compel testimony. I do not mean to suggest to you that we do not make side agreements with defendants all the time for exactly that kind of thing.

Chairman Anderson:
In the past, Mr. Graham has made it clear that about 90 percent of the workload of the district attorney's office is taken care of by plea agreements and immunities. I presume that figure still stands close to that.

Ben Graham:
There are still a very significant number of cases that are ultimately plea bargained.

Chairman Anderson:
Are there any further questions? [There were none.] Is there anyone in opposition? [There was no one.] We will close the hearing on S.B. 37. We are adjourned [at 9:05 a.m.].

RESPECTFULLY SUBMITTED:

Danielle Mayabb
Committee Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 19, 2007 **Time of Meeting: 8:00 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A	*******	Agenda
SB 34	B	Michael Sprinkle, Nevada Council for the Prevention of Domestic Violence	Letter in support of SB 34.
SB 34	C	Sue Meuschke, Nevada Network Against Domestic Violence.	Letter in support of SB 34.