

ASSEMBLY BILL NO. 55—COMMITTEE ON JUDICIARY

(ON BEHALF OF THE ATTORNEY GENERAL)

PREFILED NOVEMBER 19, 2018

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing immunity for a witness who is compelled to testify or produce evidence. (BDR 14-416)

FISCAL NOTE: Effect on Local Government: No. Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to criminal procedure; revising the orders of immunity that a court may issue to compel a witness to testify or produce evidence; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 The Fifth Amendment of the United States Constitution provides to persons the
2 privilege against compulsory self-incrimination with the clause “[n]o person . . .
3 shall be compelled in any criminal case to be a witness against himself.” This Fifth
4 Amendment right against self-incrimination applies to the states through the
5 Fourteenth Amendment of the United States Constitution. (*Estelle v. Smith*, 451
6 U.S. 454, 462 (1981); *In re Parental Rights as to A.D.L. and C.L.B., Jr. v. Clark*
7 *Cty. Dep’t of Fam. Serv.’s*, 133 Nev. Adv. Op. 72, 402 P.3d 1280, 1285 (2017))
8 Section 8 of Article 1 of the Nevada Constitution also provides this privilege.
9 Although a person has this privilege against compulsory self-incrimination, the
10 government can “compel testimony from an unwilling witness who invokes the
11 Fifth Amendment privilege against compulsory self-incrimination by conferring
12 immunity . . . from use of the compelled testimony.” (*Kastigar v. U.S.*, 406 U.S.
13 441 (1972))

14 There are two main types of immunity for a witness who is compelled to testify
15 or provide other evidence: (1) transactional immunity; and (2) use and derivative
16 use immunity. Transactional immunity means “[i]mmunity from prosecution for
17 any event or transaction described in the compelled testimony.” (*Black’s Law*
18 *Dictionary* 754 (7th ed. 1999) (defining “transactional immunity”)) As indicated by
19 *Black’s Law Dictionary*, “[t]his is the broadest form of immunity.” (*Id.*) This is
20 because transactional immunity “in essence provides complete amnesty to the
21 witness for any transactions which are revealed in the course of the compelled
22 testimony.” (*State v. Tricas*, 128 Nev. 698, 702 (2012) (quoting *Commonwealth of*



23 *Pa. v. Swinehart*, 664 A.2d 957, 960 n.5 (Pa. 1995)) Use and derivative use
24 immunity means “[i]mmunity from the use of the compelled testimony (or any
25 information derived from that testimony) in a future prosecution against the
26 witness.” (*Black’s Law Dictionary* 754 (7th ed. 1999) (defining “use immunity”))
27 Use and derivative use immunity is not as broad as transactional immunity because,
28 “[a]fter granting use [and derivative use] immunity, the government can still
29 prosecute if it shows that its evidence comes from a legitimate independent source.”
30 (*Id.*) To use such evidence, “the prosecution [has] the affirmative duty to prove that
31 the evidence it proposes to use is derived from a legitimate source wholly
32 independent of the compelled testimony.” (*Kastigar*, 406 U.S. at 460) Although
33 transactional immunity “would afford broader protection” to a witness than use and
34 derivative use immunity, the United States Supreme Court held that, in federal
35 cases, transactional immunity “is not constitutionally required.” (*Id.* at 441)
36 Specifically, in *Kastigar*, the United States Supreme Court held that the
37 government can compel, in federal cases, a witness to testify as long as the witness
38 is provided with use and derivative use immunity. (*Id.*)

39 Existing law authorizes a court on motion of the State to order that any material
40 witness be released from all liability to be prosecuted or punished. (NRS 178.572)
41 Existing law further requires that such an order forever be a bar to prosecution
42 against a witness for any offense shown in whole or in part by such testimony or
43 other evidence except for perjury committed in the giving of such testimony. (NRS
44 178.574) According to the Nevada Supreme Court, existing law “clearly and
45 unambiguously provides for a grant of transactional immunity.” (*Tricas*, 128 Nev.
46 at 703)

