State of Connecticut

DIVISION OF PUBLIC DEFENDER SERVICES

OFFICE OF CHIEF PUBLIC DEFENDER
30 TRINITY STREET - 4th Floor
HARTFORD, CONNECTICUT 06106
(860) 509-6405 Telephone
(860) 509-6495 Fax

DEBORAH Del PRETE SULLIVAN
LEGAL COUNSEL/
EXECUTIVE ASSISTANT PUBLIC DEFENDER
deborah.d.sullivan@jud.ct.gov

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

Raised S.B. No. 6423
An Act Concerning Subpoenas for Property

Public Hearing - Judiciary Committee
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The Office of Chief Public Defender is opposed to *Raised S.B. 6423, An Act Concerning Subpoenas for Property.* This proposal authorizes certain prosecutors to issue investigative subpoenas for property when no case is pending and no arrest has been made. The bill as drafted strips away a person's constitutional right to be free from unreasonable searches and seizures by granting broad and sweeping powers to the Chief State's Attorney, the Deputy Chief State's Attorneys and any of the State's Attorneys to subpoena anyone's property at anytime whenever the prosecutor thinks the person's property is "relevant" to the prosecutor's investigation and not based upon probable cause that a crime has been committed.

This proposed bill lacks any safeguards discussed in previous legislative sessions. Consistent with its position in past years, this agency opposes legislation which would grant unconstitutional and broad investigative subpoena power to prosecutors to be able to compel the production of a person's property, <u>outside the scope of a pending criminal matter in the superior court or a grand jury</u>.

Subpoena power given to administrative agencies is typically in connection with regulated, licensed, or registered persons or businesses, or in connection with people and entities that choose to do business with state or local government. Thus it is much more limited in scope and primarily affects those who voluntarily have submitted themselves and their businesses to government oversight. The subpoena power in this bill is much broader, directly implicates criminal penalties, and potentially impacts every person and business in Connecticut, not just those that have voluntarily decided to subject themselves to government oversight.

Most of all, the bill does not afford the right to counsel for indigent persons whose property may also be subject to a subpoena by a prosecutor's office and who may be subpoenaed to give testimony. Under this bill, anyone can have their property subpoenaed including juveniles, the elderly or persons suffering from mental disabilities, and all must navigate through the process without the assistance of counsel.

All Connecticut prosecutors currently possess the power to subpoena witnesses and property to a criminal and/or other proceeding. A State's Attorney also possesses the power to subpoena persons and property for grand jury proceedings pursuant to *C.G.S. §54-47b, Investigatory Grand Juries,* when investigating the commission of a class A or B felony, as well as lesser felonies. **This bill, however, authorizes prosecutors to issue subpoenas for a person's property and compels the person to bring the property directly to the prosecutor's office even when no criminal case is pending in the courts and outside of the grand jury process.**

Current review of the 50 states reveals that on their face, 12 states appear to permit investigative subpoena power to prosecutors outside the scope of grand jury proceedings and prior to an arrest. However upon closer review, **7 of these 12 require judicial oversight** prior to approving the issuance of such a subpoena.

THE PROPOSED BILL - 6423:

Section 1 of the bill defines a "prosecuting official" as the Chief State's Attorney or Deputy Chief State's Attorneys (in Connecticut there are two Deputies) or a state's attorney (in Connecticut there are 13 State's Attorneys, each State's Attorney is the head of his/her own Judicial District office.) The proposal does not limit this broad power only to the investigation of a specific case. Further, there is no oversight by the Chief State's Attorney as to the investigations that are pursued around the state in any of the 13 Judicial Districts. Nor does it restrict the state's attorney's investigative subpoena power to within that state's attorney's judicial district.

Section 1 would permit the use of investigative subpoenas to investigate whether certain conduct "would constitute the commission of a crime" for crimes including larceny, identity theft, forgery, bribery, bribery of a juror, bribery of a labor

official, commercial bribery, bid rigging, securities fraud, counterfeiting, paying kickbacks, insurance fraud, computer crimes, and vendor fraud as follows:

36b-4	(Formerly Sec. 36-472). Prohibited activities re the offer, sale or purchase of any security. Regulations
36b-6	(Formerly Sec. 36-474). Broker-dealer, agent or investment adviser required to register. Exemptions. Branch offices. Notice re termination of business
36b-16	(Formerly Sec. 36-485). Registration of security prior to offer or sale required. Exceptions.
53-153	Unlawful removal or alteration of records. Counterfeiting seals
53-451	Computer crimes.
53a-122	Larceny in the first degree: Class B felony.
53a-123	Larceny in the second degree: Class C felony
53a-129b	Identity theft in the first degree: Class B felony
53a-129c	Identity theft in the second degree: Class C felony.
53a-129d	Identity theft in the third degree: Class D felony
53a-129e	Trafficking in personal identifying information: Class D felony.
53a-138	Forgery in the first degree: Class C felony
53a-147	Bribery: Class C felony
53a-148	Bribe receiving: Class C felony
53a-149	Bribery of a witness: Class C felony.
53a-150	Bribe receiving by a witness: Class C felony.
53a-152	Bribery of a juror: Class C felony
53a-153	Bribe receiving by a juror: Class C felony
53a-158	Bribery of a labor official: Class D felony
53a-159	Bribe receiving by a labor official: Class D felony
53a-160	Commercial bribery: Class D felony
53a-161	Receiving a commercial bribe: Class D felony
53a-161a	Bid rigging: Class D felony.
53a-161c	Receiving kickbacks: Class D felony
53a-161d	Paying a kickback: Class D felony
53a-215	Insurance fraud: Class D felony
53a-252	Computer crime in the first degree: Class B felony
53a-253	Computer crime in the second degree: Class C felony
53a-254	Computer crime in the third degree: Class D felony
53a-291	Vendor fraud in the first degree: Class B felony
53a-292	Vendor fraud in the second degree: Class C felony.
53a-293	Vendor fraud in the third degree: Class D felony

