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REGINALD REESE *v.* COMMISSIONER
OF CORRECTION
(AC 44892)

Bright, C. J., and Suarez and Clark, Js.

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus, claiming, *inter alia*, prosecutorial impropriety and ineffective assistance of counsel. The habeas court dismissed three of the five counts of his third habeas petition on the basis of *res judicata*. Thereafter, the petitioner filed an amended petition, alleging ineffective assistance of his first habeas appellate counsel and of his counsel in his second habeas action. Following a trial, the habeas court denied both claims. Thereafter, the petitioner filed a petition for certification to appeal that raised only two issues, namely, whether the habeas court erred in denying his writ of habeas corpus after trial and “[a]ny and all errors or claims that might become evident” following a review of the record. The habeas court denied the petition for certification to appeal, and the petitioner appealed to this court, claiming that the habeas court abused its discretion in denying his petition for certification, that it improperly dismissed one count of his habeas petition on the basis of *res judicata*, and that it improperly denied his motion to sequester one of the witnesses of the respondent, the Commissioner of Correction, at the habeas trial. *Held* that this court declined to review the petitioner’s claims that the habeas court improperly dismissed one count of the amended petition and improperly denied his motion to sequester a witness, as an appellate court can review only the merits of the claims specifically set forth in the petition for certification to appeal, and, because the petitioner failed to include the issues that he raised on appeal in his petition for certification, the habeas court did not have the opportunity to exercise its discretion to determine whether the claims the petitioner raises on appeal warrant appellate review; accordingly, this court could not conclude that the habeas court abused discretion that it was never asked to exercise, and, because such a determination was the first step in the habeas appeal following the denial of the petition for certification, the petitioner’s claims necessarily failed and the appeal was dismissed.

Argued March 7—officially released May 23, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, granted the respondent’s motion to dismiss certain of the petitioner’s claims; thereafter, the case was tried to the court, *Chaplin, J.*; judgment denying the petition; subsequently the court, *Chaplin, J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Naomi T. Fetterman, assigned counsel, for the appellant (petitioner).

Sarah Hanna, former senior assistant state’s attorney, with whom, on the brief, were *Joseph T. Corradino*, state’s attorney, and *Susan Campbell*, assistant state’s attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Reginald Reese, following the habeas court's denial of his petition for certification, appeals from the habeas court's dismissal in part and denial in part of his petition for a writ of habeas corpus challenging his underlying criminal conviction of murder in violation of General Statutes § 53a-54a.¹ The petitioner claims that (1) the court, *Chaplin, J.*, abused its discretion in denying his petition for certification and erred in denying his motion to sequester a witness at the habeas trial, and (2) the court, *Newson, J.*, erred in dismissing one count of his amended petition based on the application of res judicata.

The respondent, the Commissioner of Correction, has not addressed the merits of the petitioner's claims. Instead, he argues that we must dismiss the appeal because the petitioner, in his petition for certification, failed to raise the substantive issues he raises on appeal. The respondent argues that we are bound by our prior decisions, which hold that if the claims on appeal were not included in the petition for certification to appeal, the habeas court never had the opportunity to exercise its discretion to grant or deny the petition as to those claims, and, hence, the claims are not reviewable. See *Lewis v. Commissioner of Correction*, 211 Conn. App. 77, 91–94, 271 A.3d 1058, cert. denied, 343 Conn. 924, 275 A.3d 1213, cert. denied, U.S. , 143 S. Ct. 335, 214 L. Ed. 2d 150 (2022). We agree with the respondent and, accordingly, dismiss the appeal.

