SUBJECT: State depositions in criminal cases

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Talton, Dunnam, Farrar, Galloway, Hinojosa, Keel, Nixon, A. Reyna

0 nays

1 absent — Place

WITNESSES: For — John Davis, El Paso District Attorney's Office

Against — None

BACKGROUND: The Code of Criminal Procedure allows defendants to depose witnesses if a court agrees there is good reason for taking the deposition. Depositions taken in criminal cases cannot be read in court unless the deposed witness resides in another state, has died since the deposition was taken, or has been prevented from attending the trial from persons involved in the proceedings or because of age or bodily infirmity.

The state may not take depositions in criminal cases.

DIGEST: CSHB 1620 would amend the Code of Criminal Procedure to allow the state to also depose witnesses who would be prevented from testifying at trial and limit defendants to depositions only when the information could not be obtained by other means.

A party seeking to depose a witness would have to file an application with an affidavit of supporting facts, complete with full identifying information on the witness. The other party would have to be notified prior to the hearing on the application. In granting an application, the court would have to state the findings supporting its determination.

Witnesses being deposed could be represented by an attorney and could assert a privilege prior to or at any time during the deposition. The court would determine the validity of any asserted privilege. A witness who failed

to assert a relevant privilege during the deposition would waive the right to assert that privilege. If a witness being deposed refused without legal justification to answer questions on cross-examination, the party taking the deposition could not use the deposition for any purpose.

A defendant in custody could appear at a deposition being taken by the state. The state would have to provide reasonable notice of the time and place of that deposition to the officer having custody of the defendant, and the officer would have to produce the defendant at the deposition unless the defendant waived the right to appear in writing or in open court. The officer would have to keep the defendant in the presence of the witness during the deposition unless the defendant became disruptive.

A defendant not in custody at the time the state took a deposition would also have a right to appear. The state would have to provide the defendant with reasonable notice of the time and place of the deposition. A defendant who failed to appear without showing good cause would waive the right. Waiver of the right to appear at a deposition also would constitute waiver of any objection based on that right to the taking and use of the deposition at trial.

The defendant would be entitled to representation by an attorney at a deposition. The court would have to advise defendants without counsel of their right to counsel. The court would have to appoint counsel to represent an indigent defendant.

Court reporters certified by Texas or the state in which the deposition is taken would be authorized to take a deposition in a criminal case.

CSHB 1620 would take effect September 1, 1997, and would apply only to a deposition in a criminal case in which an information was filed or an indictment returned on or after the effective date.

SUPPORTERS SAY:

CSHB 1620 would allow the state to take a deposition in criminal case in a very limited but very necessary instance — when a witness will be unavailable at trial. Allowing the state to take a deposition under those circumstances would preserve the testimony and increase the information available to juries to assist them to render a proper verdict. In cases where the only witness to a crime cannot come to court, the interests of justice are

served by having a sworn statement of facts from the witness. Increasing the available evidence could help defendants as well as the state.

Depositions, a tool now reserved to defendants, should also be available to the state. If juries do indeed exclusively need live testimony, then defendants should not be able to use depositions. It makes little sense to argue that the state should not be able to take depositions because of the need for live testimony when defendants already have the benefit of depositions.

The bill would properly limit a defendant's ability to conduct a discovery deposition to information that has not already been offered to them from the state's case file. Some defendants abuse discovery depositions to intimidate victims and potential adverse witnesses. This has been a particularly disturbing problem in sex offense cases with child victims.

With prosecuting attorneys employing an "open file policy," defendants or their attorneys have full right of review to obtain specific witness information needed for a deposition application. These same requirements should not pose a problem for the defense. If the information is needed for a defense witness, the defendant should be able to get that information by themselves. These specific information requirements would ensure the accuracy of witness identification.

CSHB 1620 would protect defendants' Sixth Amendment right to confront witnesses against them by setting out very detailed requirements on notice and attendance. Defendants also could have an attorney, appointed if necessary, at the deposition and would have the right to cross-examine the witness.

Furthermore, the bill would protect witnesses because waiver of privilege provisions would require that the court determine the validity of any asserted privilege. Prosecuting attorneys would not take the risk of having a deposition ruled inadmissible or a conviction reversed based on a wanton error on their part regarding a privilege.

This bill is not an unprecedented concept — at least 15 other states currently have a similar statute allowing state depositions of witnesses who would be unavailable at trial.

OPPONENTS SAY:

CSHB 1620 would give the state a new power that is unprecedented in Texas, one that the state does not need and that could have a devastating effect on the rights of defendants to a fair criminal trial. The life or liberty of a defendant is at stake in a criminal trial, and juries need something more than the paper records of a deposition to help them render a fair and appropriate verdict — they need live testimony in order to scrutinize the demeanor of witnesses and evaluate the truthfulness of their statements. This bill could put people in prison based on the testimony of witnesses who do not show up to testify or be cross-examined at trial in front of the jury. Cross-examination is the greatest engine for discovering truth, which ultimately is the purpose of the trial; CSHB 1620 would eliminate the ability to cross-examine at trial.

The wording of the bill would ensure that only the state would be able to apply for depositions. The application for a deposition would have to include the full and correct name, date of birth and social security number of the witness whose testimony was sought. The vast majority of defendants do not have such extensive information about witnesses, but that information is commonly available to the state, which has many resources to call upon. In making inquiries to obtain that information, the defendant would have to reveal the persons preliminarily being considered for trial witnesses.

Depositions are completely unnecessary for the state because the state already has an extensive law enforcement network with police forces that turn over more information from interviews than ever could be obtained from a deposition. In addition, the state can use already available evidence rules that allow hearsay to be admitted into evidence in certain instances when the witness is unavailable.

There is a real danger that the state would misuse depositions for legal strategy rather than for preserving evidence or uncovering the truth. The state could use depositions as a dress rehearsal for trial. Because there are fewer procedural rules for a deposition and the state could determine the

time and place of the deposition, a deposition could become more of an inquisition than a mere tool to collect evidence. By sitting defense witnesses down and questioning them after police have already done an investigation, the state could intimidate them from coming to court. Although most prosecutors are ethical, some would turn the deposition to their advantage. Texas should not risk the rights of defendants for these purposes.

The provisions regarding waiver of a witness' privilege are troubling and may be unconstitutional. A witness who failed to assert a relevant privilege during the deposition would waive the right to assert that privilege. The bill does not take into account the very complicated case law regarding waiver of privilege, and it should at least include the safeguards found in case law that require the waiver to be made knowingly. Additionally, the bill could be unconstitutional if the waiver applied to the attorney-client privilege because both the U.S. and Texas constitutions allow that privilege to be reclaimed.

Furthermore, although the witness could be represented by an attorney at the deposition, many witnesses would not be likely to get an attorney or could not afford one since they were not on trial. The bill should include a provision requiring the court to educate witnesses about their rights regarding waiver of privilege.

There is no reason to diminish the defendant's right to a discovery deposition by statute. The existing provision requiring application and showing of a good reason for taking the deposition were designed to give judges adequate information and wide latitude to make a decision about whether a defendant should be allowed to take the deposition. This discretion should remain with judges. They are competent to weed out applications by defendants who do not have a good reason for taking a deposition. In addition, the rights of all defendants should not be diminished just because a few defendants have tried to misuse the deposition process.

NOTES:

The original version of the bill was limited to allowing the defendant and the state to take depositions and setting forth the application procedures.