

**CHAPTER 835**  
**SECURING ATTENDANCE OF WITNESS BY MATERIAL**  
**WITNESS ORDER**

Section

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" **§835-1 Material witness order; defined.** A material witness order is a court order:

- (1) Adjudging a person a material witness in a pending criminal action; and
- (2) Fixing bail to secure the person's future attendance thereat. [L 1971, c 214, pt of §1; HRS §718-1; ren L 1972, c 9, pt of §1; gen ch 1985; am L 2016, c 55, §49]

" **§835-2 Material witness order; when authorized; by what courts issuable; duration thereof.** (a) A material witness order may be issued upon the ground that there is a reasonable cause to believe that a person whom the people or the defendant desire to call as a witness in a pending criminal action:

- (1) Possesses information material to the determination of [the] action; and
  - (2) Will not be amenable or responsive to a subpoena at a time when the person's attendance will be sought.
- (b) A material witness order may be issued only when:
- (1) An indictment or information has been filed in a circuit court and is currently pending therein;
  - (2) A grand jury proceeding has been commenced and is currently pending; or
  - (3) A felony complaint has been filed with a district court and is currently pending therein.
- (c) The following courts may issue material witness orders under the indicated circumstances:
- (1) When an indictment has been filed, an information filed, or a grand jury proceeding has been commenced, or a defendant has been held by a district court for the action of a grand jury, a material witness order may be issued only by the circuit court in which [the] indictment is pending or by which [the] grand jury has been or will be impaneled;
  - (2) When a felony complaint is currently pending in a district court, a material witness order may be issued either by said court or by the circuit court which would have jurisdiction of the case upon indictment by the grand jury.
- (d) Unless vacated pursuant to section 835-6, a material witness order remains in effect during the following periods of time under the indicated circumstances:
- (1) An order issued by a circuit court under the circumstances prescribed in [subsection (c)(1)] remains in effect during the pendency of the criminal action in [the] circuit court;

- (2) An order issued by a district court under circumstances prescribed in [subsection (c)(2)], remains in effect[:]
  - (A) Until the disposition of the felony complaint pending in [the] court[;]
  - (B) If the defendant is held for the action of the grand jury, during the pendency of the grand jury proceeding[;]
  - (C) If an indictment results, for a period of ten days following the filing of [the] indictment[;] and
  - (D) If within [the] ten-day period[, the] order is endorsed by the circuit court in which the indictment is pending, during the pendency of the action in [the] circuit court. Upon [the] endorsement, the order is deemed to be that of the circuit court. [L 1971, c 214, pt of §1; HRS §718-2; ren L 1972, c 9, pt of §1; gen ch 1985]

#### **Revision Note**

In subsection (b)(1), "or" deleted and in subsection (d)(2), (i) to (iv) reformatted as subparagraphs (A) to (D) and "and" deleted subparagraphs (A) and (B) pursuant to §23G-15.

" **§835-3 Material witness order; commencement of proceeding by application; procurement of appearance of prospective witness.** (a) A proceeding to adjudge a person a material witness must be commenced by application to the appropriate court, made in writing and subscribed and sworn to by the applicant, demonstrating reasonable cause to believe the existence of facts, as specified in section 835-2(a), warranting the adjudication of the person as a material witness.

(b) If the court is satisfied that the application is well-founded, the prospective witness may be compelled to appear in response thereto as follows:

- (1) The court may issue an order directing the prospective witness to appear therein at a designated time in order that a determination may be made whether the prospective witness should be adjudged a material witness and, upon personal service of the order or a copy thereof within the State, the prospective witness shall so appear; and
- (2) If in addition to the allegations specified in section 835-2(a), the application contains further allegations demonstrating to the satisfaction of the court reasonable cause to believe that:

(A) The witness would be unlikely to respond to such an order; or

(B) After previously having been served with such an order, the witness did not respond thereto,

the court may issue a warrant addressed to a police officer, directing the officer to take the prospective witness into custody within the State and to bring the prospective witness before the court forthwith in order that a proceeding may be conducted to determine whether the prospective witness is to be adjudged a material witness. [L 1971, c 214, pt of §1; HRS §718-3; ren L 1972, c 9, pt of §1; gen ch 1985; am L 2015, c 35, §34]

" **§835-4 Material witness order; arraignment.** (a) When the prospective witness appears before the court, the court must inform the prospective witness of the nature and purpose of the proceeding, and that the prospective witness is entitled to a prompt hearing upon the issue of whether the prospective witness should be adjudged a material witness. The prospective witness possesses all the rights, and is entitled to all the court instructions, with respect to right to counsel, opportunity to obtain counsel and assignment of counsel in case of financial inability to retain such, which, pursuant to rule 5(d)(1), Hawaii rules of criminal procedure, accrue to a defendant arraigned upon a felony complaint in the district court.

