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RICHARD JANULAWICZ *v.* COMMISSIONER
OF CORRECTION
(SC 18790)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Harper, Js.*

Argued November 29, 2012—officially released October 8, 2013

Martin Zeldis, public defender, for the appellant
(petitioner).

Michael Proto, assistant state's attorney, with whom,
on the brief, was *Kevin T. Kane*, chief state's attorney,
for the appellee (respondent).

Opinion

PALMER, J. In this habeas action, the petitioner, Richard Janulawicz, appeals from the judgment of the Appellate Court, which reversed the judgment of the habeas court purporting to reinstate his right to file a petition for certification to appeal to this court in his underlying criminal case. The petitioner had sought that remedy after the Appellate Court upheld his conviction of several felony offenses and his appellate counsel, who also served as trial counsel, failed to file a petition for certification with this court challenging the propriety of the Appellate Court's judgment. We granted certification to appeal in the present case, limited to the following issue: "Did the Appellate Court correctly determine that the habeas court improperly restored the petitioner's right to seek certification to appeal [from] an earlier decision of the Appellate Court to the Supreme Court?" *Janulawicz v. Commissioner of Correction*, 301 Conn. 909, 19 A.3d 179 (2011). After oral argument before this court, we ordered the petitioner and the respondent, the commissioner of correction, to submit supplemental briefs on a second issue, namely: "Is the issue raised by this appeal justiciable despite the fact that the petitioner has never filed a petition for certification in his underlying criminal case, and, as a result, this court has never decided whether such a petition should be rejected as untimely filed?" We conclude that the petitioner's habeas action is not justiciable because it is not ripe for adjudication. Accordingly, we reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the habeas court with direction to render judgment dismissing the habeas petition.

The following factual and procedural history is pertinent to the petitioner's appeal. "On January 20, 2004, following the . . . denial of his motion to suppress certain evidence [in his underlying criminal case], the petitioner entered conditional pleas of nolo contendere, pursuant to General Statutes § 54-94a, to two counts of criminal possession of a firearm in violation of General Statutes [Rev. to 2001] § 53a-217 (a) (1), two counts of carrying a dangerous weapon in violation of General Statutes [Rev. to 2001] § 53-206 (a) and one count of threatening in the second degree in violation of General Statutes [Rev. to 2001] § 53a-62 (a) (1) [as amended by Public Acts, Spec. Sess., November 15, 2001, No. 01-2, § 8, and Public Acts 2002, No. 02-97, § 16]. The petitioner was subsequently sentenced to a total effective term of ten years incarceration, execution suspended after seven years, and three years probation. On the petitioner's direct appeal to [the Appellate] [C]ourt, based on the denial of his motion to suppress, [the Appellate] [C]ourt affirmed the judgment of the trial court. *State v. Janulawicz*, 95 Conn. App. [569, 576], 897 A.2d 689 (2006). At trial and on appeal, the petitioner was repre-

sented by [A]ttorney Deron Freeman, who did not seek certification to appeal [from the Appellate Court's] adverse [decision] to the Supreme Court." (Footnote omitted.) *Janulawicz v. Commissioner of Correction*, 127 Conn. App. 576, 578–79, 14 A.3d 488 (2011).

The petitioner filed an amended petition for a writ of habeas corpus on August 5, 2009, alleging, inter alia, that Freeman had rendered ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984),¹ because, subsequent to the release of the Appellate Court's decision in the petitioner's criminal case, Freeman failed to take any action with respect to the petitioner's right under General Statutes § 51-197f² and Practice Book § 84-1³ to seek this court's review of the Appellate Court's judgment. In particular, Freeman did not file a petition for certification to appeal to this court, he did not transfer the matter to another attorney for that purpose, and he did not discuss the merits of the petitioner's case with the petitioner until after the twenty day appeal period prescribed by Practice Book § 84-4 (a) (1)⁴ expired. Following a trial, the habeas court found that Freeman's performance had been deficient because there was no indication that he had reviewed the Appellate Court's decision or otherwise had concluded that a petition for certification to appeal to this court lacked any merit. The habeas court also concluded that Freeman's inadequate performance had prejudiced the petitioner by depriving him of the opportunity to file a petition for certification to appeal to this court. Accordingly, the habeas court rendered judgment granting the habeas petition in part, ordering that the petitioner's right to file a petition for certification to appeal to this court be restored. The habeas court subsequently denied the respondent's petition for certification to appeal from the habeas court's adverse judgment pursuant to Practice Book § 80-1.⁵

