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**TESTIMONY OF DEBORAH DEL PRETE SULLIVAN, LEGAL COUNSEL
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Raised Bill No. 7257, An Act Concerning Grand Jury Reform
Judiciary Committee
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The Office of Chief Public Defender is strongly opposed to *Raised Bill No. 7257, An Act Concerning Grand Jury Reform* and asks that the Judiciary Committee take no action on it. This bill is almost identical to *House Bill No. 6698, An Act Concerning Grand Jury Reform* and quite similar to *Senate Bill 695, An Act Concerning Investigatory Grand Juries* proposed in the 2008 session, neither of which garnered the support of this Committee. This is another attempt by the prosecutors to obtain investigative subpoena power through simplifying the grand jury process which has not been supported by this Committee in the past. The Office of Chief Public Defender met with the Division of Criminal Justice this week to discuss this bill. Although no agreement as to the language contained in the current bill was reached, the discussion provided an opportunity to discuss the concerns of each agency. The bill as drafted presents a much diluted process which removes the current role of the court and authorizes any prosecutor to be designated to conduct a grand jury investigation. The proposed process would permit prosecutors to issue investigative subpoenas and eliminate any need for the utilization of normal investigative procedures to first be employed by the police. This bill would then allow the same prosecutor who conducted the grand jury investigation to prosecute individuals who may have been targets and/or witnesses at the grand jury.

This particular proposal ignores the 4th, 5th and 6th amendments of the federal constitutional and its state counterparts. In violation of state and federal constitutional protection against illegal searches and seizures and against self incrimination, this bill is

over broad and creates opportunity for abuse and other constitutional violations. It completely strips away any requirement of probable cause which is constitutionally necessary before requiring persons to produce documents or personal items. It puts prosecutors, not the court, in control of conducting the grand jury investigation contrary to the current law. It significantly broadens the scope of when the investigative grand jury may be used by eliminating the requirement that the State show why normal investigative procedures are inadequate. Put another way, this bill allows the State to employ an investigative grand jury even where normal investigative techniques, such as taking witness statements or executing a search warrant, are available alternatives. The Office of Chief Public Defender urges this Committee not to take any action for the seven reasons explained more fully below.

First, this proposal creates additional drain on judicial resources and new costs for our courts. Due to the greater scope of investigative powers proposed and the ease with which this process may be initiated, not only will the number of grand jury investigations increase but so will the need for the appointment of counsel for indigent persons so subpoenaed. In addition to these costs and the judicial resources involved in the grand jury process, there will be a need for additional financial resources for the courts to ensure that indigent persons have access to conflict-free counsel. Under this proposal, it is the court, not the public defender office, that will determine indigence and pay for the cost of counsel appointed from a list provided by the Division of Public Defender Services. There is a question as to whether or not Public Defenders are authorized pursuant to its enabling statute to provide representation to subpoenaed witnesses or if public defenders would be covered by the agency's malpractice policy. In addition, if public defenders were to provide representation, they would need proper training and resources. However, the greater concern is that if public defenders are utilized, those offices could be conflicted out from the representation of persons arrested as a result of the grand jury process.

Second, this proposal raises questions about separation of powers. Traditionally a grand jury is a deliberative body called to evaluate whether the bringing of criminal charges is justified, i.e., whether the prosecuting authority possesses evidence sufficient to establish probable cause that the target has committed a particular offense. In this regard a traditional grand jury occupies a judicial role or function; it does not occupy an investigative role, which is reserved to the executive authority of law enforcement, particularly the police and/or prosecuting authority, under Article XXIII Amendments to the Constitution of the State of Connecticut. Assigning executive investigative law enforcement duties to a grand jury, particularly where the "grand jury" will be comprised of one or more Superior Court Judges, would therefore appear to violate the mandate of Article Second of the Constitution of the State of Connecticut that the powers of government should be divided into three distinct departments. This is not merely an academic distinction; the difficulty in blending judicial and prosecutorial functions is illustrated by considering the constitutional validity of an investigatory

grand jury proceeding upon a showing of something less than probable cause and without the guaranty of a neutral magistrate, C.G.S. §54-47c. (b)(2).

Third, under this proposal, the power of a prosecutor to employ an investigative grand jury is defined broadly, vaguely and without limitation. Section 1 of this bill removes the authority of the Judiciary to apply for a grand jury investigation so that only the Chief State's Attorney or a State's Attorney may apply. Sections 1 and 2 also significantly relax the standard for the applying and granting of a grand jury investigation. Current law requires that prosecutors explain why the grand jury is necessary to determine whether there is probable cause to believe that a crime has been committed. An application may be granted under current law if (1) the administration of justice requires a grand jury investigation to determine whether or not there is probable cause, (2) normal investigative procedures have been tried and failed or reasonably appear unlikely to succeed, and (3) the grand jury process is likely to succeed in determining whether or not there is probable cause. This proposal totally eliminates the need to show belief that a grand jury investigation will result in a finding of probable cause and the requirement that normal investigative procedures are inadequate. Instead, it authorizes application for a grand jury whenever a prosecutor "reasonably suspects" a crime has been committed and shows that the "interests of justice require the use of an investigatory grand jury."