(b) If the proceeding is adjourned at the prospective witness' instance, for the purpose of obtaining counsel or otherwise, the court must order the prospective witness to appear upon the adjourned date. The court may further fix bail to secure the prospective witness' appearance upon such date or until the proceeding is completed and, upon default thereof, may commit the prospective witness to the custody of the chief of police for such period. [L 1971, c 214, pt of §1; HRS §718-4; ren L 1972, c 9, pt of §1; gen ch 1985]

" **§835-5 Material witness order; hearing, determination and execution of order.** (a) The hearing upon the application must be conducted as follows:

- (1) The applicant has the burden of proving by a preponderance of the evidence all facts essential to support a material witness order, and any testimony so adduced shall be given under oath;
- (2) The prospective witness shall testify under oath;
- (3) The prospective witness may call witnesses in his behalf, and the court must cause process to be issued for any such witness whom he reasonably wished to call, and any testimony so adduced shall be given under oath;

(4) Upon the hearing, evidence tending to demonstrate that the prospective witness does or does not possess information material to the criminal action in issue, or that he will or will not be amenable or respond to a subpoena at the time his attendance will be sought, is admissible even though it consists of hearsay.

(b) If the court is satisfied after such hearing that there is reasonable cause to believe that the prospective witness[:]

(1) Possesses information material to the pending action or proceeding[;] and

(2) Will not be amenable or respond to a subpoena at a time when his attendance will be sought[;]

it may issue a material witness order, adjudging him a material witness and fixing bail to secure his future attendance.

(c) A material witness order must be executed as follows:

(1) If the bail is posted and approved by the court, the witness must be released and be permitted to remain at liberty; provided that where the bail is posted by a person other than the witness himself, he may not be so released except upon his signed written consent thereto;

(2) If the bail is not posted, or if though posted it is not approved by the court, the witness must be committed to the custody of the chief of police. [L 1971, c 214, pt of §1; HRS §718-5; ren L 1972, c 9, pt of §1]

#### Revision Note

In subsection (b), (1) and (2) reformatted as paragraphs (1) and (2) pursuant to §23G-15.

" **§835-6 Material witness order; vacation, modification and amendment thereof.** (a) At any time after a material witness order has been issued the court must, upon application of such witness, with notice to the party upon whose application the order was issued, and with opportunity to be heard, make inquiry whether by reason of new or changed facts or circumstances the material witness order is no longer necessary or warranted, or, if it is, whether the original bail currently appears excessive. Upon making any such determination, the court must vacate the order. If its determination is that the order is no longer necessary or warranted, it must, as the situation requires, either discharge the witness from custody or exonerate the bail. If its determination is that the bail is excessive, it must

issue a new order fixing bail in a lesser amount or on less burdensome terms.

(b) At any time when a witness is at liberty upon bail pursuant to a material witness order, the court may, upon application of the party upon whose application the order was issued, with notice to the witness if possible and to the witness' attorney if any and opportunity to be heard, make inquiry whether, by reason of new or changed facts or circumstances, the original bail is no longer sufficient to secure the future attendance of the witness at the pending action. Upon making such a determination, the court must vacate the order and issue a new order fixing bail in a greater amount or on terms more likely to secure the future attendance of the witness. [L 1971, c 214, pt of §1; HRS §718-6; ren L 1972, c 9, pt of §1; gen ch 1985]

" **§835-7 Material witness order; compelling attendance of witness who fails to appear.** If a witness at liberty on bail pursuant to a material witness order cannot be found or notified at the time the witness' appearance as a witness is required, or if after notification the witness fails to appear in such action or proceeding as required, the court may issue a warrant, addressed to a police officer, directing such officer to take such witness into custody anywhere within the State and to bring the witness to the court forthwith. [L 1971, c 214, pt of §1; HRS §718-7; ren L 1972, c 9, pt of §1; gen ch 1985]

" **§835-8 Material witness order; witness fee.** A witness held in the custody of the chief of police as a result of a material witness order must be paid the sum of twenty dollars per day for each day of confinement in such custody. Such compensation is a county charge and is payable upon release of such material witness from custody or, in the discretion of the court, at any designated times or intervals during the confinement as the court may deem appropriate. [L 1971, c 214, pt of §1; HRS §718-8; ren L 1972, c 9, pt of §1]