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**Raised Bill No. 1387**  
**An Act Concerning Appellate Review of Certain Post Conviction Judgments**

**Judiciary Committee Public Hearing**  
**March 12, 2007**

The Office of the Chief Public Defender urges the Committee not to support the proposed amendment of General Statute's section 52-470 as contained in S.B. 1387. The Bill would amend General Statutes §52-470 (b) as follows:

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. There shall be no right to further review of the decision on certification except by motion for review to the Appellate Court or Supreme Court. The motion for review shall address only the issue of whether the decision on certification was proper. The procedure on the motion for review shall, except as otherwise provided, be in accordance with the procedure provided by rule or law for a motion for review of a trial court ruling.

**A summary of the reasons presented for opposing this Bill:**

The Bill would not reduce litigation but would multiply the procedural hurdles in state court procedure. Given its language and existing interpretations of §52-470, the Bill would not strip the courts of appellate jurisdiction to decide the propriety of denial of certification to appeal in habeas corpus cases. The Bill can not return Connecticut Habeas Corpus procedure to pre-Simms status due to other statutory, practice book and common law changes that have occurred since that time. The Bill raises constitutional concerns where it attempts to dictate to the Courts the manner in which a

particular legal question shall be decided; the concern is heightened because the question at issue is one of the court's own jurisdiction to hear any particular case.

**The Bill would not be effective to conserve state resources.** The Bill would create a right to file a Motion for Review with the Appellate Court when a habeas corpus trial court denies a petition for certification to appeal from the judgment. That is a procedural avenue for review not presently contemplated by statute or Rule of Court. From such a motion, an aggrieved litigant may seek reconsideration, reconsideration en banc and for further review of an Appellate Court decision by the Supreme Court.

Because of the necessity for habeas corpus petitioners to exhaust all state court procedures before having post-conviction access to the federal courts, it would be expected that the Bill would cause an immediate and large increase in the burdens on counsel and appellate courts as motions and appeals would be pursued simultaneously.

**The Connecticut Supreme Court has held that the Motion for Review is “not an appropriate vehicle for determining whether an appellate tribunal has jurisdiction.”** Simms v. Warden, 229 Conn. 6178, 186 n. 13. Because the Bill would attempt to require an appellate court to consider its own jurisdiction pursuant to a procedure established and defined by the Court for other purposes, the Bill appears unlikely to succeed in reducing litigation. The Bill would inject substantial uncertainty into judicial proceedings by attempting to have the courts of appeals perform something less than an appellate function by limiting the court to hearing questions by way of motion. The fundamental question of an appellate court's jurisdiction to hear any given case is one on which the parties are entitled to be heard and the court has a duty to decide. What is an appellate court that can not hear an appeal on the question of its own jurisdiction?

Additionally, the certification statute has been amended since Simms so that the losing litigant can only take his petition for certification to the judge who already ruled against him. One of the safeguards identified in that case already has been taken away. That the Motion for Review is an inappropriate tool for deciding the court's own jurisdiction can be seen by considering that success in a Motion for Review still sends the case back to the trial court from whence it came. The Bill would appear to delegate to the Judges of the Superior Court hearing habeas corpus cases the power to decide, case-by-case, which of their decisions are within the jurisdiction of the Supreme and Appellate Courts. The wisdom and legality of such a practice may well be questioned by the committee. Such practice will deprive future litigants of the uniform and articulated legal standards which we expect to develop through the appellate process.

**The Bill would not prevent the Supreme and Appellate Courts from affording the same level of review they now do to habeas corpus cases where certification to appeal has been denied.** The Bill would amend General Statutes §52-470(b), which is not a jurisdictional statute. Because the proposed additional language would not upset the controlling interpretation of the existing statute, it would not change the jurisdiction of reviewing courts to address the question of whether a denial of certification to appeal constitutes an abuse of the trial court's discretion. Because the appeal by way of certification procedure already is discretionary, stating that there shall be “no right” to further review does not change the status quo except, by inference, to add the right to pursue a motion for review. Creating an additional

occasion on which the legal issues must be raised and briefed would create additional burdens on resources available to the litigants as well as on the courts. The “no right to further review” language has only been interpreted to prevent appellate jurisdiction where it stands alone. Because the Bill would not prevent appellate review but only purports to control the court’s internal procedure on such review, it plainly does not strip the appellate courts of jurisdiction to decide any cases.