The respondent appealed from the judgment of the habeas court to the Appellate Court, claiming that the habeas court improperly had granted in part the petitioner's habeas petition and abused its discretion in denying the respondent's petition for certification to appeal. See *Janulawicz v. Commissioner of Correction*, supra, 127 Conn. App. 577–78. The Appellate Court agreed with both of the respondent's claims and reversed the judgment of the habeas court. *Id.*, 578, 586. In so concluding, the Appellate Court determined that, to prevail in his habeas action, the petitioner was required to adduce evidence demonstrating, under the prejudice prong of the *Strickland* test; see footnote 1 of this opinion; that it was "reasonably probable that he would have prevailed in obtaining further review of his direct appeal had counsel not been deficient." *Janulawicz v. Commissioner of Correction*, supra, 585. Accordingly, the Appellate Court determined that, "[a]lthough . . . Freeman's representation of the peti-

tioner was deficient . . . the petitioner failed to introduce any evidence that he was prejudiced by Freeman's deficiency"; *id.*, 583; that is, he had not demonstrated that this court likely would have granted his petition for certification to appeal. *Id.*, 585. This appeal followed.

Our resolution of this appeal begins and ends with our analysis of the justiciability of the petitioner's habeas action. Although the respondent did not raise the issue of ripeness, we must address and resolve the question because it implicates this court's subject matter jurisdiction. See, e.g., *Chapman Lumber, Inc. v. Tager*, 288 Conn. 69, 85, 952 A.2d 1 (2008).

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of the ripeness of a claim] is plenary." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Id.*, 86. "[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire." (Citation omitted; internal quotation marks omitted.) *Id.*, 86–87. "[R]ipeness is a sine qua non of justiciability" (Internal quotation marks omitted.) *Milford Power Co., LLC v. Alstom Power, Inc.*, 263 Conn. 616, 624, 822 A.2d 196 (2003).

In his habeas petition, the petitioner alleged that his counsel's deficient performance prevented him from filing a timely petition for certification to appeal to this court pursuant to Practice Book § 84-4. According to the petitioner, this lapse deprived him of his right to petition this court for certification to review the Appellate Court's judgment in his criminal case.⁶ We conclude that, despite the petitioner's failure to comply with the time period set forth in the Practice Book § 84-4 (a), the petitioner's habeas petition is not ripe for adjudication in view of the fact that the petitioner's injury is contingent on this court's denial of a motion to file a late petition for certification, a motion that the petitioner has never filed, because he will not suffer such an injury if this court were to grant his request for permission to file an untimely petition for certification to appeal.

As a threshold matter, it bears emphasis that the petitioner's failure to comply with the rules of practice does not deprive this court of subject matter jurisdiction

to consider an untimely petition for certification to appeal from the Appellate Court's judgment. "[B]ecause the twenty day time limitation on appeals [to this court] imposed by [the rules of practice] is not subject matter jurisdictional, we have discretion to hear a late appeal. . . . The rationale for this rule is that the twenty day period . . . is not a constitutionally or legislatively created condition precedent to the jurisdiction of this court. The source of the authority for the adoption of the rule lies in the inherent right of constitutional courts to make rules governing their procedure. . . . Such time constraints, which are created by courts, can be waived by the courts." (Citations omitted; internal quotation marks omitted.) *Ambroise v. William Raveis Real Estate, Inc.*, 226 Conn. 757, 762-63, 628 A.2d 1303 (1993).