The following procedural history is relevant to our analysis. On December 11, 2018, the petitioner filed a five count, amended petition for a writ of habeas corpus in this, his third, habeas action. On February 5, 2019, pursuant to Practice Book § 23-29 (3), Judge Newson dismissed counts one (prosecutorial impropriety), two (ineffective assistance of trial counsel), and three (ineffective assistance of first habeas counsel) of the petitioner's amended petition on res judicata grounds. On November 26, 2019, the petitioner filed the operative fifth amended petition, in which he alleged ineffective assistance of his first habeas appellate counsel and ineffective assistance of his counsel in his second habeas action. Following a trial, Judge Chaplin issued a memorandum of decision on June 25, 2021, denying both claims. On June 30, 2021, the petitioner filed a petition for certification to appeal. In his petition, the petitioner sought to raise two issues on appeal: (1) "Whether the habeas court erred in denying the petitioner's writ of habeas corpus after trial"; and (2) "[a]ny and all errors or claims that may become evident upon review of the record, evidence, and/or transcript of the proceedings." The habeas court denied the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner raises two substantive claims: (1) Judge Newson improperly dismissed one count of his amended petition on the basis of res judicata and (2) Judge Chaplin improperly denied his motion to sequester one of the respondent's witnesses, Attorney C. Robert Satti, who prosecuted the petitioner in his underlying criminal trial and prosecuted one of the petitioner's witnesses at the habeas trial for committing perjury during the petitioner's criminal trial. The respondent argues that the petitioner's two claims are unreviewable because he did not identify them in his petition for certification. In response, the petitioner, after recognizing that decisions of this court require that any claims on appeal be presented first in a petition for certification, argues that "it can hardly be gainsaid that the claims of error [the petitioner] has enumerated in this appeal were not raised before, and decided by, the habeas court." He concludes by arguing that, "although the petition for certification to appeal that was filed in this case is broadly worded, the claims that [the petitioner] has pursued on appeal clearly fall within its penumbra. The habeas court's denial of the petition for certification in its entirety was a discretionary act, subject to review by this court. Further, and more importantly, the claims were fully litigated below, both by way of written motions and at oral argument. Consequently, there can be no contention that it would be an 'ambuscade' of the habeas court for this court to assess the claims on their merits." We are not persuaded by the petitioner's arguments.

General Statutes § 52-470 (g) provides: "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." "[A] habeas petitioner whose petition for certification to appeal pursuant to § 52-470 (g) has been denied must make a two part showing to prevail on appeal. . . . First, the petitioner must demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . Second, [i]f the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." (Citations omitted; internal quotation marks omitted.) *Goguen v. Commissioner of Correction*, 341 Conn. 508, 519–20, 267 A.3d 831 (2021). "If the statutory mandate of § 52-470 (g) is to retain any force at all . . . a petitioner whose petition for certification to appeal has been denied must at least expressly allege that the denial was an abuse of discre-

tion to obtain appellate review. Allowing a petitioner to bypass completely any allegation that the habeas court abused its discretion would render a duly enacted statute meaningless, which we are not at liberty to do.” *Id.*, 525.

“An appellate court . . . reviews only the merits of the claims specifically set forth in the petition for certification. . . . This court has declined to review issues in a petitioner’s habeas appeal in situations where the habeas court denied certification to appeal and the issues on appeal had not been raised in the petition for certification. . . .

“The standard of review of an appeal following the denial of a petition for certification to appeal from the judgment [disposing of] a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner’s appeal is frivolous. Thus, we review whether the issues for which certification to appeal was sought are debatable among jurists of reason, a court could resolve the issues differently or the issues are adequate to deserve encouragement to proceed further. . . . Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court’s attention in the petition for certification to appeal. . . .

“It is well established that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue raised on appeal was never raised before the court at the time that it considered the petition for certification to appeal as a ground on which certification should be granted.” (Citations omitted; internal quotation marks omitted.) *Lewis v. Commissioner of Correction*, *supra*, 211 Conn. App. 92–93.

In the present case, the petitioner set forth two claims in his petition for certification: “[w]hether the habeas court erred in denying the petitioner’s writ of habeas corpus after trial; and . . . [a]ny and all errors or claims that may become evident upon review of the record, evidence, and/or transcript of the proceedings.” This petition is very similar to the petition for certification that the petitioner in *Lewis* filed, which we found insufficient to preserve the evidentiary claims, including the failure to sequester a witness, which the petitioner had briefed in that case. See *Lewis v. Commissioner of Correction*, *supra*, 211 Conn. App. 93–94. In *Lewis*, the petition for certification raised two issues for appeal: “Whether the petitioner’s constitutional right to the effective assistance of appellate counsel was violated; and . . . [s]uch other errors as are revealed upon a review of the transcripts and record.” (Internal

