CCDLA
"READY IN THE DEFENSE OF LIBERTY"
FOUNDED IN 1988

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March 7, 2016
Hon. Eric D. Coleman, Co-Chair
Hon. William Tong, Co-Chair
Joint Committee on Judiciary
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: Raised Bill No. 5473 - *An Act Concerning the Investigation of Fraud and Corruption*

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 ensuring 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. 5473.

The CCDLA strongly **opposes** *Raised Bill 5473 - An Act Concerning the Investigation of Fraud and Corruption* because this bill seeks to give prosecutors unlimited, unrestricted, unprecedented and extraordinary powers to subpoena any and all documents and other personal property without any judicial oversight or approval in defiance of the privacy rights and liberty interests of Connecticut's citizens. The bill, if passed, would:

- Bestow the State's Attorneys of Connecticut with **extraordinary powers** to compel individuals to appear on demand and produce documents or physical property, **without any judicial approval** or oversight at any step of the process.
- **Override the Fourth Amendment** to the United States Constitution and Article 1, Section 7 of the Connecticut Constitution by compelling individuals to provide papers, documents and effects without any showing of probable cause or any judicial oversight or approval.
- **Override the Fifth Amendment** to the United States Constitution and Article 1, Section 8 of the Connecticut Constitution by compelling individuals to produce, in person, potentially incriminatory documents and prove authentication and ownership of those documents.
- **Override the Sixth Amendment** to the United States Constitution and Article 1, Section 8 of the Connecticut Constitution by compelling individuals to produce documents that are

ordinarily protected by the attorney-client privilege.

- **Override many state statutes** that provide for confidential communications, such as the doctor-patient privilege, the psychologist-patient privilege, the rape counselor-patient privilege and many, many others.
- **Give prosecutors limitless power** to use information obtained pursuant to a subpoena to prosecute and further investigate *any* crime.

Fourth Amendment: 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] This bill circumvents those requirements by enabling the State's Attorney to subpoena property based on the State's Attorney's own determination that the property is merely "related" to the matter under investigation. This bill cuts out a neutral judge and instead hands the power to compel production of documents and property to prosecutors. This 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.

Under the provisions of this bill, citizens of Connecticut would be forced to turn over sensitive, private documents like bank statements, medical records, letters and even their cell phones and computers whenever a prosecutors feels that they are 'related' to an 'investigation'.

Fifth Amendment: Section 2(c) gives prosecutors the power to issue subpoenas to force individuals to turn over property (documents, etc.), affidavits, and sometimes testimony - all of which may be self-incriminating. It essentially conscripts citizens to become agents of the State's Attorney's Office, forcing them to conduct the search and seizure for law enforcement and then compelling them to incriminate themselves.

This subsection 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.

The bill provides for no warning, Miranda or otherwise, to the subject of the subpoena or custodian or 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. Instead, the bill 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 this bill 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.

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[1] See New York v. Class, 475 U.S. 106, 117 (1986); State v. Joyce, 229 Conn. 10 (1994).

Sixth Amendment: This bill makes no exceptions for documents and records covered by the attorney-client privilege and the Sixth Amendment. It is conceivable that under this bill a prosecutor could subpoena an attorney's file relating to a client who is under investigation. Our supreme court has held that government intrusion into the attorney-client privilege violates the Sixth Amendment.[2] This bill would make a mockery of the very foundation of our adversarial system.

Statutory Privileges: The bill also 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 for the production of these records shall be subject to a motion to quash, 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).

As stated above, the Motion to Quash is ill equipped to address the constitutional concerns raised herein. 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.[3] This bill unfairly and unconstitutionally shifts that burden to the subject of the subpoena.

Overreach: This bill leaves to the discretion of prosecutors the parameters of an 'investigation' and places no limits on the information obtained and its use in subsequent prosecutions for crimes not listed in Section 1. There is nothing in this bill that would prevent prosecutors from prosecuting an individual for other crimes, evidence of which may have been discovered as a result of this bill. Thus, the flagrant violation of our Constitutional rights would not be limited to the offenses listed in Section 1.

For the reasons stated herein, **CCDLA strongly opposes Raised Bill 5473**.

Sincerely,
Morgan Rueckert
Executive Board Member
James O. Ruane
President
CCDLA

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[2] State v. Lenarz, 301 Conn. 417 (2011). Lenarz is a case in which police seized the defendant's computer and on it found notes written to his lawyer. The prosecutor was in possession of those notes through his trial and our supreme court reversed that conviction as violative of the Sixth Amendment.
[3] Davis v. Mississippi, 394 U.S. 721 (1969).