In *Ramos v. Commissioner of Correction*, 248 Conn. 52, 57, 61, 727 A.2d 213 (1999), we applied this principle in considering a claim by the habeas petitioner in that case, Reynaldo Ramos, that the Appellate Court improperly had declined to entertain his appeal from the denial of his habeas petition because the appeal had not been filed within the twenty day appeal period prescribed by the rules of practice. Because Practice Book § 80-1, like Practice Book § 84-4, does not create a subject matter jurisdictional bar to the filing of an appeal, we observed that, "[i]n the absence of [such] jurisdictional barriers, appellate tribunals must exercise their discretion to determine whether a late appeal should be permitted" *Id.*, 61. In view of our determination that Ramos had demonstrated good cause for the delay in filing his appeal beyond the twenty day limitation period, we concluded that the Appellate Court had abused its discretion in dismissing Ramos' appeal from the adverse judgment of the habeas court.⁷ *Id.* As in *Ramos*, it is perfectly clear in the present case that no jurisdictional barrier would prevent this court from exercising its discretion to consider the petitioner's untimely petition for certification to appeal.

Moreover, and equally important to our justiciability analysis, untimely petitions and appeals are expressly contemplated by Practice Book §§ 60-2⁸ and 60-3.⁹ Indeed, a review of petitions for certification filed in the last twenty years reveals that we routinely grant motions for permission to file late petitions whenever it appears that there is a reasoned basis for doing so.¹⁰ In deciding whether to consider an untimely petition for certification to appeal to this court, we consider a variety of factors, including but not limited to the reason for the late filing, whether the application for permission to file a late petition is opposed, the nature of the underlying case, and the interests of judicial economy.¹¹ See, e.g., *id.*, 61-62. Because, however, our decision to *review* an untimely petition for certification is entirely separate and distinct from the decision whether to *grant* such a petition, and because there frequently is

no material prejudice arising from the late filing, as we have indicated, we often agree to consider the merits of untimely petitions otherwise in compliance with our rules of practice. Consequently, there simply is no basis to assume that we would decline to consider the merits of the petitioner's petition for certification to appeal because it was not timely filed. Indeed, a contrary presumption would be considerably more reasonable.

In sum, our application of established justiciability principles to the facts and circumstances of the present case leads to the conclusion that the petitioner's habeas action is not ripe for adjudication.¹² The petitioner's claim is contingent on our denial of his motion to file a late petition for certification to appeal, an event that may never occur, thereby obviating any need for a resolution of the issues presented by this appeal.¹³

The form of the judgment of the Appellate Court is improper, the judgment of the Appellate Court is reversed, and the case is remanded to that court with direction to remand the case to the habeas court with direction to dismiss the petition for a writ of habeas corpus.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

¹ "According to *Strickland*, [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs [of the *Strickland* test] are satisfied." (Internal quotation marks omitted.) *William B. v. Commissioner of Correction*, 128 Conn. App. 478, 488–89, 17 A.3d 522, cert. denied, 302 Conn. 912, 27 A.3d 371 (2011).

² General Statutes § 51-197f provides in relevant part: "Upon final determination of any appeal by the Appellate Court, there shall be no right to further review except the Supreme Court shall have the power to certify cases for its review upon petition by an aggrieved party"

³ Practice Book § 84-1 provides: "An appeal may be taken to the supreme court upon the final determination of an appeal in the appellate court where the supreme court, upon petition of an aggrieved party, certifies the case for review."

⁴ Practice Book § 84-4 (a) provides in relevant part: "A petition for certification shall be filed by the petitioner within twenty days of (1) the date the opinion is officially released"

⁵ Practice Book § 80-1 provides: "In any habeas corpus proceeding where the party desiring to appeal is required by statute to petition the trial court for certification that a question is involved in the decision which ought to be reviewed by the appellate court, the petition for such certification shall be made to the judge who tried the case or, if such judge is unavailable, a judge of the superior court designated by the chief court administrator, within ten days after the case is decided. The appeal shall be filed within twenty days from the issuance of the notice of decision on the petition for certification, unless an application for waiver of fees, costs and security is filed pursuant to Section 63-6, in which event the appeal shall be filed within twenty days from the decision on the application."

⁶ The petitioner also contends that counsel's deficient performance deprived him of his right to assistance of counsel in connection with the filing of a petition for certification to appeal to this court. In *Gipson v. Commissioner of Correction*, 257 Conn. 632, 778 A.2d 121 (2001), we concluded that "an indigent criminal defendant has the right to the assistance

of counsel for purposes of determining whether a sound basis exists for the filing of a petition for certification. If such basis does exist, the defendant has the right to the assistance of counsel in preparing and filing the petition and, if the petition is granted, the right to counsel's assistance in connection with the appeal to this court." *Id.*, 638–39 n.13. This claim is effectively moot in light of our decision in this case because, under *Gibson*, the petitioner will be entitled to the assistance of counsel for purposes of his petition for certification, including his motion seeking this court's review of his petition despite the lack of compliance with the twenty day limitation period of Practice Book § 84-4 (a).

