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ABANDONING PRINCIPLED STATUTORY CONSTRUCTION TO EXPAND HABEAS APPEALS AND RIGHTS

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I. INTRODUCTION

In the 1990s, the Connecticut Supreme Court, in two seminal cases, *State v. Linares*¹ and *State v. Oquendo*² interpreted Connecticut's Constitution to provide criminal defendants with greater protection than the U.S. Constitution in the key areas of the punishment of speech and police seizures of suspects. In these two cases, as I have previously explained,³ the Court harnessed its fixed belief in the value of expanding defendant's rights to run roughshod over our state constitutional jurisprudence. And, unsurprisingly, the influence of this fixed belief has spread beyond the state constitution, spilling over into the Court's treatment of another key right: the statutory right of habeas corpus.⁴

Thus, in *Simms v. Warden*,⁵ the Court ignored foundational tools of statutory construction to interpret General Statutes § 52-470(b)⁶ to supply an appellate court with ju-

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¹ 232 Conn. 345, 655 A.2d 717 (1995).

² 223 Conn. 635, 613 A.2d 1300 (1992).

³ See *Pitfalls In State Constitutional Theorizing: Free Speech In Connecticut*, 95 Conn. B.J. 148 (2025); *The Ideological Origins Of Connecticut's State Constitutional Jurisprudence*, 95 Conn. B.J. 286 (2025).

⁴ CONN. GEN. STAT. § 52-466.

⁵ 230 Conn. 608, 646 A.2d 126 (1994) (*Simms II*).

⁶ Section 52-470(b) was later renumbered as § 52-470(g); however, for the purposes of this article, the original numbering will mostly be used to remain consistent with the cases analyzing the earlier version of the statute. The statute provides, in pertinent part:

No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried ... to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

risdiction to review a habeas court's denial of certification to appeal from its adverse judgment.⁷ Only a shared imperative to expand the rights of habeas litigants can explain why the *Simms II* Court construed § 52-470(b) without analyzing its text and legislative history. Had it done so, these tools of statutory construction would have shown that the legislature intended to invest a habeas court with authority to deny a certification petition with finality, for the purpose of reducing the number of frivolous appeals and hastening the advent of justice. Today it would be unthinkable to question whether appellate court jurisdiction extends to denials as well as grants of certification to appeal, given that such denials are invariably appealed and resolved on the adverse judgment's merits without considering (or merely gesturing to) the threshold question of whether the denial of certification constituted an abuse of discretion. However, well before the prominence of the rights of defendants and habeas litigants gained momentum in Connecticut's jurisprudence and habeas claims started crowding the appellate court docket, it was an open question whether the legislature, in enacting § 52-470(b) in 1957, provided for unqualified appellate jurisdiction that covered both denials and grants of certification to appeal from a habeas court's adverse judgment.

II. SILENCE

The *Simms II* Court said nothing about why, in construing § 52-470(b), it discarded the standard practice of examining a statute's text and legislative history to determine its meaning.⁸ The Court held that the legislature, in adopting

⁷ The writ of habeas corpus and right to appeal from a habeas court's adverse judgment is afforded by statute rather than the common law, and the legislature has the prerogative to limit jurisdiction over such an appeal. *Carpenter v. Meachum*, 229 Conn. 193, 200-02, 640 A.2d 591 (1994).

⁸ See *Texaco Ref. & Mktg. Co. v. Comm'r*, 202 Conn. 583, 589, 522 A.2d 771 (1987) ("In seeking to discern intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter."). The *Simms II* Court construed § 52-470(b) decades before the legislature enacted General Statutes § 1-2z, which established a rule of statutory construction that requires, in the first instance, an examination of the plain meaning of a

subsection (b), did not intend to limit appellate jurisdiction to a habeas court's grant of certification to appeal from its adverse judgment. Instead, according to the Court, the legislature intended that subsection (b) "define the scope of appellate review" to also cover a habeas court's denial of certification to appeal, based on whether the denial constituted an abuse of discretion and, if so, whether its adverse judgment should be reversed on the merits.⁹

