

CCDLA
"Ready in the Defense of Liberty"
Founded in 1988

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March 17, 2010

Hon. Andrew J. McDonald, Senator
Hon. Michael P. Lawlor, House Representative
Chairmen, Judiciary Committee
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: **Raised Bill No. 5503**
An Act Concerning Subpoenas For Property

Dear Chairmen and Committee Members:

The Connecticut Criminal Defense Lawyers Association ("CCDLA") is a statewide organization of approximately 350 attorneys, both private and public, who are dedicated to defending people accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally, and that those rights are not diminished. CCDLA also strives to improve legislative enactments that apply to the criminal justice system by either supporting or opposing bills such as Raised Bill No. 5503.

**CCCDLA OPPOSES RAISED BILL NO. 5503, AN
ACT CONCERNING SUBPOENAS FOR PROPERTY**

Raised Bill 5503 seeks to confer unnecessary powers onto the State's Attorneys Office in derogation of the privacy rights and liberty interests of Connecticut's citizens. It is, in plain terms, an end run around the fourth amendment requirement that law

enforcement establish probable cause before a court issues a search and seizure warrant. It essentially conscripts citizens to become agents of the State's Attorneys Office, forcing them to conduct the search and seizure *for* law enforcement and then compelling them to incriminate themselves. It ignores the reality that indigent citizens will get swept up in the dragnet, and have no means of asserting their rights because most would not pursue a motion to quash without a lawyer's assistance. The language of the Bill is vague, its terms are overly broad, and it vests powers in numerous State's Attorneys basically guaranteeing disparate use of the subpoena power.

I. Raised Bill 5503 Violates the Fourth Amendment

Section 2 of Raised Bill 5503 enables the State's Attorney to subpoena property based on the State's Attorneys own determination that the property is merely *relevant* to the matter under investigation:

Sec. 2. (NEW) (*Effective October 1, 2010*) In the investigation of conduct that would constitute the commission of a crime, a prosecuting official, in the performance of such official's duties during such investigation, may issue a subpoena to compel the production of property relevant to the matter under investigation.

See Raised Bill 5503, Section 2. The Bill provides for neither pre-issuance judicial oversight, nor the application of a reasonable standard that would protect the citizens of Connecticut from prosecutorial abuse of power.

The fourth and fourteenth amendments to the United States constitution and article first, sections 7 and 8 of the Connecticut constitution, require that law enforcement officials obtain a warrant backed by probable cause before they may

conduct a search and seizure.¹ Raised Bill 5503 circumvents this protection by giving the State's Attorneys Office the power to compel people to turn over whatever property it deems "relevant to the matter under investigation", without a prior judicial determination of probable cause, or any form of pre-issuance judicial oversight.

- A. The Division of Criminal Justice is different from all other state agencies with subpoena power because the Division investigates and prosecutes criminal, not civil, matters.

The fact that various state agencies have the power to issue administrative/civil subpoenas in civil investigations, and are not subject to the same probable cause requirements applicable to search warrants, does not diminish the constitutional hurdle faced by Raised Bill 5503.

Administrative/civil subpoenas relate to civil investigations. Civil investigations do not have the potential to directly result in deprivation of a person's liberty; criminal investigations have that potential. Consequently, there is less at stake in civil investigations so courts apply more flexible standards in determining the reasonableness of administrative/civil subpoenas.²

¹ See *New York v. Class*, 475 U.S. 106, 117, 89 L. Ed. 2d 81, 106 S. Ct. 960 (1986); *United States v. Karo*, 468 U.S. 705, 714-15, 82 L. Ed. 2d 530, 104 S. Ct. 3296 (1984); *United States v. Ventresca*, 380 U.S. 102, 105-106, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965).

² See *Abel v. United States*, 362 U.S. 217, 226, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts . . . The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.")

B. The subpoena power conferred by Raised Bill 5503 is not subject to grand jury oversight.

Grand jury subpoenas may be justified under the fourth amendment because the very *fact* of the grand jury and its purpose, effectively substitutes the protections of the fourth amendment.³ "The most important function of the grand jury is not only to examine into the commission of crimes but 'to stand between the prosecution and the accused...'" Hoffman v. United States, 341 U.S. 479, 95 L. Ed. 1118, 71 S. Ct. 814 (1951), and to protect citizens from harassment and unfounded prosecution. See e.g., Wood v. Georgia, 370 U.S. 375, 390, [8 L. Ed. 2d 569, 82 S. Ct. 1364] (1962); Hoffman v. United States, 341 U.S. 479, 485, [95 L. Ed. 1118, 71 S. Ct. 814] (1951); Ex parte Bain, 121 U.S. 1, 11 [30 L. Ed. 849, 7 S. Ct. 781] (1887).

