Office of Chief Public Defender
State of Connecticut

30 TRINITY STREET, 4TH FLOOR
HARTFORD, CONNECTICUT 06106
TEL (860)509-6429
FAX (860-509-6499
susan.storey@jud.ct.gov

ATTORNEY SUSAN O. STOREY
CHIEF PUBLIC DEFENDER

Testimony of
Deborah Del Prete Sullivan, Legal Counsel, Director

Judiciary Committee Public Hearing March 7, 2016

Raised Bill No. 5473
An Act Concerning the Investigation of Fraud and Corruption

The Office of Chief Public Defender strongly opposes passage of **Raised Bill No. 5473, An Act Concerning the Investigation of Fraud and Corruption. The bill contains identical language to last year's investigative subpoena bill** which would provide Connecticut state prosecutors with extraordinary, unfettered discretion to issue a subpoena:

- **to anyone** regardless of being a person or an entity, including but not limited to children, juveniles, legislators, Judges, state officials, and, private or public businesses or state agencies;

- **to compel** a person or entity on demand to produce any personal or business documents or property, **including but not limited to computers, tablets, cell phones, and the content of such, financial records, other electronic records or recordings and documents, including medical files and attorney client files;**

- **without the constitutional requirement of showing that probable cause** exists that a crime has been or is being committed thereby overriding the Fourth Amendment to the United States Constitution and Article I, Section 7 and 8 of the Connecticut Constitution without an arrest or criminal proceeding pending;

- **whenever** the prosecutor is investigating conduct he or she believes would constitute a crime;

- **without any judicial oversight;**

- **without constitutionally required safeguards** for Connecticut citizens.

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This office continues to oppose granting prosecutors such broad and unrestricted investigative subpoena power as it has done so for years. The bill as drafted, provides absolutely no safeguards for anyone who may be the subject of the subpoena and circumvents required constitutional protections.

Section 1 – This section defines a "crime" broadly to include violations of Connecticut law which involve corruption in any branch of government, bribery type statutes and the election laws of the state. In addition, the definition of "crime" includes vendor fraud wherein a prosecutor could subpoena the privileged and confidential medical or psychiatric records of a vendor for any type of larceny in the first degree, a class B felony including theft of a motor vehicle valued at over $20,000.

Property, as stated, is broadly defined and includes virtually anything tangible, **including computers, tablets, cell phones, content of personal or business data, emails, text messages,** or other correspondence regardless of whether such is privileged or confidential.

As drafted, the Chief State's Attorney, his Deputy Chief State's Attorneys and any of the 13 State's Attorneys would be able to subpoena property from anyone, including attorneys and medical and/or psychiatric providers, any company, LLC, trust, association, trust or estate.

Section 2 - Section 2 circumvents the Fourth Amendment constitutional protections because it allows prosecutors to issue subpoenas without probable cause. The bill as drafted would permit a prosecutor to investigate "conduct" he/she *subjectively* believes to be a crime. There is no judicial oversight or a recognizable legal standard that would provide protection to Connecticut citizens from prosecutorial overreaching.

There is no requirement of court oversight or that records of items subpoenaed pursuant to such "investigation" are maintained. The result is that an "investigation" can essentially be conducted in secret and without time limits..

In addition, **Section 2** also requires that the property subpoenaed be **produced to the prosecutor's "office"**, even if such is sensitive information and confidential. This would include personal and business computers. However, current law requires any subpoena for property issued by either party in a criminal case to be delivered to the court clerk's office, not the office of the subpoenaing party. As a result, the bill runs afoul of constitutional protections and would require citizens to turn over property or documents including those that are self-incriminating directly to the State's Attorney's office.

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The bill does not contain any provision that a Miranda warning be issued to advise individuals that turning over the demanded property or making statements regarding such property could subject them to prosecution.

Section 3 - This section proposes what the bill calls immunity. However, this section ignores a person's 5th Amendment constitutional right against self incrimination.

Section 4 This Section would allow prosecutors to subpoena privileged communications, including those between a person and his/her psychiatrist, rape crisis or battered women's counselor, social worker or attorney. In 2011, the CT Supreme Court (Rogers, C.J.) dismissed a case of a defendant when the court found that he was presumptively prejudiced by the prosecutor's intrusion into privileged [attorney/client] documents and utilized knowledge obtained from those documents to try the defendant's case to conclusion. See: State v. Lenarz, 301 CT 417 (2011). Despite the fact that the bill requires the prosecutor to provide written notice to the person to whom the subpoenaed records belong, the shifting of the burden to the defendant to take affirmative action to protect the privilege and confidential nature of his/her records by filing a Motion to Quash is unreasonable.

Section 5 – Furthermore, Section 5 (e) does not require a judge to grant the Motion to Quash or modify a subpoena merely because a privilege exists. Therefore, if the Motion to Quash is denied, the prosecutor will have access to such privileged information, including attorney client files and sensitive medical information, in his/her office. Additionally, any proceeding on a Motion to Quash is held in secret and the results sealed from the view of the public. The bill could also permit proceedings to be scheduled so quickly that person may not have an adequate opportunity to obtain or consult with counsel, thereby violating his/her 6th Amendment right to effective assistance of counsel and 5th Amendment right against self incrimination.

This bill places no defined limits on coerced and secretive prosecutorial investigations, and unconstitutionally shifts the burden to a citizen subject to the subpoena to establish the unlawful action by the State. The U.S. Supreme Court in the case of Davis v. Mississippi, 394 US 721 (1969) stated that the State's must establish that such intrusion on a citizen's liberty is lawful.

Because of the lack of constitutional safeguards and the reasons enumerated above, the Office of Chief Public Defender respectfully requests that the Committee take no action on this bill.