The Court explained that the abuse of discretion standard would be satisfied if the issues raised in a petition for certification to appeal "are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further."¹⁰ The Court further explained that the legislature sought to hasten habeas proceedings, and thereby counter unjustifiable delays, by "discourag[ing] frivolous habeas appeals," presumably based on the prospect of a denial of certification being upheld on review under an abuse of discretion standard; but, if there was an appeal and the habeas court was found not to have abused its discretion in denying certification, then the appeal was not frivolous.¹¹

Notably, the *Simms II* Court's justification for interpreting subsection (b) in this way was limited to two general

statute's terms and its relationship to other statutes, followed by an assessment of extratextual sources, such as legislative history, only if the textual meaning is ambiguous.

⁹ 230 Conn. at 612, 615. *Simms II*'s procedural history is as follows: The habeas court resolved the claims in the petition for a writ of habeas corpus against the petitioner, and it denied the petitioner's petition for certification to appeal from its adverse judgement. *Simms v. Warden (Simms I)*, 229 Conn. 178, 179-80, 640 A.2d 601 (1994). The petitioner filed a writ of error, pursuant to General Statutes § 52-273, instead of appealing from the denial of certification under § 52-470(b), *id.* at 180, but the *Simms I* Court dismissed the writ of error on the ground that an appeal was the "proper procedure for appellate review" of the denial of certification. *Simms II*, 230 Conn. at 609. The petitioner then brought a public interest appeal under General Statutes § 52-265a, claiming that the habeas court had improperly denied his request for certification, and the *Simms II* Court "invoked its appellate jurisdiction" pursuant to this provision and "permitted a belated appeal" to resolve the claim. *Id.* Ultimately, after finding that subsection (b) allowed for review of a denial of certification, the *Simms II* Court determined that the habeas court had not abused its discretion in denying certification to appeal. *Id.* at 615-18.

¹⁰ *Simms II*, 230 Conn. at 616 (cleaned up).

¹¹ *Id.*

principles: a “strong presumption in favor of appellate jurisdiction” and “the significant role of the writ of habeas corpus in our jurisprudence.”¹² Wholly absent from the Court’s analysis was an examination of subsection (b)’s text and legislative history to justify its assertion that the means the legislature chose to counter unjustifiable habeas delays was the mere discouragement of frivolous habeas appeals. If these tools of statutory construction had been applied, they would have established that the legislature intended to reduce frivolous habeas appeals by limiting appellate jurisdiction to grants of certification by a habeas court. In other words, the legislature aimed to prevent the frivolous appeals of petitioners who could not be dissuaded from appealing by treating a habeas court’s denial of certification to appeal as final. After all, it stands to reason that unqualified appellate jurisdiction permits a petitioner bent on delay to delay via the appeal itself, irrespective of its outcome.

There is no other way to understand the plain meaning of § 52-470(b) other than that it mandatorily hinges appellate jurisdiction over a petition for certification to appeal on a habeas court granting certification:

No appeal from the judgment rendered in a habeas corpus proceeding brought in order to obtain his release by or in behalf of one who has been convicted of crime may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried ... to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

And this textual conditioning of appellate review on a granted—rather than denied—certification to appeal is supported by the general canon of statutory construction that a legislature “acts intentionally and purposely in the disparate inclusion or exclusion.”¹³ The *Simms II* Court’s reliance

¹² *Id.* at 614.

¹³ *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *Iovieno v. Comm’r of Corr.*, 222 Conn. 254, 258, 608 A.2d 1174 (1992), *overruled*, 242 Conn. 689, 699 A.2d 1003 (1997) (*Iovieno I*) (statute providing that

on a general presumption of appellate jurisdiction without considering whether it was rebutted by a combination of subsection (b)'s text and interpretive canons pertinent to that specific text constitutes a significant departure from the way statutory meaning is usually ascertained.

