

SUBJECT: Requiring hearing before issuing writ of attachment for certain witnesses

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Moody, Canales, Hefner, Lang, Wilson

0 nays

2 absent — Hunter, Gervin-Hawkins

SENATE VOTE: On final passage, April 5 — 30-0

WITNESSES: *On House companion bill, HB 3881:*

For — Kim Ogg, Harris County District Attorney's Office; Maisie Barringer

Against — None

BACKGROUND: Code of Criminal Procedure, art. 24.11 defines an attachment as a writ issued by court clerks, magistrates, or grand jury foremen in criminal cases, commanding a peace officer to take a witness into custody and to bring the witness to court to testify for the defendant or the prosecution.

Art. 24.12 allows a defendant or prosecutor to request and obtain a writ of attachment for a witness who lives in the county where a prosecution is taking place and who has failed to appear before a court after being served with a subpoena to appear and testify in a criminal proceeding.

Art. 24.22 allows a court to issue a writ of attachment for a witness who lives outside the county of prosecution if the witness has refused to obey a subpoena.

Under Code of Criminal Procedure, art. 24.14, courts issue writs of attachment after the defendant or prosecution has filed an affidavit with the court stating a belief that a material witness who resides in the county

of prosecution is about to move out of the county. These may be issued whether or not a witness has disobeyed a subpoena.

**DIGEST:** SB 291 would revise the procedure for requesting and issuing writs of attachment for witnesses in criminal proceedings and would require reporting on the writs that were issued.

**Process to request writ.** When a witness in the county in which a criminal case was being prosecuted had been served a subpoena to testify and had failed to appear, the prosecutor or defendant could request a writ of attachment, instead of being "entitled" to have one issued as provided under current law. The request would be filed with the court clerk and would have to include an affidavit from the defendant or prosecutor stating that there was good reason to believe that the witness was a material witness. The same requirement for an affidavit would apply to a request for a writ of attachment for a defendant from outside the county of prosecution who had refused to obey a subpoena.

When the defendant or the prosecutor believed that a witness was about to move from the county of a prosecution, either party could request a writ of attachment through the procedure established by the bill. In these cases, the affidavit also would have to state that the requestor had good reason to believe and did believe that the witness was about to move out of the county.

If the defendant or prosecutor requested a writ of attachment of a child witness, the request would have to include the affidavit described by the bill. This requirement would not apply to a writ issued for a witness who was in the custody of the Texas Juvenile Justice Department or other juvenile correction facilities.

**Required hearings.** The bill would require hearings before the issuance of writs of attachment in these cases. A writ of attachment only could be issued in these situations by the judge of the court in which the witness was to testify if the judge determined, after a hearing, that issuing a writ was in the best interest of justice.

The judge would have to consider the affidavit of the defendant or prosecutor that was submitted with the request for the writ. The court would be required to appoint an attorney to represent a witness at the hearing, including a hearing conducted outside the presence of the witness.

As soon as practicable after taking custody of a witness subject to a writ of attachment issued after a hearing, the sheriff would be required to submit to the court an affidavit stating that the sheriff had taken the witness into custody.

A witness who had been confined for five or more days under a writ of attachment could request a hearing to consider whether the continued confinement was necessary. The court would have to hold such a hearing as soon as practicable. Subsequent requests for a hearing could be granted only if a court determined that the hearing was in the best interest of justice. Attorneys appointed for the initial hearing would be required to represent the witness at these hearings.

**Reporting on writs of attachment.** SB 291 would require that within 30 days of the issuance of a writ of attachment by a district court, statutory county court, or county court, the court clerk would have to report on the writ to the Texas Judicial Council. The report would include:

- the date the writ of attachment was issued;
- whether the attachment was issued in connection with a grand jury investigation, criminal trial, or other criminal proceeding;
- the names of the person requesting and of the judge issuing the writ of attachment; and
- the statutory authority under which it was issued.

The Texas Judicial Council would be required to include a summary of the information in its annual report to the governor and Texas Supreme Court.

The bill would take effect September 1, 2017, and would apply only to writs of attachment issued on or after that date.

**SUPPORTERS  
SAY:**

SB 291 is necessary to protect the rights of witnesses subject to writs of attachment in criminal proceedings. The need for the bill was illustrated by a case in Houston in which a rape victim broke down during the trial of the accused rapist, was hospitalized for mental health issues, and then was jailed for weeks so she would be available to testify later in the trial. While in jail, she was housed with offenders and suffered trauma and abuse. The bill would revise the state's procedures for requesting and issuing writs of attachment to balance the rights of witnesses with the needs of the criminal justice system in rare cases to be able to ensure a witness came to court.

SB 291 would ensure that writs of attachment for witnesses were issued only when necessary and that any confinement continued only for as long as necessary. Instead of writs of attachment being automatically issued upon request, the bill would require a judge to hold a hearing in open court and to decide whether to issue the writ. The witness would be appointed an attorney, and a rehearing would be held if requested after a witness had been confined for at least five days.

In contrast to the treatment of the witness in the Harris County case, the procedures under the bill would ensure the witness had an advocate and was not lost in the system. A judge could set the hearing to allow the witness and lawyer time to meet beforehand, and in the rare case in which that did not occur, the lawyer still would be able to protect the basic due process rights of the witness. Having a lawyer and a judge involved would help to keep any confinement to a minimum and ensure frequent review. A witness whose liberty is at stake should be afforded a lawyer and a hearing, which are the same rights given to accused criminals.

The bill is necessary to ensure that these procedures occur throughout Texas. While the case that illustrates the need for SB 291 occurred in one county, the need to protect witnesses and their due process rights is a statewide issue and should be applied uniformly in all jurisdictions. The

bill would not allow witnesses to avoid the consequences of a subpoena, but rather would ensure that when those consequences occurred, the process would be fair and adequately would consider the rights of the witness.

OPPONENTS  
SAY:

It is unnecessary to change statewide law and established procedures relating to writs of attachment in response to the poor policies of one county. These problems have not occurred in other counties, and the issues prompting SB 291 could be addressed adequately by changes in local policies and procedures. There should not be a new process established that would allow a witness who had been properly subpoenaed by a court to attempt to avoid the consequences.

Some of the measures proposed in SB 291 could be difficult to implement. For example, the bill would require a hearing on a request for a writ of attachment and the appointment of a lawyer to represent the witness. It might be difficult to provide adequate representation at a hearing because it is quite possible the lawyer might not have met the witness beforehand, especially if the witness had been avoiding a subpoena.

OTHER  
OPPONENTS  
SAY:

It might be appropriate to require a review of a detention that resulted from a writ of attachment sooner than after five days of confinement.

NOTES:

A companion bill, HB 3881 by Alvarado, was considered in a public hearing of the House Committee on Criminal Jurisprudence and left pending on April 17.