



House of Representatives

General Assembly

File No. 466

February Session, 2000

Substitute House Bill No. 5902

House of Representatives, April 6, 2000

The Committee on Judiciary reported through REP. LAWLOR of the 99th Dist., Chairperson of the Committee on the part of the House, that the substitute bill ought to pass.

An Act Concerning Investigative Subpoenas.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) For the purposes of sections 1 to 11, inclusive, of
2 this act:

3 (1) "Prosecuting official" means the Chief State's Attorney, a deputy
4 Chief State's Attorney, a state's attorney, an assistant state's attorney
5 specifically designated by the Chief State's Attorney, or a special
6 assistant state's attorney appointed by the Chief State's Attorney
7 pursuant to subsection (b) of section 51-285 of the general statutes;

8 (2) "Subpoena" means a subpoena ad testificandum or a subpoena
9 duces tecum, or both;

10 (3) "Property" includes, but is not limited to, documents, books,
11 papers, records, films, recordings and other tangible things.

12 Sec. 2. (NEW) In the investigation of conduct that would constitute

13 the commission of a class A or B felony, including the investigation of
14 whether a defense or affirmative defense raised with respect to the
15 commission of a class A or B felony constitutes a valid defense under
16 the law, a prosecuting official, in the performance of such official's
17 duties during such investigation, shall have the authority to compel by
18 subpoena the appearance and testimony of witnesses and the
19 production of property concerning the matter under investigation. No
20 prosecuting official may issue a subpoena under this section unless
21 authorized by a judge of the Superior Court pursuant to section 3 of
22 this act.

23 Sec. 3. (NEW) (a) A prosecuting official who seeks to issue a
24 subpoena under section 2 of this act shall submit an application to a
25 judge of the Superior Court. Such application shall include an affidavit
26 sworn to by such prosecuting official stating that such official:

27 (1) Has reasonable grounds to believe that a class A or B felony has
28 been committed or a defense or affirmative defense has been raised
29 with respect to the commission of a class A or B felony, and the basis
30 for such belief;

31 (2) Has reasonable grounds to believe that the person to be
32 summoned to appear and give testimony or produce property has
33 information relevant and necessary to the investigation concerning the
34 alleged commission of a class A or B felony or the validity of a defense
35 or affirmative defense raised with respect to the commission of a class
36 A or B felony, and the basis for such belief;

37 (3) Has reasonable grounds to believe that the appearance and
38 testimony of such person or the production of property by such person
39 would not occur or be available without the issuance of a subpoena,
40 and the basis for such belief; and

41 (4) Has made reasonable efforts to secure such appearance,
42 testimony and property without recourse to a subpoena and those

43 efforts have been unsuccessful.

44 (b) If the judge finds that the provisions of subsection (a) of this
45 section have been satisfied, such judge may grant the application for
46 the issuance of a subpoena by such prosecuting official.

47 Sec. 4. (NEW) (a) Any subpoena issued pursuant to sections 1 to 11,
48 inclusive, of this act shall (1) compel only the appearance of witnesses
49 and the production of property relevant and necessary to the
50 investigation being conducted, (2) specify with reasonable particularity
51 any property to be produced, and (3) require only the production of
52 documents or records covering a reasonable period of time.

53 (b) Any subpoena issued pursuant to sections 1 to 11, inclusive, of
54 this act shall be served at least five working days prior to the date
55 scheduled for the appearance of the witness, unless a judge of the
56 Superior Court in the judicial district where compliance with the
57 subpoena is sought, as provided in section 5 of this act, otherwise
58 orders for good cause shown.

59 (c) Any subpoena issued pursuant to sections 1 to 11, inclusive, of
60 this act shall contain a notice advising the person summoned of the
61 following: (1) The purpose of the investigation, (2) whether such
62 person is a target or possible target of the investigation, (3) that such
63 person has the right not to be compelled to give evidence against
64 himself or herself, (4) that such person has the right to have counsel
65 present and to consult with such counsel and, if such person is
66 indigent, to have counsel appointed to represent him or her, and (5)
67 that such person has the right to file a motion to quash or modify the
68 subpoena.

