PREPARED REMARKS OF JAMES A. KILLEN, SENIOR ASSISTANT STATE'S ATTORNEY, AT JANUARY 15, 2020 MEETING OF THE HABEAS TASK FORCE

Thank you. Unfortunately, we never got an opportunity to respond to Darcy's remarks at the last meeting two months ago, but I know we have a lot to cover today and, for that reason, I won't give a point by point response. And I again apologize for reading my remarks, but feel it will keep me focused and, more importantly, keep me briefer than I would be if I didn't.

Needless to say, there are some points Darcy made that we agree with and some points we don't, but for purposes of today's discussion, especially on the important topic of successive petitions, I just want to highlight a few pertinent points.

First, we take issue with the assertion that the state minimizes the harm from wrongful convictions. We don't. But the phrase "wrongful convictions" can be very misleading. There is a world of difference between an actually innocent person who's been wrongly convicted of an offense he did not commit and a guilty person who gets awarded another trial because of a mistake in his original trial, that was not litigated until so many years after the crime that the state can no longer collect the evidence to try him again and the guilty man goes free. And we have to explain why to the victims, who thought their ordeal was over and the guilty party would be in jail.

No one, including the state, disputes the harm from the wrongful conviction of an actually innocent person. And this is true even in cases where the state and the defense bar, by the very nature of their functions, might disagree as to whether the person truly is innocent. But there is no disagreement that habeas corpus should always permit a person who makes a prima facie showing of actual innocence to at least to have his day in habeas court to try to back that claim up. And an important part of our job here is to make sure that meaningful and prompt consideration of those types of claims remain available, regardless of what reforms we propose.

But the reality is that the *overwhelming* number of cases clogging our habeas dockets make no claim, or legitimate claim, that there is evidence of actual innocence. In fact, ever since the mid-1980's, when our Supreme Court directed all claims of ineffective assistance of counsel to habeas, the cases truly involving fundamental miscarriages of justice – what habeas historically was intended to address – have been suffocated by routine and overwhelmingly meritless claims of ineffectiveness.

And it may, in fact, be too late to do much about that. While it would have been better if, thirty years ago, the Court had instead directed those claims only to petitions for a new trial, where the rules and the time limits were more clearly defined already, and the case would have been more likely to have been heard by the original judge, our habeas law has since become so intertwined with ineffective assistance of counsel claims that untangling them at this point might be difficult.

But where we make a real difference right now is in the area of multiple habeas petitions, specifically the habeas on a habeas, etc. And, in fact, our Supreme Court, in *Kaddah v. Commissioner of Correction*, 324 Conn. 548 (2017), a case I handled, made clear that any meaningful relief in this area will *have to* come from the legislature, not our courts. In *Kaddah*, Judge Sferrazza attempted to place what we considered a reasonable limitation on the number of times a petitioner can keep coming back to habeas court to litigate claims that all of his prior attorneys, no matter how many different ones he had, were incompetent. As part of our argument in the Supreme Court, we noted that *even with the limitation adopted by Judge Sferrazza*, a petitioner, in addition to his direct appeal to the Appellate Court and possible appeal to our Supreme Court, could then bring at least four separate habeas petitions, each one challenging not only criminal trial counsel but counsel on direct appeal, counsel on the first habeas and counsel on appeal from the first habeas. And the number actually could be greater because of the way in which Gen. Stat. § 51-296 has been interpreted over the years to apply to additional proceedings, like petitions for certification and motions to correct an illegal sentence. And again, that's *with* the limitation that Judge Sferrazza tried to place on the filings.

But the *Kaddah* Court said, essentially, that's an issue for the legislature, not the Court. If that's a problem that flows from Gen. Stat. § 51-296, then it's the legislature's job to fix it, not ours.

And so, here we are. With an opportunity, and undoubtedly our only opportunity for many years to come, to say that, at some point, enough is enough. If even the litigation of a first habeas on a habeas presents a "herculean task", as our courts have recognized, then at what point do we continue to allow even further habeas petitions thereafter, *particularly those petitions in which there is no suggestion of actual innocence* and where state is even further removed from the time of the crime and further prejudiced in its ability to retry a guilty party?

Should we make that determination with a constant eye on protecting the right of the truly innocent party to never have the habeas door closed to a legitimate claim? Absolutely. But, with all due respect to Darcy and the other members of the habeas bar here, I'm not certain that leaving the decision as to which claims merit litigation and which don't to the people who are charged with representing habeas petitioners in the first place is going to be anywhere near enough, as Darcy suggested. We already have an *Anders* procedure in habeas and, as experience has shown, relying on counsel's own view as to the degree of merit to the case just doesn't work, and many times it is not the fault of counsel. It is a very gray area for a habeas attorney, particularly one who is routinely called upon to pursue these types of actions and who may not share the same philosophy as judges, and certainly prosecutors, as to which claims deserve to be litigated.

And I certainly think that, as with the petition for certification issue, resolution of this problem also will require a subcommittee to hash out all of the details in a way that just isn't possible in our general meetings.

With that said, I'll turn it back to the Chairpersons.