⁷ In reaching this determination, we relied on three factors: "First, the late appeal [arose] from the dismissal of a petition for [a writ of] habeas corpus in which the habeas court certified that 'a question [was] involved in the decision which ought to be reviewed by the court having jurisdiction' General Statutes § 52-470 (b). Second, the principle of judicial economy counsel[ed] against a new habeas corpus hearing if that hearing [was] likely to result in the reinstatement of [Ramos'] appeal. . . . Third, and most significant, the delay in the appeal [could not] be attributed to [Ramos] but arose from specifically identified confusion in the office of the public defender." (Citation omitted.) *Ramos v. Commissioner of Correction*, *supra*, 248 Conn. 61–62.

⁸ Practice Book § 60-2 provides in relevant part: "The court may . . . on its own motion or upon motion of any party . . . (6) order that a party for good cause shown may file a late appeal, petition for certification, brief or any other document, unless the court lacks jurisdiction to allow the late filing"

⁹ Practice Book § 60-3 provides: "In the interest of expediting decision, or for other good cause shown, the court in which the appeal is pending may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its own motion and may order proceedings in accordance with its direction."

¹⁰ We note that when this court grants a motion for permission to file a late petition for certification to appeal, it does not reach the merits of the petition unless, of course, the petition is granted. Thus, our granting of permission to file a late petition does not necessarily result in a full-blown appeal; in fact, most often, it does not because the standards governing our consideration of an untimely petition for certification to appeal are significantly more permissive than those governing our certification of the appeal itself. See Practice Book § 84-2 ("[c]ertification by the supreme court . . . is not a matter of right but of sound judicial discretion and will be allowed only where there are special and important reasons therefor"). This stands in stark contrast to what occurs when the Appellate Court considers and grants a motion for permission to file a late appeal, an action that requires the court also to consider the merits of the appeal. In fact, as this court expressly has recognized, "the Appellate Court has broad authority to manage its docket . . . [and] [i]n the exercise of that authority, it legitimately has adopted a policy of docket control that, in other than exceptional cases, the need to address cases that were filed timely outweighs the need to permit appeals that are in fact late." (Citation omitted; internal quotation marks omitted.) *Alliance Partners, Inc. v. Voltarc Technologies, Inc.*, 263 Conn. 204, 212, 820 A.2d 224 (2003). Because of the discretionary nature of petitions for certification, this court has no such policy.

¹¹ Although we will not formally decide whether to grant the petitioner's motion to file a late petition for certification to appeal until such a petition is filed, it bears noting that the petitioner has submitted substantial evidence, during the litigation of this case, to support his contention that the delay in filing a petition for certification fairly cannot be attributed to him. Moreover, because a denial of a motion for permission to file a late petition for certification undoubtedly would require this court to address the constitutional issue raised by the petitioner's action; see footnote 6 of this opinion; considerations of judicial economy militate strongly in favor of granting the motion to file a late petition.

¹² We recognize that, in *Ghant v. Commissioner of Correction*, 255 Conn. 1, 3–4, 6, 761 A.2d 740 (2000), we considered the merits of the claim of the petitioner, James X. Ghant, that he had been deprived of his right to appeal from his conviction of murder, due to counsel's alleged failure to inform him of his appellate rights, without inquiring whether the issue was ripe for adjudication. In that case, however, the issue of the justiciability of Ghant's habeas action in the absence of a motion for permission to file a late petition for certification was never raised.

¹³ We note that, even if the present case was ripe for adjudication, and therefore justiciable, prudential considerations would counsel against our review of this appeal before the petitioner has sought permission to file a late petition for certification. See, e.g., *Simmonds v. Immigration & Naturalization Service*, 326 F.3d 351, 357 (2d Cir. 2003) (describing doctrine of prudential ripeness in federal courts as “a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of, especially, constitutional issues that time may make easier or less controversial”).