Similarly deviating from standard statutory construction was the *Simms II* Court's silence on whether subsection (b)'s legislative history rebutted the presumption of appellate jurisdiction. This legislative history reveals a clear intent to restrict appellate jurisdiction to petitions for certification to appeal that are granted by a habeas court. As Senator John H. Filer commented (uncontested from the Senate floor), § 52-470 was amended to add subsection (b) to "allow for an appeal to the Supreme Court of Errors from an adverse judgment only when within one week there's a certification by the judge who denied the petition for habeas corpus ... if there is a question that should be reviewed."¹⁴ Senator Filer added that subsection (b)'s goal is to "reduce successive frivolous appeals in criminal matters and hasten ultimate justice without repetitive trips to the Supreme Court of Errors."¹⁵

Senator Filer's commentary grew out of, and expanded upon, the narrower concern of then-Chief Justice William M. Maltbie conveyed in a letter that Senator Elmer S. Watson read during the legislative debate on amending § 52-470, to the effect that habeas appeals in death sentence cases were unjustifiably delaying the carrying out of such sentences.¹⁶ Senator Watson noted that "some members of the [Connecticut] Supreme Court [had said that the delays were] "making a mockery out of our justice."¹⁷ The remedy Chief Justice Maltbie had proposed in his letter (based on language that subsection (b) largely followed) was to bar appeals from an adverse judgment by a habeas court "unless" it certified that the judgment implicated a question

a thing shall be done in a certain way impliedly bars doing it in another way), *overruled by Simms I*, 229 Conn. 178, 640 A.2d 601 (1994).

¹⁴ 7 S. Proc., Pt. 5, 1957 Sess., p. 2936.

¹⁵ *Id.*

¹⁶ *Id.* at 2936-40.

¹⁷ *Id.* at 2937.

warranting appellate review.¹⁸

Ignoring subsection (b)'s legislative history enabled the *Simms II* Court to avoid explaining how increasing the number of habeas appeals by permitting appellate review of denials as well as grants of certification could be reconciled with the legislative aim of reducing the number of frivolous appeals to prevent unjustifiable delay. Nor can the *Simms II* Court's apparent lack of concern about increasing the number of habeas appeals be justified by the prospect of foreshortened appeals, with minimal delays, resulting from a habeas court's denial of certification being governed by its exercise of discretion and the leniency with which the discretionary standard is treated on review. This is so because, as would have been apparent to the legislature, an appellate court's lack familiarity with the issues raised in a certification petition requires an examination of the issues' merits to resolve whether a habeas court abused its discretion in denying certification. That such an examination would ordinarily approximate a full merits assessment and delay the proceedings is borne out by the aftermath of *Simms II*, which has been marked by appellate courts routinely resolving appeals from denials of certification directly on the merits of the adverse judgment, or merely gesturing to satisfaction of the abuse of discretion standard before doing so.

Similarly, the *Simms II* Court failed to test its contention that unqualified appellate review is consistent with the writ's jurisprudential significance against subsection (b)'s legislative history. Left unexplored was Chief Justice Maltbie's contention that conditioning appellate jurisdiction on a grant of certification was in accord with "right of the innocent to the full protection of the law," by which he meant that delays on direct appeal from trials and retrials following conviction (as well as appeals to the U.S. Supreme Court) were to be countenanced to "guarantee every accused the right to a proper trial," but that "more regulation" of, or a restriction on, habeas appeals was allowable in order to pre-

¹⁸ *Id.* at 2938-39.

vent unjustifiable delays.¹⁹ Because it ignored former Chief Justice Maltbie's position favoring finality's interest in limiting habeas appeals, the *Simms II* Court never entertained subsection (b)'s legislative history by designating the habeas court as the arbiter of a frivolous appeal and its unsuitability for reaching the appellate court.

