



State of Connecticut

DIVISION OF PUBLIC DEFENDER SERVICES

OFFICE OF CHIEF PUBLIC DEFENDER
30 TRINITY STREET-4th Floor
HARTFORD, CONNECTICUT 06106

DEBORAH DEL PRETE SULLIVAN
LEGAL COUNSEL/EXECUTIVE ASSISTANT PUBLIC DEFENDER
(860) 509-6405 Telephone
(860) 509-6495 Fax
deborah.d.sullivan@jud.ct.gov

**Testimony of
Deborah Del Prete Sullivan
Legal Counsel/Executive Assistant Public Defender**

**Raised S.B. No. 1239
An Act Concerning Investigative Subpoenas**

**Public Hearing - Judiciary Committee
March 16, 2007**

The Office of Chief Public Defender is opposed to *Raised S.B. 1239, An Act Concerning Investigative Subpoenas*. In past years, this agency has consistently opposed legislation that would grant investigative subpoena power to prosecutors outside the scope of a pending criminal matter in the superior court or a grand jury. During the 2004 session, a proposal to grant such broad power failed in the Senate 22 - 13 on April 29, 2004 (Senate Amendment A - LCO #4335 to HB-5439). During the 2005 legislative session, Raised Bill No. 6887 failed in Committee. The proposal was not raised during the 2006 legislative session.

Consistent with this office's past testimony and comments, the Office of Chief Public Defender offers to work together with the proponents of this legislation and this legislature towards the goal of achieving a grand jury process that is fair and constitutional. Any reform of the grand jury process as it exists must assure a fair process for all persons summoned, including persons who are indigent who have a right to counsel.

A report issued by the Office of Legal Research (OLR) of the Connecticut General Assembly reveals that in the majority of states, prosecutors do **not** possess investigative subpoena power. *See OLR report entitled Investigative Subpoenas (2001-R-0201) issued February 21, 2001*. The report indicates that:

At least 12 states, but not Connecticut, permit prosecutors to serve investigative subpoenas on targets, witnesses and record keepers before they charge a person with a crime" . . . Moreover, with one exception, in all

of the other states the investigatory subpoena is one component of a criminal procedure that includes investigation and indictment by grand jury.

In 2003, this legislature passed *Public Act No. 03-273 - An Act Concerning the Appointment of an Investigatory Grand Jury*. This act amended subsection (2) of section (c) of C.G.S. §54-47c, *Application for investigation into commission of crime* and provided an alternative basis for seeking an investigatory grand jury under this subsection. The intent behind this compromise that was reached late in the 2003 session was to make the application process for the appointment of a grand jury less stringent. This proposal is not necessary given the passage of P.A. 03-273, the availability of C.G.S. §54-47b and the constitutional power possessed by prosecutors in this state to charge a person with the commission of a crime by information.

A state's attorney already possesses the power to subpoena witnesses to a criminal and/or proceeding. **This bill as drafted would provide broad powers to the state to subpoena anyone to testify and produce property in instances where there is no case pending.** A State's Attorney already possesses the power to subpoena persons pursuant to C.G.S. §54-47b, *Investigatory Grand Juries*, for the investigation of class A and B felonies, as well as lesser felonies. Under that statute, an application can be made for a grand jury investigation, including obtaining the testimony of witnesses, if necessary to determine whether or not a crime was committed or the identity of the person who committed a crime.

Second, "prosecuting official", as defined in **Section 1** of the bill, includes the Chief or Deputy Chief State's Attorneys or a state's attorney. The proposal does not limit such authorizations to the investigation of a specific case and thereby would provide no opportunity for oversight by the Chief State's Attorney as to the investigations that are pursued.