There are no such protections in Raised Bill 5503. The power conveyed by the Bill is not analogous to grand jury subpoena power because, under 5503, prosecutors are not subject to grand juror oversight; prosecutorial discretion under the bill is unfettered. Unlike a grand jury, the State's Attorneys office is not a neutral and detached body, and it has no duty to protect citizens from its *own* overreaching. Consequently, 5503 provides no substitute -akin to grand jury oversight- for fourth amendment protections.

³ See In re Criminal Investigation, 754 P.2d 633, 659-666, 79 Utah Adv. Rep. 3 (1988) (Steward, J. dissenting).

II. Raised Bill 5503 Violates the Fifth Amendment.

As demonstrated herein, Raised Bill 5503 compels subjects of the subpoena to provide property (documents, etc.), affidavits, and sometimes testimony – all of which may be self-incriminating:

Sec. 3. (NEW) (*Effective October 1, 2010*) (a) Any subpoena issued pursuant to section 2 of this act *shall compel the person to produce the property* at the office of the prosecuting official. . .

Sec. 4. (NEW) (*Effective October 1, 2010*) (a) In complying with any subpoena issued pursuant to section 2 of this act, the person to whom the subpoena has been issued shall designate a custodian who is authorized to authenticate the property and affirm full compliance with the subpoena *by swearing, under oath*, in a notarized affidavit that: (1) He or she is the duly authorized property custodian of the person to whom the subpoena has been issued, (2) *he or she has conducted*, or has caused to be conducted, a thorough search for all property responsive to the subpoena within the care, custody or control of the person to whom the subpoena has been issued, (3) *he or she avers to the authenticity of any property produced in response to the subpoena*, and (4) the property produced in response to the subpoena constitutes, to the best of his or her knowledge, all responsive property in the possession of the person to whom the subpoena has been issued at the time the subpoena was served.

(b) If any person to whom a subpoena has been issued pursuant to section 2 of this act fails to designate a custodian in accordance with subsection (a) of this section, or if any such custodian fails to supply a sworn, notarized affidavit in accordance with said subsection, the prosecuting official may submit an application to a judge of the Superior Court for the issuance of a subpoena ad testificandum by the prosecuting official to be directed to any owner, director, officer or agent for service of the person to whom the subpoena has been issued, or to such custodian.

...

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

(d) Testimony taken pursuant to such subpoena ad testificandum shall be limited to determining: (1) Whether the person has conducted, or has caused to be

conducted, a thorough search for all property responsive to the subpoena within the care, custody or control of such person, (2) *the authenticity of any property produced in response to the subpoena*, and (3) whether the property produced in response to the subpoena constitutes, to the best of the witness' knowledge, all responsive property in the possession of the person at the time the subpoena was served.

(Emphasis added.) See Raised Bill 5503, Sections 3 and 4 (in relevant part).

Raised Bill 5503 implicates a person's privilege against self-incrimination because it requires the subject of the subpoena to produce property that could contain self-incriminating information (admissions, statements, etc.) and it requires the subject of the subpoena (who may also be the custodian of records) to make potentially incriminatory admissions in attesting to the authenticity of the property.

Raised Bill 5503 provides for no warning, Miranda or otherwise, to the subject of the subpoena or custodian of records, advising them that by turning over property and making admissions regarding the property, he or she could be incriminating themselves and be subject to later prosecution. Raised Bill 5503 requires the subject of the subpoena or the custodian of records to do more than merely remain quiet or decline to turn over property based on the fifth amendment protection; it imposes a burden on the subject to file a Motion to Quash in order to assert constitutional protections.

Most people will not know how to file a Motion to Quash and will require counsel to do so. Indigent people caught in the snare of 5503 would have no remedy because they would be unable to hire counsel to assist them with a Motion to Compel. The Bill contains no provision for appointing counsel to indigent persons subject to the investigative subpoena.

III. The Motion to Quash Provision Is Inadequate Protection Against Prosecutorial Overreaching.

Section 7 of Raised Bill 5503 allows the subject of a subpoena to file a motion to quash the subpoena:

Sec. 7. (NEW) (*Effective October 1, 2010*) (a) Whenever a subpoena has been issued to compel the production of property pursuant to section 2 of this act or to compel testimony pursuant to section 4 of this act, the person summoned may file a motion to quash the subpoena. . .

. . .

(e) A judge may quash or modify any subpoena issued pursuant to sections 1 to 6, inclusive, of this act for just cause or in recognition of any privilege established under law.

