Speeding to Appellate Review

By CHARLES D. RAY

Section 52-470(g) of the General Statutes brings us the following:

> 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 or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, 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.

Although a bit of a word salad, the legislative meaning is reasonably clear—no appeal is permitted in a habeas case unless a Superior Court judge certifies that there is a question involved in the case that ought to be reviewed by a higher court. No certification, no appeal, right? You'd think and you'd be wrong.

Over the years, the Supreme Court has spilled gallons of ink explaining why and how what looks to be a jersey barrier is, in fact, only a speed hump standing between a habeas petitioner and appellate review. The latest effort at defining the height and width of that speed hump came in *Banks v. Commissioner of Correction*, 347 Conn. 345 (2023). The issue was whether Mr. Banks was entitled to appellate review on two issues that had not been raised during the habeas proceedings and had not been included in his petition for certification for appellate review. The Appellate Court said "no" and the Supreme Court said "yes," albeit in a 3-2 decision.

Some history may be helpful. In *Simms v. Warden*, 229 Conn. 178 (1994), the Court held that a writ of error could not be used as an end-around where the trial court had denied certification to appeal. Instead, the Court construed the certification requirement to permit an appeal if the petitioner could demonstrate that the "denial of certification to appeal was an abuse of discretion or that an injustice appears to have been done." Next, in *Simms v. Warden*, 230 Conn. 608 (1994), the Court determined that the statutory certification requirement was meant only to define the scope of the Court's review and not its jurisdiction. That being the case, appellate jurisdiction rested on the petitioner making a two-part showing. First, that the denial of his or her petition was an abuse of discretion and, second, that the judgment of the habeas court should be reversed on the merits. On the question of whether a habeas court abused its discretion in denying a petition to appeal, the Court held that a petitioner could prevail upon showing that the appeal is not frivolous under one or more of the criteria established by the United States Supreme Court in *Lozada v. Deeds*, 498 U.S. 430 (1991). Namely, issues are debatable among jurists of reason or a court could resolve the issues in a different way or the questions are adequate to deserve encouragement to proceed further.

On the issues of preservation and review of unpreserved claims, the Supreme Court also has a history. In *James L. v. Commissioner of Correction*, 245 Conn. 132 (1998), the trial court granted certification to appeal but the petitioner included in his appeal an issue that had been preserved in the habeas court but had not been raised in the petition. Review was granted regardless, based on the Court's conclusion that absent prejudice, "the legislature did not intend the terms of the habeas court's grant of certification to be a limitation on the specific issues subject to appellate review." Next, in *Mozell v. Commissioner of Correction*, 291 Conn. 62 (2009), the Court held that upon a grant of certification to appeal, it could consider constitutional claims that had not been presented in the habeas court. In Moye v. Commissioner of Correction, 316 Conn. 779 (2015), the Court made clear that its review of unpreserved constitutional claims was available only to address proceedings in the habeas court and not issues that arose during the petitioner's underlying criminal trial. Finally, in *Brown v. Commissioner of Correction*, 345 Conn. 1 (2022), the Court reviewed the petitioner's claim that he was entitled to notice prior to summary dismissal of his habeas case, notwithstanding that the notice issue had not been raised in the habeas court, had not been included in the petition for certification to appeal, and the petition had been denied.

With this as background, the decision in *Banks* is not all that surprising. Mr. Banks was convicted of robbery in 2012. More than five years later, he filed a habeas petition challenging his conviction. The Commissioner moved to dismiss, relying on Conn. Gen. Stat. § 52-470(c), which provides a rebuttable presumption that a habeas petition has been delayed without good cause if it is filed more than five years after the date of conviction. After a

hearing, the habeas court dismissed the petition. Mr. Banks then filed a petition for certification which was denied. In his appeal from that ruling, Mr. Banks claimed that: 1) his habeas attorney was ineffective; and 2) the habeas court failed to fulfill an alleged duty to intervene to protect Mr. Bank's rights. Neither issue had been presented to the habeas court and neither was included in the petition for certification to appeal.

The Appellate Court dismissed the appeal, taking the position that the habeas court could not have abused its discretion by denying the petition for certification on issues that it had never been asked to consider and rule on. The Appellate Court also concluded that the statutory certification requirements barred appellate review of claims that had not been preserved in cases in which the petition to appeal was denied. The Supreme Court rejected both conclusions, in an opinion penned by Justice Ecker for himself and Justices McDonald and D'Auria. Justice Ecker deemed the Appellate Court's first ruling "a matter of semantics, not substance." For the majority, the more accurate question was whether the habeas court *would have* abused its discretion by denying certification to appeal if the issue had been included in the petition.

On the second ground articulated by the Appellate Court, Justice Ecker first relied on the Court's past history to distill the following principles: 1) the certification requirement is construed narrowly to preserve the purpose of the writ; 2) the certification requirement is meant to discourage frivolous appeals, not to preclude appellate review altogether; 3) a habeas appeal is not frivolous if the issues presented are debatable among jurists of reason; and 4) if an appeal is not frivolous, the Court can review claims raised for the first time in that appeal, so long as the claims challenge the proceedings in the habeas court. Justice Ecker finds support for his ultimate conclusion in the prior case law, the legislative history of the certification statute, analogous procedures in federal court, the judicial policies animating appellate review of unpreserved claims, and the realities of habeas litigation, which appears to point to most petitions being filed *pro se* in order to meet the 10-day deadline for filing.

But notwithstanding the Court's willingness to consider unpreserved claims, the petitioner is still obligated to establish that the habeas court abused its discretion in denying the petition for permission to appeal. That burden can be met in either of two ways. First, by expressly arguing specific reasons why the habeas court abused its discretion in denying the petition. Second, by alleging that their argument on the merits of the appeal demonstrates an abuse of discretion.

For the dissent, Chief Justice Robinson writing for himself and Justice Mullins, the majority's outcome was inconsistent with the purpose of the statutory certification requirement, which was to reduce the number of repetitive and frivolous appeals in habeas cases. For the Chief Justice, the Court's recent reaffirmation of the obligation to at least allege and discuss an abuse of discretion in the denial of a petition for certification; *see Goguen v. Commission of Correction*, 341 Conn. 508 (2021); made crucial the fact that "a habeas court cannot abuse its discretion in denying a petition for certification regarding matters of which it never had notice." According to the dissent, the limited availability of appellate review in habeas cases is justified, at least in part, by the fact that neither an appeal nor a writ of error was historically available in habeas cases until the late 1800's. But the key for the dissent remained primarily the coupling of the abuse of discretion standard with review of claims the habeas court had never been asked to rule on.

Tinkering with the speed hump will no doubt continue. ■

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