Section 2 authorizes the *approval* of such application if there is reasonable suspicion that a crime or crimes may have occurred, if the interests of justice require the use of an investigatory grand jury, and if compelling testimony and production of evidence "will substantially aid the investigation."

These vague terms - reasonable suspicion, substantially aid, interests of justice - are not defined or subject to limitation in this proposal, and, as a result, cannot be evenly or consistently applied or serve as adequate protection against harassment or abuse of the process. The proposed "interests of justice" standard is too nebulous to safeguard the constitutional rights of individuals who would be compelled to participate in the grand jury process and, further, provides insufficient guidance for the panel to distinguish between applications that merit a grand jury investigation and those that do not. Under the diluted "interests of justice" standard, the investigation of any crime would ostensibly warrant the impaneling of a grand jury. Further, prosecutors would no longer be required to exhaust normal investigative efforts, including obtaining search and seizure warrants based on probable cause. The bill's relaxed standards and curtailed judicial oversight would, in essence, invite prosecutors and law enforcement to bypass traditional transparent investigative methods in favor of a secretive, powerful, and extraordinary investigative tool that has historically been considered a last resort. The potential for misuse and abuse of grand jury investigations is

substantially increased by the watered down “interests of justice” standard in the proposed bill.

In contrast, use of the well-established probable cause standard and requiring that a prosecutor show the need for the grand jury, as opposed to normal investigative techniques, provided an important check on the power of the prosecution to compel testimony and production of evidence in closed proceeding. As drafted, the bill lacks any checks on the conduct of prosecutors as they investigate crimes through this new grand jury process.

Finally, Section 1 also expands the criminal activity that may be investigated by a grand jury by adding any crime “involving the abuse of authority” of any state employee, and by eliminating the requirement that for any class A, B or C felonies or unclassified felonies carrying more than 5 years imprisonment, the prosecutor must demonstrate that there are “no other means of obtaining sufficient information as to whether a crime has been committed” or the identity of the perpetrator(s). These changes allow a prosecutor to apply for a grand jury investigation for run-of-the-mill criminal activity (drug offenses, robberies and larcenies, sexual and other assaults, burglaries, etc.) that may be investigated using normal investigative techniques and procedures and for which the prosecutor does not have probable cause.

Fourth, this proposal allows prosecutors to conduct routine investigation into garden-variety crime in secret and under seal. Under this proposal, a prosecutor may elect to conduct investigations into any A, B, or C felonies, as well as many drug offenses, by way of grand jury instead of using normal investigative techniques. Most problematic is that the bill is not limited to investigating felonious conduct. Under the bill, abuse of authority, which is undefined, could include misdemeanor conduct including crimes such as threatening, harassment or assault by such governmental officials listed in lines 15-17. As a result, felonies and misdemeanors could be investigated by the prosecutor who is conducting the grand jury investigation.

This proposal eliminates the important requirement that law enforcement make a good faith effort to use normal police work, such as taking witness statements and using search warrants to obtain evidence, before it resorts to convening a grand jury to conduct its investigation, which should be a last resort. Passage of this bill would not only result in an increase in the use of grand juries, but it precludes transparency in routine criminal investigations. Currently, all reports, statements, and other documentation of an investigation must be disclosed to a defendant during a criminal prosecution under our rules of practice or to a member of the public under the Freedom of Information Act. A defendant’s and the public’s access to and ability to scrutinize police work and the investigation of criminal activity must be taken seriously.

This proposal does not lay out adequate procedures for ensuring that a target who is later charged is guaranteed access to all of the witness testimony and evidence presented against him or her, as well as all exculpatory evidence in the possession of the State. It is not clear that the State or courts would take the position that grand jury proceedings must be disclosed under Practice Book Section 40-13A, which requires that the state disclose “all statements, law enforcement reports and affidavits within the possession of the prosecuting authority and his or her agents.” Discovery facilitates fair disposition of criminal cases. Denying the defendant discovery of the investigation and witness statements will cause delay, increase costs, and work to frustrate the efficient and just disposition of cases.

Moreover, this proposal insulates criminal investigations from public view and scrutiny in two ways: removing the investigation – and accompanying documentation – from the police to the courthouse, and reducing transparency of the grand jury process itself by eliminating the requirement that prosecutors provide information about the investigation and why the grand jury was necessary. Currently, prosecutors must provide “full and complete statements” regarding any investigations conducted by law enforcement including state and local police in their applications:

- as to the status of the investigation and any evidence collected;
- that any normal investigative procedures that were unsuccessful and the reasons for such;
- why normal investigatory procedures would not help the investigation or why such procedures would fail;
- why other normal investigatory procedures haven’t been tried, the reasons why they haven’t been tried, the reasons why they such procedures would fail or be dangerous;
- why the applicant believes that the grand jury would lead to a finding of probable cause that a crime has been committed.