III. FOREWARNINGS

The *Simms II* Court's failure to analyze subsection (b)'s text and legislative history is even more conspicuous because the Court was not writing on a blank slate, having been implicitly forewarned in two related cases about the merits of adhering to, rather than deviating from, standard statutory analysis. In the first case, *Iovieno v. Commissioner of Correction*,²⁰ the Court assessed subsection (b)'s text and legislative history to determine that the legislature intended to bar a habeas court from considering untimely petitions for certification to appeal.²¹ Mining the canon of statutory construction that a "statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way," the *Iovieno I* Court reasoned that, because the plain language of § 52-470(a) explicitly afforded a habeas court discretionary authority to resolve a claim raised in a habeas petition, while subsection (b) was silent on the court's authority over an untimely certification petition, the legislature would not have intended to add an untimely petition to a habeas court's jurisdiction.²²

The *Simms II* Court could have taken notice of this analysis and applied it in the following way: because subsection (b)'s terms only provided for appellate jurisdiction over a grant of certification to appeal, the legislature would not have intended to add what it left out, *i.e.*, appellate jurisdiction over a denial of certification. In addition, the *Iovieno I*

¹⁹ *Id.* at 2937-40.

²⁰ *Iovieno I*, 222 Conn. 254.

²¹ *Id.* at 261-62.

²² *Id.* at 258.

Court assessed subsection (b)'s legislative history and concluded that it showed an intent to reduce habeas appeals by limiting a habeas court's jurisdiction to timely certification petitions.²³ The *Simms II* Court could have taken notice of this conclusion and applied it in the following way: the legislature's aim of reducing frivolous habeas appeals for the purpose of thwarting unjustifiable delays is consistent with limiting appellate jurisdiction to grants of certification and inconsistent with expanding appellate jurisdiction to cover review of all certification petitions, whether granted or denied. But the *Simms II* Court did nothing of the sort.

Even more conspicuous was the fact that the *Simms II* Court took minimal notice of the concurring opinion in *Simms I*.²⁴ In dictum, the *Simms I* Court first interpreted subsection (b) to invest the appellate court with jurisdiction to review a habeas court's denial of certification to appeal,²⁵ and the concurrence pointedly criticized this interpretation. The majority's interpretation of subsection (b) relied upon "the salutary purposes of the writ of habeas corpus," unrelated statutes that (unlike subsection (b)) contained explicit language deeming the denial of certification to be final, and

²³ *Id.* at 258-61.

²⁴ *Simms I*, 229 Conn. 178.

²⁵ The *Simms I* Court first held that, despite the habeas court's denial of certification to appeal from its adverse judgment, the plaintiff was barred from bringing a writ of error, pursuant to General Statutes § 52-273, for the purpose of obtaining review of the merits of the judgment. *Id.* at 181-86. The Court reasoned that, consistent with the terms of § 52-273, which disallows a writ of error where "the correction of any error ... might have been reviewed by process of appeal," an adverse judgment might be reviewed under General Statutes § 52-470(b)'s allowance for a qualified right of appeal where a habeas court grants a petition for certification to appeal from its adverse judgment. *Id.* at 181-82.

In addition, the *Simms I* Court found that the "legislature could not have intended a writ of error to serve as an alternate, unrestricted route for appellate review." *Id.* at 183. The *Simms I* Court then determined that, even if certification to appeal is denied, a "disappointed habeas corpus litigant" may "invoke appellate jurisdiction for plenary review of the decision" under General Statutes § 52-470(b) to ascertain whether the denial of certification constituted an abuse of discretion. *Id.* at 188. The *Simms I* concurrence pointed out that because a determination that subsection (b) invested the appellate court with jurisdiction to review a habeas court's denial of certification to appeal was not "necessary to [the] decision that a writ of error does not lie following the denial of certification to appeal," the determination is "dictum" and the issue of whether the subsection provides for such appellate jurisdiction should have been resolved in another case, where it would be "squarely presented." *Id.* at 190 (Borden, J. concurring).

an analogy between subsection (b) and General Statutes § 54-96, based on the latter having been interpreted by case law to permit the state to appeal with the permission of the trial court and allow for review upon the denial of such permission under an abuse of discretion standard.²⁶ However, as the concurrence argued, principles of statutory construction do not treat the absence of such explicit language as dispositive of the legislature's intentions, and analogizing § 52-470(b) to § 54-96 is misplaced in that the former aims to "limit appellate rights that previously existed" while the latter aims to "creat[e] appellate rights that previously had not existed."²⁷

The concurrence also anticipated that *Simms* *Is* allowance for review of a denial of certification to appeal, based on an abuse of discretion standard, would lead to resolution of the appeal directly on the merits of the adverse judgment:

The majority's implied invitation to appeal, directed to all disappointed habeas petitioners denied certification to appeal, could well eviscerate the limitations contained in § 52-470(b). In effect, the denial of the petition for certification could become an empty gesture, because one does not need to be prescient to foresee that every disappointed habeas petitioner could, once his petition for certification is denied, file or perfect a direct appeal under the same statute. Although, under the majority's analysis, the "threshold" issue will be whether the denial of the § 52-470(b) petition was an abuse of discretion, that will not prevent the appeal itself, nor is it likely that the threshold issue will be a jurisdictional issue that we will be able to dispose of prior to hearing the appeal on its merits. Unlike a question of whether an appeal was timely, a question of whether the habeas court abused its discretion requires an examination of the merits.²⁸

²⁶ *Id.* at 187-88.

²⁷ *Id.* at 190-91 (Borden, J. concurring).

²⁸ *Id.* at 191-92 (Borden, J. concurring).

In addition, the concurrence could not

understand why the legislature would have limited the right to appeal as it did under § 52-470(b), and at the same time, nonetheless, intended to permit a full appeal, the first issue of which would be whether the court abused its discretion under § 52-470(b) in denying a petition for certification.²⁹

Tellingly, the *Simms II* Court's analysis of subsection (b) was confined to: (1) positing, consistent with *Simms I*'s emphasis on the writ's salutary purposes, that the legislature would not have intended for subsection (b) to restrict appellate jurisdiction because review of a denial of certification was supported by the writ's jurisprudential significance; (2) adding a general presumption of appellate jurisdiction; and (3) following the *Simms I* concurrence to the limited extent of omitting an analogy between subsection (b) and § 54-96 and any reference to the subsection's lack of explicit language deeming a habeas court's denial of certification to appeal to be final.³⁰ Nowhere did the *Simms II* Court mention the concurrence's warning that the legislative goal of reducing frivolous habeas appeals was irreconcilable with permitting review of both denials and grants of certification to appeal.³¹

²⁹ *Id.* at 192 (Borden, J. concurring).

³⁰ *Simms II*, 230 Conn. at 614-15.

³¹ The import of the *Simms I* concurrence could not have been lost on the *Simms II* Court because the author of the concurrence, Justice David M. Borden, joined the majority in *Simms II*. The only available explanation for this change in position can be found in the concurrence's call for "further thought and scholarship" on the extent of appellate jurisdiction afforded under § 52-470(b). *Simms I*, 229 Conn. at 191 (Borden, J. concurring). But, in failing to analyze the subsection's text and legislative history, the majority opinion in *Simms II* did not measurably improve upon *Simms I*.

Justice Robert J. Callahan concurred in the result of *Simms II*, which was that the habeas court had not abused its discretion in denying certification to appeal. 230 Conn. at 615-18. He did so only because he was not on the *Simms I* panel, although he felt "obligated" to point out, citing generally to the *Simms I* concurrence, that "the plain language and the legislative history of General Statutes § 52-470(b) both clearly indicate that the legislature intended prohibition of any appeal of a judgment rendered in a habeas corpus proceeding after a denial of certification by the habeas court." *Id.* at 618.

IV. MISGIVINGS

That the Connecticut Supreme Court may have had misgivings about *Simms II*'s analysis of subsection (b) is suggested by two subsequent and related cases, both of which added new, although unconvincing, arguments in support of that analysis. In *Iovieno II*,³² the Court applied *Simms II*'s construction of subsection (b) to overrule the earlier conclusion in *Iovieno I* that the subsection deprived a habeas court of jurisdiction to consider untimely petitions for certification to appeal.³³ The *Iovieno II* Court's ruling relied on *Simms II* in reasoning that "[i]f the prohibition on the right to appeal without certification contained in § 52-470 (b) does not implicate an appellate court's jurisdiction, it logically follows that the time by which to request that certification, set forth in the same sentence, is not jurisdictional."³⁴

The *Iovieno II* Court bolstered this rationale with arguments that were specific to subsection (b)'s time limitation and those that generally implicated the scope of appellate review.³⁵ The latter, which is pertinent to the question of appellate jurisdiction over a denial of certification appeal, posited that because subsection (b) limited an unqualified statutory right to a habeas appeal that existed since 1882, there was "good reason for the court to be hesitant to attribute to the legislature an intent to substantially limit that right, without an explicit expression of such an intent," via either an "expressly declared or necessarily implied" intention.³⁶ However, this reluctance to substantially limit a longstand-

³² *Iovieno II*, 242 Conn. 689.