69 Sec. 5. (NEW) Any subpoena issued pursuant to sections 1 to 11,
70 inclusive, of this act shall compel the witness to appear or produce the
71 property in the presence of a judge at a specified location in a
72 courthouse in the judicial district where the incident or incidents

73 subject to investigation are alleged to have occurred or, if the
74 investigation is being conducted by a prosecuting official of a judicial
75 district other than the judicial district where the incident or incidents
76 subject to investigation are alleged to have occurred, in a courthouse in
77 that judicial district.

78 Sec. 6. (NEW) (a) Whenever a subpoena is issued pursuant to
79 sections 1 to 11, inclusive, of this act, the prosecuting official shall, not
80 later than forty-eight hours after service of the subpoena, excluding
81 weekends and holidays, give written notice of the issuance of the
82 subpoena to the presiding judge for criminal matters in the courthouse
83 where compliance with the subpoena is required. Such notice shall
84 include the identity of the person and, if the production of property is
85 compelled, a description of the property. Such notice shall be
86 confidential and not subject to disclosure. The failure to give such
87 notice shall not invalidate the subpoena. Such presiding judge shall
88 assign a judge of the Superior Court to preside over the proceeding.
89 The assignment of such judge shall be confidential and not subject to
90 disclosure. The proceeding shall not be open to the public.

91 (b) Prior to any witness being questioned, the prosecuting official
92 shall advise such person of the following: (1) The purpose of the
93 investigation, (2) whether such person is a target or possible target of
94 the investigation, (3) that such person has the right not to be compelled
95 to give evidence against himself or herself, and (4) that such person
96 has the right to have counsel present and to consult with such counsel
97 and, if such person is indigent, to have counsel appointed to represent
98 him or her. The presiding judge shall assure that such rights are not
99 infringed.

100 (c) A court reporter or assistant court reporter shall make a record of
101 the proceeding. The record of the proceeding shall be sealed and not
102 subject to disclosure, except that any witness who appeared and
103 testified shall be allowed access, at all reasonable times, to the record

104 of such witness' own testimony and shall have the right to receive a
105 copy of the transcript of the record of such testimony.

106 Sec. 7. (NEW) If any witness properly summoned fails to appear or
107 to produce any property specified in the subpoena or, if having
108 appeared, fails to answer any proper question, the prosecuting official
109 may apply to a judge of the Superior Court in the judicial district as
110 provided in section 5 of this act setting forth such failure and
111 requesting an order requiring such person to appear and answer
112 questions or produce such property, as the case may be. If the judge
113 finds that reasonable cause exists, the judge shall issue a citation
114 requiring the witness to appear before a judge of the Superior Court in
115 camera to show cause why such witness should not appear or produce
116 property or should not answer any proper question. If, after hearing,
117 the judge finds that the witness has failed to show cause why such
118 witness should not be required to comply with the subpoena, the judge
119 shall enter an order requiring the witness to appear, to produce
120 property or to answer any proper question, as the case may be. The
121 failure to obey such order may be punished by the court as a contempt
122 thereof. The application of the prosecuting official and the order of the
123 court shall be sealed as to the public and not be subject to disclosure.
124 The hearing on the application shall not be open to the public.

125 Sec. 8. (NEW) (a) Whenever a subpoena has been issued to compel
126 the appearance and testimony of a witness or the production of
127 property pursuant to sections 1 to 11, inclusive, of this act, the person
128 summoned may file a motion to quash the subpoena with the chief
129 clerk of the court for the judicial district as provided in section 5 of this
130 act. No fees or costs shall be assessed.

131 (b) The party filing the motion to quash shall be designated as the
132 plaintiff and the prosecuting official shall be designated as the
133 defendant.

134 (c) The motion, upon its filing, shall be sealed as to the public. The

135 motion shall be referred to the presiding criminal judge of the court for
136 hearing or for assignment to another judge for hearing. Unless
137 otherwise ordered by the judge conducting the hearing, the hearing
138 shall be conducted in camera and the file on the motion shall be sealed
139 as to the public, subject to further order of the court.