Section 2 *requires* the person served with the subpoena to produce the property at the prosecutor's office. The bill contains no provisions for the safe keeping of confidential financial, medical or legal records that may be produced.

Section 2 also lacks standards for the issuance of a subpoena to compel a person to bring his/her personal or business records including computers. The proposal does not require probable cause as the standard and is in contradiction to the constitutional right to be free of unreasonable searches and seizures pursuant to our federal and state constitutions. Other examples of property that can be subpoenaed in the discretion of a prosecutor if he/she thinks the property is relevant to their own investigation include personal belongings (clothing), personal journals, computers, tablets, medical/psychiatric/psychological records, telephones, organizers, business records, banking records, and parish or congregation lists of people who worship at particular churches, lists of people who borrow particular books from libraries, and, lists of people who subscribe to certain periodicals.

Section 2 of the proposal **does not prohibit** the issuance of a subpoena for privileged attorney-client files. This would violate the attorney client privilege and the rules of confidentiality unless the compelling needs test is met by the prosecutor.

The immunity provisions of **Section 3** 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 produce property on the basis of his/her 5th amendment right against self-incrimination.**

Section 4 clearly **permits a prosecutor to subpoena medical records, psychiatric records and substance abuse records.** It raises a strong possibility that without a challenge to the subpoena, such records could become open to the public and even an exhibit at a trial unrelated to the subject of the records.

No counsel is afforded to an indigent person who is served with an investigative subpoena. The proposal merely provides that the prosecuting official shall give written notice of the issuance of a subpoena for the production of such medical, psychiatric or substance abuse records to the person whose records were subpoenaed. It is unknown whether such notice would be sent simultaneously with the service of the subpoena upon the medical doctor or provider.

Section 4 grants standing to the person to file a motion to quash, apparently pro se, in accordance with **section 5**. <u>However</u>, **Section 5** addresses the procedures only as they would apply to the person who is actually served the subpoena.

Section 5 permits the person who has been served the subpoena the right to file a motion to quash. However, there are no time limitations within which a person needs to file a motion and no reference to those persons who did not receive a subpoena but whose records are the subject of the subpoena. And as stated, no counsel is appointed for an indigent person so served.

The motion to quash **proceedings** are to be conducted in camera and **are not open to the public.** The record of the proceeding is sealed and not subject to disclosure. And the party who files the motion to quash is "Jane Doe" or "John Doe".

It is after this hearing that a judge has the discretion <u>but is not required</u> to quash a subpoena even if the property is protected by any privilege established under the law.

In the past, the Office of Chief Public Defender offered 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 in light of issues raised by the Division of Criminal Justice. This office remains committed to do so today. If such a reform were undertaken, it is imperative that a fair process for all persons summoned, including persons who are indigent who have a right to counsel, exist.

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.

Connecticut History of Investigative Subpoena Legislative Proposals:

2003 - 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.**

2004 - During the 2004 session, a proposal to grant such broad power failed in the Senate 22 – 13 on April 29, 2004. (See Senate Amendment A - LCO #4335 to *HB-5439, An Act Concerning the Chief State's Attorney*)

2005 - During the 2005 legislative session, a motion to JFS *Raised Bill No. 6887, An Act Concerning Investigative Subpoenas* failed in the Judiciary Committee.

> During the 2005 legislative session, *P. A. 05-182, An Act Authorizing Law Enforcement Officials to Request Ex Parte Authority to Compel Disclosure of Telephone and Internet Records* did pass. The act, now codified in *C.G.S. §54-47aa, Ex parte court order to compel disclosure of certain telephone and Internet records* permits a law enforcement official to apply to a judge for an exparte order compelling telecommunications carriers to release subscriber information and call identifying information, but not the content of the telephone or internet communications.

2006 - The proposal was not raised during the 2006 legislative session.

2007 – During the 2007 legislative session, *Raised Bill No. 1239, An Act Concerning Investigative Subpoenas,* had a public hearing but did not come to a vote in the Judiciary Committee.

2008 - The proposal was not raised during the 2008 legislative session.

2009 – Two bills were proposed (No. 351 and No. 540) but not raised by the Judiciary Committee.

2010 – During the 2010 legislative session, *Raised Bill No. 5503, An Act Concerning Subpoenas for Property* had a public hearing but did not come to a vote in the Judiciary Committee.

Given the passage of P.A. 03-273 and P. A. 05-182 and the availability of C.G.S. §54-47b and the constitutional power already possessed by prosecutors in this state to charge a person with the commission of a crime by information, this legislation is not necessary.