Section 2 contemplates that a subpoena could be issued for privileged attorney-client communications and files and medical/psychiatric records. The bill provides that "no prosecuting official may issue a subpoena" to an attorney or persons who assist or assisted the attorney regarding a former or current client. However, the language does not specifically prohibit a subpoena from issuing to an attorney as evidenced by the permissive language used. The issuance of a subpoena to an attorney for testimony or production of property regarding a current or former client would violate the attorney client privilege and the rules of confidentiality unless the compelling needs test is met by the prosecutor. Also, this section contemplates that a subpoena could be issued for medical/psychiatric records of a person. This is further supported by the language of section 6 which provides standing to a person whose medical, "including psychiatric and substance abuse treatment records", have been subpoenaed.

Section 3 requires only reasonable grounds, not probable cause, as the standard to seek an investigative subpoena and compel a person to produce property in contradiction to the constitutional right to be free of unreasonable searches and seizures. The type of

property that may be subpoenaed is especially overbroad. A prosecutor could subpoena a person requiring the production of property and tangible things including personal belongings, personal journals, computers, medical/psychiatric/psychological records, telephones, organizers, business records, banking records, and lists of people who worship at particular churches, borrow particular books from libraries, subscribe to certain periodicals.

A person could be subpoenaed to appear in court as soon as 24 hours after service of the subpoena. A question arises whether the bill, as drafted permits a subpoena issued on a Friday could require a person to appear in 24 hours? What if a person is subpoenaed on a Sunday for a Monday? Such a time frame can be a substantial hardship to innocent persons who must attempt to retain legal advice/representation within such a short period of time. The bill does not permit a reasonable time period for court appointed counsel to meet with and advise the client or file appropriate motions following appointment by the court at the time of the witness' appearance. Such a time period is necessary to insure that a person's rights are not infringed especially in those cases where a witness is eligible and seeks the appointment of a public defender as counsel. The continuance would allow for newly appointed counsel to meet with the client, to become familiar with the subject matter of the client's testimony, and to advise the client as to the proceedings and any substantive issues resulting from being subpoenaed.

Section 4 contains a notice that is required which reveals that the legislation would permit a prosecutor to subpoena a child of any age, and that the court may exclude the parents or guardian of a child from the courtroom for good cause shown.

Section 6 acknowledges that a prosecutor may subpoena medical/psychiatric records and raises the possibility that such records could become a trial exhibit and open to the public. It provides that the prosecuting official shall give written notice of the issuance of a subpoena for the production of medical and/or psychiatric records to the person whose records were subpoenaed. An inquiry is whether the notice to the person will be sent simultaneously with the service of the subpoena upon the medical doctor or provider.

Section 7 provides for the proceedings to be conducted in secret. The identity of a judge is confidential and the proceedings are not open to the public. Although the proceedings are recorded by a court reporter, the record of such is sealed and not subject to disclosure. Further, at this inquiry proceeding, the prosecutor, not the judge, advises a witness of his/her rights.

Section 9 provides for a person subpoenaed to file a Motion to Quash the subpoena. A person who files a motion to quash is thereafter designated as Jane Doe or John Doe or "some other alias". The motion to quash is sealed from the public and the hearing is secret.

The provisions of **Section 10** are not consistent with the current statutory provision for granting immunity to witnesses in criminal prosecutions and grand jury proceedings. See C.G.S. §54-47a, *Compelling testimony of witness - Immunity from Prosecution*. As a result, a person could potentially be incarcerated for refusing to testify on the basis of his/her 5th amendment right against self-incrimination.

Section 11 makes all information and property produced as a result of the issuance of a subpoena confidential and not subject to disclosure, except to the extent the prosecuting official is of the opinion that it should be "used or disclosed" in the performance of his official duties. The bill contains no provision as to where and how the subpoenaed records will be retained.

Further, despite the designation as "confidential records", such a designation exists only until an arrest is made. As written, these confidential records could be used as an exhibit in a trial, thereby becoming public record. In addition, there is no process or time limit within which these records must be returned to the person from whom they were subpoenaed.

In conclusion, given the investigative resources that are at the disposal of the Chief State's Attorney and the State's Attorneys, including the investigatory grand jury, as well as the inherent power and authority of law enforcement officials over private citizens, the Office of Chief Public Defender is opposed to conferring this additional power on prosecuting officials.