Presently, an aggrieved party—either the habeas corpus petitioner or the respondent—can take his appeal to the Appellate Court when certification is granted. When certification to appeal is denied, the aggrieved party may appeal on the ground that the denial of certification constitutes an abuse of discretion. If the Appellate Court sustains the denial of certification, the appeal is dismissed. If the Appellate Court overrules the denial of certification, it will then render a substantive decision on the appeal. However, because the legal standard applied to the question of whether certification should be granted requires reference to the legal grounds for the appeal, the litigants and the reviewing court must both consider those claims in either event.

The existing interpretation of General Statutes §52-470(b) has been summarized:

The certification requirement contained in § 52-470 (b) provides that no appeal may be taken from the habeas court unless that court first certifies “that a question is involved in the decision which ought to be reviewed . . . .” The statute was enacted in order “to reduce successive frivolous appeals in criminal matters and hasten ultimate justice without repetitive [appeals]” to this court. 7 S. Proc., Pt. 5, 1957 Sess., p. 2936, remarks of Senator John H. Filer. The issue before us is the proper construction of the term “question” in light of this legislative purpose. Neither the text of the statute nor its avowed legislative purpose sheds significant light on this issue.

Our recent habeas corpus jurisprudence has construed § 52-470 (b) narrowly so as to preserve the commitment to justice that the writ of habeas corpus embodies. We have stated that, “the principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness.” (Internal quotation marks omitted.) Lozada v. Warden, 223 Conn. 834, 840, 613 A.2d 818 (1992); see also Bunkley v. Commissioner of Correction, 222 Conn. 444, 460-61, 610 A.2d 598 (1992). In Simms v. Warden, 230 Conn. 608, 614-15, 646 A.2d 126 (1994), we held that **the statute did not impose a jurisdictional constraint on appellate review but was designed only to limit the scope of such review**. As we noted in that case, “when the legislature enacted § 52-470 (b), it limited a statutory right to appeal that had existed, unconditionally, since 1882.” Id., 614. Presumably, the legislature crafted that limitation with due respect for “the significant role of the writ of habeas corpus in our jurisprudence . . . and the strong presumption in favor of appellate jurisdiction” existing under our current law. (Citation omitted.) Id., 614-15. Only last year, in Iovieno v. Commissioner of Correction, 242 Conn. 689, 696-97, 699 A.2d 1003 (1997), we reiterated this interpretation of § 52-470 (b).

James L. v. Commissioner of Correction, 245 Conn. 132, 137-138 (1998) (emphasis added; sustaining the Commissioner’s argument that 52-470(b) does not limit the jurisdiction of the court).

**If the legislature were to strip the Appellate Court of jurisdiction to hear appeals from denial of certification, review would then be available by writ of error to the Supreme Court.** Review of habeas corpus judgments is taken by way of appeal from the certification decision because, in Simms v. Warden, 229 Conn. 178 (1994), the Connecticut Supreme Court held that the possibility of direct appeal through certification rendered such decisions outside the class of cases to be reviewed by way of the writ of error. The Simms court interpreted the language concerning review by writs of error in General Statutes §52-273 which, although it since has been repealed ( P.A. 03-176), has since been adopted verbatim as a Rule of Court in Practice Book §72-1.

If the legislature were to strip the courts of appeals of the power to review denial of certification in habeas corpus cases—which this Bill does not appear to do—then review by the writ of error, as occurred prior to the decision in Simms, arguably would be revived. With the repeal of General Statutes §52-273, formerly controlling jurisdiction and procedure on writs of error, the jurisdiction to hear the writs was consolidated in General Statutes §§ 51-199 (Supreme Court) and 51-197a (Appellate Court). Thus, the constricting language interpreted in Simms now appears in the Rules of Court; the previously perceived jurisdictional bar has been removed and the courts can now interpret their own Rules in the interests of justice. In such a situation, aggrieved petitioners would be obliged to seek recourse to the writ of error in order to ensure exhaustion of state court procedures.

The history shows that the Connecticut Supreme Court already has determined that it is important that an aggrieved party have access to an appeal through “someone other than the judge hearing the habeas case [as a] significant protection of the rights that habeas corpus proceedings are intended to protect.” Simms v. Warden, supra, 229 Conn. 186 (citation omitted).

However, as the Simms court suggested, an appeal will still lie from the denial of certification to appeal because, to the extent certification is jurisdictional, the Courts will retain the power to determine the question of their own jurisdiction. That is, the denial of certification to appeal rendered by the same judge who ruled against the party at trial can not, in fairness, be considered to deprive the Supreme and Appellate courts of jurisdiction to review such a denial of certification. To the extent the Bill would limit the manner in which courts may decide the question of their own jurisdiction-- by way of a motion, as opposed to a full appeal-- it encounters constitutional roadblocks

For all these reasons, we urge that the Committee not support S.B. 1387.