Fifth, this proposal fails to provide sufficient protection or appropriate deference to the rights, dignity and privacy of our state’s residents, particularly our most vulnerable residents. Under this proposal, the scope of the power of the prosecution is drastically expanded, any check on that power is significantly reduced, and the possibility for abuse is unacceptable. The prosecutor would have the power under this draft to subpoena law-abiding citizens into testify, possibly putting them in danger, as well as to produce evidence that may include an endless list of personal effects and items that may cause inconvenience, financial loss, and embarrassment (computers, cell phones, tablets, personal journals, and medical/psychiatric records, etc.) Bear in mind that this is all in service of an investigation for which less intrusive and intensive procedures could have been used and for which the prosecution only need a reasonable

suspicion. Instead of using regular investigative tools, the prosecution can compel our residents to comply or face findings of contempt.

This proposal will adversely impact and effect communities of color, the poor, the disabled, and the youth. Last summer, 2 public defender clients who were minors were subpoenaed to a grand jury to testify. One of these minors was served a subpoena at her place of employment. And this is not the first time this occurred as another juvenile client had previously been subpoenaed from a residential facility to testify regarding incidents of gun violence in a Connecticut city. Not a target, the juvenile felt intimidated, confused and distraught about his safety should he testify about any of these events. Through this legislation, the state is asserting the premise as true that there are communities who distrust police, or who choose not to report certain crimes or get involved in criminal investigations. This proposal, which compels cooperation on less of a showing and for a broader category of crimes, will have a disproportionate impact on communities of color and low income neighborhoods.

Moreover, this proposal fails to honor the privacy, dignity and right of our citizens to make value judgments about crime and their community. The criminal justice system, in theory, should reflect our society's values, and police work should reflect community values. People and communities who have made the choice and value judgment to not cooperate with certain investigations should not categorically get less protection and privacy under the constitution.

Sixth, this proposal does not provide adequate notice to or protection of the rights of witnesses subpoenaed to testify. These witnesses, even where not suspected of committing any criminal behavior, will be forced to incur costs associated with their appearance and collection of whatever evidence they are compelled to produce. Subpoenas must be served at least 72 hours before the date the person so subpoenaed must appear and give testimony. That provides a person so subpoenaed only 3 days to obtain counsel and advice regarding the scope of the subpoena and to produce what could be voluminous records and documents. If a person is indigent and needs counsel, they will need to wait until they can travel to the court where the grand jury is convening, even if across the state, and apply for the appointment of counsel after completing an affidavit of indigence for the court. They then must wait until counsel is appointed by the court to discuss the scope of the subpoena as it applies to them. This time period is much too short, especially for indigent persons to obtain counsel and engage in a meaningful consultation wherein counsel can advise the person so subpoenaed of their rights.

As with proposals in the past, although the bill ostensibly allows assistance of counsel, once inside the grand jury room the witness, including any juvenile so subpoenaed, is alone answering the questions of the Judge and/or the prosecutor(s). The witness's lawyer is not allowed inside the grand jury room, although the witness can leave the

room to consult with his/her counsel “at reasonable times” and “for a reasonable period of time” upon request, who decides this. Under the proposal, it appears to be the prosecutor conducting the investigation. It appears that any discretion as to when and for how long such periods of time are within the discretion of the prosecutor or as used in the proposal the “attorney or attorneys” who are conducting the investigation at lines 54-55. What recourse is there if the witness’ request is denied? This process significantly hampers the witness’ ability to obtain accurate and complete advice from counsel when counsel must rely on the ability of the witness to convey the content of the proceedings and the scope of what is being asked of the witness. There is also no guarantee that the witness will be able to meet with the counsel for the amount of time necessary to obtain the needed advice.

Seventh, this proposal is unnecessary. There is no need to change the current grand jury process. Pursuant to C.G.S. §54-47h, current law requires that the number of grand jury applications made and approved each year, as well as any extensions of time, be reported to the Chief Justice. The reports obtained from the Judicial Department demonstrate that for the 2013 and 2014 calendar years there were no grand jury applications ~~or~~ denied. There was one extension of time granted in 2013. During the 2015 calendar year, 2 grand jury applications were made, 2 were granted and 1 extension of time was granted. During the 2016 calendar year, 1 grand jury application was made, 1 was granted and 1 extension was granted.

The Office of Chief Public Defender urges this Committee to reject this proposal as another attempt to obtain sweeping investigative subpoenas power. This bill will impose significant burdens upon law abiding and innocent residents of this state and give prosecutors unfettered discretion without sufficient judicial oversight. Again, the Office of Chief Public Defender as in the past is available to discuss true grand jury reform with the various stake holders at any time.