quotation marks omitted.) *Id.* As does the petitioner in the present case, the petitioner in *Lewis* argued that, despite any deficiencies in his petition for certification, this court should review the petitioner's claims on appeal because the habeas court "actually considered whether to deny his motion to sequester" and his other evidentiary claims. *Id.*, 94. In rejecting the petitioner's argument, we noted: "The petitioner's argument misapprehends the consideration that is relevant to a petition for certification to appeal. Although the habeas court may have considered and exercised its discretion with respect to rulings it made during the habeas trial, the court did not have an opportunity to consider those issues in the context of a petition for certification to appeal because the petitioner failed to include them in his petition. The only issue the petitioner presented for consideration by the habeas court with respect to the petition for certification to appeal was whether its denial of the petitioner's claim that his appellate counsel was ineffective should be appealed." *Id.*

The same analysis applies in the present case, in which neither issue raised by the petitioner on appeal was addressed in his petition for certification. As in *Lewis*, merely alleging in the petition for certification that the court erred in denying his habeas petition and that the petitioner may raise other issues upon a review of the record did not give the court the opportunity to exercise its discretion as to the sequestration of Satti. See *id.* Similarly, alleging that the court improperly *denied* the habeas petition did not raise for the court's consideration whether the court improperly had *dismissed* one of the petitioner's claims on the basis of *res judicata*. In fact, although Judge Chaplin denied the habeas petition and the petition for certification, Judge Newson previously had granted the respondent's motion to dismiss certain of the petitioner's claims. It would be unreasonable to expect Judge Chaplin to understand that the petition for certification that challenged his *denial* of the habeas petition also was directed to Judge Newson's earlier *dismissal* of some of his claims. Accordingly, because the petition for certification never asked the habeas court to determine whether the claims the petitioner raises on appeal warrant appellate review, we cannot conclude that the court abused discretion that it was never asked to exercise. See *Damato v. Commissioner of Correction*, 156 Conn. App. 165, 169, 113 A.3d 449 ("it is impossible to review an exercise of discretion that did not occur" (internal quotation marks omitted)), cert. denied, 317 Conn. 902, 114 A.3d 167 (2015). Furthermore, because such a determination is the first step in a habeas appeal following the denial of a petition for certification, the petitioner's claims necessarily fail.²

The appeal is dismissed.

In this opinion the other judges concurred.

¹ This court affirmed the petitioner's conviction. *State v. Reese*, 77 Conn.

App. 152, 167, 822 A.2d 348, cert. denied, 265 Conn. 910, 831 A.2d 252 (2003).

² We note that, during oral argument before this court, counsel for the respondent acknowledged that the petitioner's claims on appeal are not frivolous. Assuming that is correct, had the petitioner raised his appellate claims in the petition for certification, the habeas court likely would have granted certification as to those claims. See *Simms v. Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994) (noting that issues that "are debatable among jurists of reason; that a court *could* resolve . . . [in a different manner]; or that . . . deserve encouragement to proceed further" are not frivolous (emphasis in original; internal quotation marks omitted)). Thus, we recognize, as stated by the petitioner's counsel during oral argument before this court, the possibility that the petitioner will institute a fourth habeas action alleging that his habeas counsel in this action provided ineffective assistance of counsel by filing a deficient petition for certification. Consequently, some might argue that our decision in the present case elevates form over substance and will result only in further litigation and a delay in addressing the petitioner's claims on their merits. Putting aside that we express no views as to the merits of such an ineffective assistance of counsel claim, we are constrained in our decision in the present case by our prior decisions and the plain and unambiguous language of § 52-470 (g). As our Supreme Court recognized in *Goguen v. Commissioner of Correction*, supra, 341 Conn. 519-20, § 52-470 (g) is not just a matter of form. If the statute is to have any meaning, a petitioner must comply with its requirements. Any streamlining of the procedure to pursue habeas appeals is thus an issue to be addressed by the legislature and not the courts.