140 (d) The motion shall be expeditiously assigned and heard. The date
141 and time of the hearing shall be established by the clerk after
142 consultation with the judge assigned to conduct the hearing. The clerk
143 shall give notice to the parties of the hearing so scheduled.

144 (e) A judge may quash or modify any subpoena issued pursuant to
145 sections 1 to 11, inclusive, of this act on the following grounds: (1) That
146 the witness summoned does not have information relevant and
147 necessary to the investigation, (2) that the testimony sought is
148 protected by the attorney-client privilege or a statutory or
149 constitutional privilege, (3) that the production of the property sought
150 would be unreasonable or oppressive or that the property constitutes
151 attorney-client work product, or (4) for any other just cause as may be
152 found by the judge.

153 Sec. 9. (NEW) (a) In any investigation conducted pursuant to
154 sections 1 to 11, inclusive, of this act, a state's attorney or, at the request
155 of a special assistant state's attorney, the Chief State's Attorney, may
156 apply to a judge of the Superior Court for an order granting immunity
157 from prosecution to any person whom the state calls or intends to call
158 as a witness if the prosecuting official finds that the testimony of the
159 person is necessary to the investigation of the case. Such immunity
160 may provide that the person will not be prosecuted or subjected to any
161 penalty or forfeiture (1) for or on account of any testimony given or
162 evidence produced by such person, or for or on account of any
163 evidence discovered as a result of or otherwise derived from testimony
164 given or evidence produced by such person, or (2) for or on account of
165 any transaction, matter or thing concerning which such person gives

166 testimony or produces evidence. A person who receives immunity
167 under this subsection shall not be immune from prosecution for
168 perjury or contempt committed while giving such testimony or
169 producing such property.

170 (b) No person who has been properly served with a subpoena
171 pursuant to sections 1 to 11, inclusive, of this act and receives
172 immunity under subsection (a) of this section, shall be excused from
173 appearing and testifying or producing any property before the
174 prosecuting official concerning an investigation pursuant to sections 1
175 to 11, inclusive, of this act upon the ground or for the reason that the
176 testimony or property required of such person may tend to convict
177 such person of a crime or subject such person to a penalty or forfeiture.

178 Sec. 10. (NEW) All information and property obtained by a
179 prosecuting official as a result of the issuance of a subpoena pursuant
180 to sections 1 to 11, inclusive, of this act shall be confidential and not
181 subject to disclosure, except such as should, in the opinion of such
182 official, be used or disclosed in the performance of the official duties of
183 such official.

184 Sec. 11. (NEW) All property produced as a result of the issuance of a
185 subpoena pursuant to sections 1 to 11, inclusive, of this act shall be
186 returned to the person from whom it was received if no criminal
187 prosecution is commenced involving the use of such property or shall
188 be otherwise disposed of as provided by law.

189 Sec. 12. Section 51-296 of the general statutes is repealed and the
190 following is substituted in lieu thereof:

191 (a) In any criminal action, in any habeas corpus proceeding arising
192 from a criminal matter, in any extradition proceeding, [or] in any
193 delinquency matter or in any proceeding in which a witness has been
194 summoned by a subpoena issued pursuant to section 2 of this act, the
195 court before which the matter is pending shall, if it determines after

196 investigation by the public defender or [his] the public defender's
197 office that a defendant or a witness summoned by a subpoena issued
198 pursuant to section 2 of this act is indigent as defined under this
199 chapter, designate a public defender, assistant public defender or
200 deputy assistant public defender to represent such indigent defendant
201 or witness, unless, in a misdemeanor case, at the time of the
202 application for appointment of counsel, the court decides to dispose of
203 the pending charge without subjecting the defendant to a sentence
204 involving immediate incarceration or a suspended sentence of
205 incarceration with a period of probation or the court believes that the
206 disposition of the pending case at a later date will not result in a
207 sentence involving immediate incarceration or a suspended sentence
208 of incarceration with a period of probation and makes a statement to
209 that effect on the record. If it appears to the court at a later date that, if
210 convicted, the sentence of an indigent defendant for whom counsel has
211 not been appointed will involve immediate incarceration or a
212 suspended sentence of incarceration with a period of probation,
213 counsel shall be appointed prior to trial or the entry of a plea of guilty
214 or nolo contendere.