³³ *Id.* at 694-95. The *Iovieno II* Court then determined that the failure of petitioner's counsel to petition for certification to appeal from the habeas court's adverse judgment within subsection (b)'s time limitation period constituted a violation of his right to effective assistance of counsel because of the complete denial of the right to appeal, and that no showing of prejudice was required to prove a violation of this right. *Id.* at 702-08. This article does not assess the *Iovieno II* Court's determination that a failure to satisfy subsection (b)'s time limitation is not a jurisdictional barrier to bringing a petition for certification to appeal.

³⁴ *Id.* at 697.

³⁵ *Id.* at 697-700.

³⁶ *Id.* at 699. Although the *Iovieno II* Court stated that the *Simms II* Court first offered this argument, *id.*, the *Simms II* Court only referenced the lengthy history of an unqualified statutory right to habeas appeal. *Simms II*, 230 Conn. at 614.

ing statutory right to unqualified appellate review adds little that is definitive to the presumption of appellate jurisdiction because the *Iovieno II* Court, adhering to *Simms II*, did not examine subsection (b)'s text and legislative history for the purpose of ascertaining whether the legislature actually intended to exercise its prerogative to substantially limit appellate jurisdiction by predicated review on a habeas court granting certification to appeal.

In the second case, *Banks v. Commissioner of Correction*,³⁷ the Court interpreted § 52-470(g) (the later version of § 52-470(b)) to permit review of unpreserved claims arising from a habeas court's actions or omissions in handling the habeas proceeding under the plain error rule or the *State v. Golding* doctrine³⁸ when the nonfrivolous claims raised had not been identified in the petition for certification to appeal.³⁹ The *Banks* Court went on to define a nonfrivolous appeal "as raising a colorable claim of plain error or the violation of a constitutional right."⁴⁰ The *Banks* Court's allowance for review of such unpreserved claims relied, in part, on *Simms II*'s conclusion that § 52-470(b) aimed "only to discourage frivolous habeas appeals" rather than "preclude appellate review altogether."⁴¹ In doing so, the *Banks* Court set out § 52-470(g)'s legislative history and offered the sole explanation for why it supported *Simms II*'s interpretation of the subsection: as framed by the *Banks* Court, the subsection's "animating purpose" was to "discourage frivolous habeas appeals," "while at the same time preserving the right of appellate review for meritorious claims."⁴²

The *Banks* Court derived this construction of the legislature's intent from the subsection's legislative history: Senator Filer's understanding of subsection (b) as aiming to "reduce successive frivolous appeals in criminal matters

³⁷ 347 Conn. 335, 297 A.3d 541 (2023).

³⁸ 213 Conn. 233, 239-40, 567 A.2d 823 (1989), *as modified by* In re Yasiel R., 317 Conn. 773, 781, 120 A.3d 1188 (2015).

³⁹ *Banks*, 347 Conn. at 339-50, 359-61.

⁴⁰ *Id.* at 350-51.

⁴¹ *Id.* at 350.