See Raised Bill 5503, Section 7. The Motion to Quash is ill equipped to address the constitutional concerns raised herein and to combat prosecutorial abuses under the subpoena power. Citizens should not be required to take affirmative action to prevent the state from intruding on their privacy rights and liberty interests, and from compelling them to incriminate themselves. It is well settled that until a criminal charge is formally made, the state bears the burden of first establishing that its intrusion upon a citizen's liberty is lawful.⁴ Raised Bill 5503 unfairly and unconstitutionally shifts that burden

IV. Implementation of Raised Bill 5503 Will Overburden Courts.

Assuming that subjects of the investigative subpoena take advantage of the motion to quash provision, courts will be overburdened as these motions must be decided expeditiously. In order to keep dockets moving at an acceptable pace, more

⁴ Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969).

judges and additional training will be required. In the present economy, it would be frivolous to adopt a bill that is neither constitutional nor necessary, but that will, rest assured, cost the State money and man power.

V. Raised Bill 5503 Violates Conn. Gen. Stats. Sections 52-146c, 52-146d, 52-146e, 52-146k, 52-146q, and 52-146s.

Raised Bill 5503 contemplates subpoenaing privileged communications (documentary), between a patient and his/her psychiatrist or psychologist, battered women's counselor or rape crisis counselor, social worker, or any other professional counselor. Though the bill provides that "any subpoena . . . issued pursuant to section 2 of this act [is] for the production of the medical records, including psychiatric and substance abuse treatment records, of a person, the prosecuting official shall give written notice of the issuance of such subpoena to such person . . . [and] [s]uch person shall have standing to file a motion to quash the subpoena in accordance with section 7 of this act," it directly conflicts with the statutorily established privileges articulated in Conn. Gen. Stats. Sections 52-146c, 52-146d, 52-146e, 52-146k, 52-146q, and 52-146s.

It would be unconscionable to require a psychiatric patient, or an individual in alcohol or drug counseling to appear in court to fight a criminal subpoena where no criminal charges have been lodged; the very act of appearing to quash the subpoena compels the subject to disclose otherwise privileged information (that he or she is actually a patient, or beneficiary of counseling is privileged information under state and federal law).

VI. Raised Bill 5503 Is Broader Than Its Stated Objective.

Raised Bill 5503 exceeds its stated objective because it enables the State's Attorneys Office to subpoena records relevant to *any* criminal investigation, not only those related to fraud. The Bill sets forth various "crimes" to which the subpoena power applies – many do involve fraud offenses; however, it encompasses offenses that do not relate to fraud. Raised Bill 5503 lists offenses that fall within the Corrupt Organizations and Racketeering Activity Act, as crimes for which investigative subpoenas may be issued. CORRA encompasses a broad category of offenses including (but not limited to) prostitution, drug offenses, murder and assault. Under the Bill, a State's Attorney would merely have to articulate that the property sought by the warrant was relevant to one of the many categories of offenses under CORRA – this would enable the State's Attorney's Office to investigate *any* offense it wished by linking it to CORRA. Whether the State's Attorney actually brought charges under CORRA or under any other statute covered by 5503 is irrelevant – the prosecutor would merely have to justify the subpoenaed documents as relevant to a CORRA offense.

VII. Raised Bill 5503 Contains No Structure For Uniform Application Of Its Provisions .

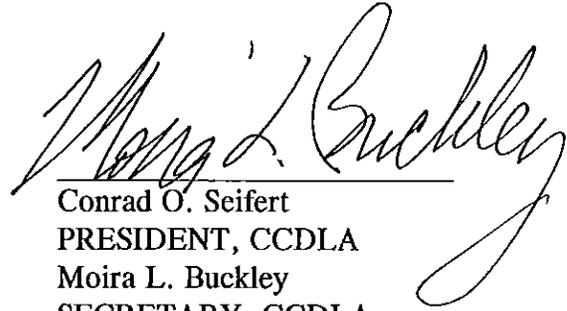
The Bill gives subpoena power to 15 different appointed state's attorneys, who in turn, will undoubtedly delegate power to various assistant state's attorneys, and numerous investigators, inspectors, and state police officers. Some State's Attorneys may abuse the subpoena power, others may not. The Bill provides no structure for uniform application of its provisions, and its broad language ensures that the various

state's attorneys will have differing views on offenses they may prosecute under 5503,
and the various vague definitions throughout the bill.

CONCLUSION

For the reasons stated herein, CCDLA opposes Raised Bill 5503.

Respectfully submitted,



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ON BEHALF OF THE
CONNECTICUT CRIMINAL
DEFENSE LAWYERS
ASSOCIATION