215 (b) In the case of codefendants, the court may appoint one or more
216 public defenders, assistant public defenders or deputy assistant public
217 defenders to represent such defendants or may appoint counsel from
218 the trial list established under section 51-291.

219 (c) Prior to [a defendant's appearance in court] the appearance in
220 court of a defendant in any matter specified in subsection (a) of this
221 section or of a witness summoned by subpoena issued pursuant to
222 section 2 of this act, a public defender, assistant public defender or
223 deputy assistant public defender, upon a determination that the
224 defendant or witness is indigent pursuant to subsection (a) of section
225 51-297, shall be authorized to represent the defendant or witness until
226 the court appoints counsel for such defendant or witness.

JUD **Committee Vote:** Yea 33 Nay 6 JFS

The following fiscal impact statement and bill analysis are prepared for the benefit of members of the General Assembly, solely for the purpose of information, summarization, and explanation, and do not represent the intent of the General Assembly or either House thereof for any purpose:

OFA Fiscal Note

State Impact: See Explanation Below

Affected Agencies: Division of Criminal Justice

Municipal Impact: None

Explanation

State Impact:

The bill would result in additional costs to the Division of Criminal Justice related to staff time, witness expenses and court reporter costs. Since the bill limits the use of these subpoenas to suspected class A and B felonies and since such use is discretionary, it is anticipated that in the majority of cases, such costs would not be significant and can be absorbed within the normal budgetary resources of the agency. It should be noted, however, that in certain complex cases or combination of cases, the usage of these subpoenas could strain the normal budgetary resources of the agency and require additional funding.

OLR Bill Analysis

sHB 5902

AN ACT CONCERNING INVESTIGATIVE SUBPOENAS.

SUMMARY:

This bill allows a prosecuting official, after authorization by a Superior Court judge, to subpoena a person to testify or produce property necessary and relevant to an investigation into the possible commission of a class A or B felony, including whether a raised defense is valid.

The bill includes provisions for:

1. subpoena applications;
2. advising a person of certain information and rights;
3. quashing a subpoena;
4. enforcing a subpoena after a person fails to appear, produce documents, or answer questions; and
5. granting immunity to a person the state calls or intends to call as a witness.

EFFECTIVE DATE: October 1, 2000

DEFINITIONS

The bill defines a "prosecuting official" as the chief state's attorney, deputy chief state's attorney, state's attorney, assistant state's attorney, or special assistant state's attorney designated by the chief state's attorney. "Property" includes documents, books, papers, records, films, recordings, and other things.

APPLICATION FOR SUBPOENA

The bill requires a prosecuting official to apply to a Superior Court judge for a subpoena. The judge can authorize the use of a subpoena if satisfied with the application. The application must include the official's sworn affidavit stating the basis for his reasonable belief that:

1. a class A or B felony has been committed or a defense or affirmative defense to the crime has been raised;
2. the person summoned has necessary and relevant information for the investigation of it; and
3. the testimony of the person or production of the property will not occur without a subpoena.

The official must also state that reasonable efforts to secure the testimony or property without a subpoena were unsuccessful.

SUBPOENAS

The bill requires the subpoena to (1) compel the appearance of a witness or the production of property relevant and necessary to the investigation, (2) specify any property to be produced, and (3) require production of documents or records covering a reasonable period of time.

The subpoena can compel attendance or production of property before a judge at a specific location in a courthouse in the judicial district where the underlying incidents occurred or where the prosecuting official is.

The subpoena must be served at least five working days before the date scheduled for the witness's appearance. A Superior Court judge in the judicial district where compliance is required can order otherwise for good cause.