⁴² *Id.* at 352.

and ... hasten ultimate justice without repetitive trips to the [Connecticut] Supreme Court,”⁴³ and Chief Justice Maltbie’s admonition in his letter to the legislature that “any effort to reduce ... delays must be [weighed against] the necessity that nothing should be done [that] would in any way jeopardize the right of the innocent to the full protection of the law.”⁴⁴ The *Banks* Court appears to have viewed this admonition as a window on the legislature “balanc[ing] these competing interests” and favoring appellate review of both granted and denied certifications to appeal, while anticipating that the “weeding out” of frivolous claims under the abuse of discretion standard and reviewing the merits of only non-frivolous claims would discourage frivolous appeals and reduce delays.⁴⁵ Recall, however, that Chief Justice Maltbie followed his admonition with an explanation to the effect that the fullest protection of the innocent was afforded on direct appeal, while “more regulation” governed habeas appeals,⁴⁶ which means that the scales of his balancing of the competing interests tipped in favor of finality and, therefore, in the direction of restricting appellate jurisdiction to grants of certification to appeal. The *Banks* Court did not address this explanation.

It is symptomatic of the *Banks* Court giving short shrift to the role of finality in subsection (b)’s legislative history that, three decades after *Simms II*, it said nothing about how litigants have not been discouraged from bringing frivolous appeals by predicated review of the merits of an adverse judgment on satisfaction of a threshold showing that a habeas court abused its discretion in denying certification to appeal. Instead, appealing from the denial of certification and having the appeal resolved directly on the merits of the adverse judgment, or after a mere “gestur[ing]” to an abuse of discretion,⁴⁷ has become the rule rather than the exception.

⁴³ *Id.* at 352-53 (quoting 7 S. Proc., Pt. 5, 1957 Sess., p. 2936).

⁴⁴ *Id.* at 353 (quoting 7 S. Proc., Pt. 5, 1957 Sess., p. 2937).

⁴⁵ *Id.* at 352-53.

⁴⁶ 7 S. Proc., Pt. 5, 1957 Sess., p. 2937-40.

⁴⁷ *Simms I*, 229 Conn. at 192 (Borden, J. concurring).

That litigants seeking delay would not be discouraged from appealing was apparent to the *Simms I* concurrence, as it surely was to the legislature in enacting subsection (b), given that the necessary merits component of review of a denial certification under an abuse of discretion standard, due to a lack of familiarity with the issues raised in the petition for certification, plainly encouraged, and therefore augured, full merits review. And, in the same vein, it is likely that a litigant would not be dissuaded from appealing from a denial of certification and raising an unpreserved claim because, on review, satisfaction of the threshold standard of whether the claim is colorable under plain error or *Golding*, and therefore nonfrivolous, necessarily entails a merit assessment that is sufficient to result in direct merits review pursuant to these doctrines and delay, even though the threshold standard is not onerous. *Simms II*'s mishandling of subsection (b) courses through *Banks* and Connecticut's habeas corpus jurisprudence, leaving the erroneous impression that the legislature originally intended to expand rather than reduce habeas appeals and rights.

V. HIDDEN BELIEFS

To be sure, it ordinarily cannot be gleaned from an appellate court ruling favoring a litigant and expanding rights whether the court was driven by a fixed belief in the imperative of such expansion or the merits of the expansion. But a reliable benchmark of the sway of such a fixed belief is surely a ruling that transparently discards standard interpretive tools that are integral to understanding the rights at issue.

Witness *Linares*,⁴⁸ where the Court, under the Connecticut Constitution, expanded free speech protection beyond federal constitutional safeguards while ignoring its own jurisprudence that plainly interpreted two state constitutional provisions to protect speech in a circumscribed way, due to the prospect of a speaker abusing speech and trenching upon the rights of others.

⁴⁸ *Linares*, 232 Conn. 345, 655 A.2d 717 (1995).

Witness *Oquendo*,⁴⁹ where the Court adopted a state constitutional test for the seizure of a suspect by the police that afforded the suspect greater protection than the federal constitutional test, based on mischaracterizing the state's pre-constitutional common law of seizures and giving short shrift to its settled approach to interpreting the state constitution as a living document with contemporary requirements.

And witness *Simms II*,⁵⁰ where the Court, looking back more than three decades, determined that the legislature, in enacting § 52-470(b), provided for review of a habeas court's denial of certification to appeal in the absence of any examination of the subsection's text and legislative history, the very means for understanding the legislative aims underlying the subsection.

⁴⁹ *Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992).

⁵⁰ *Simms II*, 230 Conn. 608, 646 A.2d 126 (1994).