47 **Section 1** of this bill authorizes a court to order that any witness be compelled
48 to testify or produce other evidence and requires, subject to the provisions of
49 **section 2** of this bill, that such a witness receive either transactional immunity or
50 use and derivative use immunity. **Section 2** provides that: (1) if a witness receives
51 transactional immunity pursuant to **section 1**, such immunity shall forever be a bar to
52 prosecution against the witness, except for perjury committed in giving such
53 testimony, giving a false statement or otherwise failing to comply with the court’s
54 order; and (2) if a witness receives use and derivative use immunity pursuant to
55 **section 1**, no testimony or other evidence compelled, or information directly or
56 indirectly derived from such testimony or other evidence, may be used against the
57 witness in any criminal case, except in a prosecution for perjury committed in
58 giving such testimony, giving a false statement or otherwise failing to comply with
59 the court’s order. **Section 3** of this bill makes conforming changes.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 **Section 1.** NRS 178.572 is hereby amended to read as follows:
2 178.572 1. In any investigation before a grand jury, ~~for~~ any
3 preliminary examination ~~for~~, **any trial or any other evidentiary**
4 **hearing** in any court of record, the court, on motion of the State,
5 may order that any ~~material~~ witness be ~~released~~ :
6 **(a) Compelled to testify or produce other evidence; and**
7 **(b) Subject to the provisions of NRS 178.574:**
8 **(1) Released** from all liability to be prosecuted or punished
9 on account of any testimony or other evidence the witness may be
10 required to produce ~~for~~; **or**



1 (2) *Released from liability to be prosecuted or punished on*
2 *account of the use or derivative use of any testimony or other*
3 *evidence the witness may be required to produce.*

4 2. Any motion, hearing or order regarding the immunity of a
5 grand jury witness must not be made public before an indictment or
6 presentment is issued in the case.

7 **Sec. 2.** NRS 178.574 is hereby amended to read as follows:

8 178.574 ~~[Such]~~

9 1. *If a court issues an order of immunity which releases a*
10 *witness from all liability to be prosecuted or punished pursuant to*
11 *subparagraph (1) of paragraph (b) of subsection 1 of NRS*
12 *178.572, the order of immunity shall forever be a bar to prosecution*
13 *against the witness for any offense shown in whole or in part by*
14 *such testimony or other evidence except in a prosecution for*
15 ~~[perjury]:~~

16 (a) *Perjury committed in the giving of such testimony* ~~[;]~~;

17 (b) *Giving a false statement; or*

18 (c) *Otherwise failing to comply with the order.*

19 2. *If a court issues an order of immunity which releases a*
20 *witness from liability to be prosecuted or punished on account of*
21 *the use or derivative use of any testimony or other evidence that*
22 *the witness produced pursuant to subparagraph (2) of paragraph*
23 *(b) of subsection 1 of NRS 178.572, no testimony or other evidence*
24 *compelled under the order of immunity, or information directly or*
25 *indirectly derived from such testimony or other evidence, may be*
26 *used against the witness in any criminal case, except in a*
27 *prosecution for:*

28 (a) *Perjury committed in the giving of such testimony;*

29 (b) *Giving a false statement; or*

30 (c) *Otherwise failing to comply with the order.*

31 **Sec. 3.** NRS 178.578 is hereby amended to read as follows:

32 178.578 The court shall deny the motion of the State under
33 NRS 178.572 if it reasonably appears to the court that ~~[such]:~~

34 1. *If the motion of the State seeks an order of immunity*
35 *described in subparagraph (1) of paragraph (b) of subsection 1 of*
36 *NRS 178.572, such testimony or evidence would subject the*
37 *witness to prosecution* ~~[, except for perjury committed in the giving~~
38 ~~of such testimony,]~~ *under the laws of another state or of the United*
39 *States* ~~[,], unless the prosecution is for perjury committed in the~~
40 *giving of such testimony, giving a false statement or otherwise*
41 *failing to comply with an order.*

42 2. *If the motion of the State seeks an order of immunity*
43 *described in subparagraph (2) of paragraph (b) of subsection 1 of*
44 *NRS 178.572, such testimony or evidence, or information directly*
45 *or indirectly derived from such testimony or evidence, would be*



1 *used against the witness in any criminal case, unless the case is a*
2 *prosecution for perjury committed in the giving of such testimony,*
3 *giving a false statement or otherwise failing to comply with an*
4 *order.*

5 **Sec. 4.** This act becomes effective on July 1, 2019.