The bill requires the subpoena to advise the person:

1. of the purpose of the investigation;

2. whether he is the target or possible target of the investigation;
3. of his right not to give evidence against himself;
4. of his right to have counsel present, to consult counsel, and to have counsel appointed for him if he is indigent; and
5. that he has the right to file a motion to quash or modify the subpoena.

NOTICE TO JUDGE

The bill requires the prosecuting official to notify in writing the presiding judge for criminal matters in the courthouse where compliance with the subpoena is required within 48 hours of serving the subpoena (excluding weekends and holidays). The notice must include the identity of the person and a description of any property requested. The judge must assign a Superior Court judge to preside. The failure to notify does not invalidate the subpoena. The notice and assignment of a judge are confidential and cannot be disclosed. The proceedings are not public.

APPEARANCE OF WITNESS

The bill requires the prosecuting official to advise a witness before questioning:

1. of the purpose of the investigation;
2. whether he is the target or possible target of the investigation;
3. of his right to have counsel present, to consult counsel, and to have counsel appointed for him if he is indigent; and
4. that he has the right to file a motion to quash or modify the subpoena.

The presiding judge must insure that these rights are not infringed.

The bill allows a public defender to represent an indigent witness

summoned by a subpoena and authorizes him to represent the person until the court appoints counsel.

It requires a court reporter or assistant court reporter to make a record of the proceeding. The record must be sealed and cannot be disclosed except that a witness has access to his testimony at any reasonable time and has the right to a copy of the transcript.

QUASHING A SUBPOENA

The bill allows a person summoned to appear or produce property to file a motion to quash a subpoena with the chief clerk of the court in the judicial district where appearance is required. There are no fees or costs for the motion. The motion is sealed. The presiding criminal judge of the court hears the motion or assigns it to another judge for a hearing. The motion must be expeditiously assigned and heard. The clerk consults with the judge to set the date and time of the hearing and gives notice to the parties. Unless the judge orders otherwise, the hearing is conducted in private and the file is sealed.

The bill allows a judge to quash or modify a subpoena if:

1. the witness does not have information relevant and necessary to the investigation;
2. the testimony sought is protected by the attorney-client privilege or a statutory or constitutional privilege;
3. producing the requested property is unreasonable or oppressive or the property is an attorney-client work product; or
4. the judge otherwise finds just cause.

FAILURE TO APPEAR

When a witness fails to appear, produce property, or answer proper questions, the bill allows a prosecuting official to apply to a Superior Court judge in the appropriate judicial district for an order requiring the person to do so. If the judge finds reasonable cause, he must issue a citation requiring the witness to appear before a Superior Court

judge. The judge, after a hearing, must order the witness to comply with the subpoena if the person does not show cause why he should not answer questions or produce the property. Failing to obey the order is punishable as contempt. The prosecuting official's application and the court order are sealed and cannot be disclosed. The hearing is not open to the public.

IMMUNITY

The bill allows a state's attorney or the chief state's attorney (at the request of a special assistant state's attorney) to apply to a Superior Court judge for a grant of immunity from prosecution for a person the state calls or intends to call as a witness if the testimony is necessary to investigate the case. The immunity can protect against prosecution, penalties, or forfeiture for (1) testimony or evidence produced by the person, (2) evidence discovered or derived from the person's testimony or evidence, or (3) any transaction or thing that the person testifies or provides evidence about. The person is not immune from prosecution for perjury or contempt committed while giving the testimony or producing the property.

The bill provides that a person properly subpoenaed and given immunity is not excused from testifying or producing property before a prosecuting official because it may tend to convict the person of a crime or subject him to a penalty or forfeiture.

CONFIDENTIALITY

The bill makes all information or property obtained by a prosecuting official under a subpoena confidential and prohibits disclosure except as the official decides in the performance of his duties.

PROPERTY

The bill requires property that is not involved in a criminal prosecution to be returned to the person who produced it or otherwise disposed of according to law.

COMMITTEE ACTION

Judiciary Committee

Joint Favorable Substitute

Yea 33 Nay 6