No. 13-204

In The

Supreme Court of the United States

JAMES E. DZURENDA,
COMMISSIONER OF CORRECTION,
Petitioner

v.

ODILIO GONZALEZ and JOURDAN HUERTAS,
Respondents

On Petition for Writ of Certiorari
To The Supreme Court of Connecticut

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this case is a proper vehicle for determining whether the Sixth Amendment guarantees counsel at bail determination proceedings when that question was not raised or decided by the Connecticut Supreme Court in the course of its unchallenged decision that the Sixth Amendment guarantees the right to counsel at the particular arraignment at issue below, as well as at plea and sentencing, such that counsel's failure to follow a well-established state procedure to guarantee that a criminal defendant is not held in custody longer than the stated length of his sentence, is subject to scrutiny for ineffective assistance of counsel?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the opinions of the Connecticut Supreme Court. The petitioner is James E. Dzurenda, Commissioner of the Connecticut Department of Correction. The individual respondents are Odilio Gonzalez and Jourdan Huertas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Introduction

This Court should deny the petition because the issue presented ("whether counsel's assistance is guaranteed in matters pertaining to bail, regardless of when they occur" Petition at 14 n.3) was not raised or decided below. Although the petition fails to challenge the decision actually rendered by the Connecticut Supreme Court, it argues that a proceeding cannot be a 'critical stage' unless that proceeding could impair the right a fair trial. Petition, at 16, 20-25. The Court rejected that claim in *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1384 (2012) and *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012), as well as this Court's decisions holding that the Sixth Amendment right to counsel includes counsel at sentencing and on direct appeal. The petition for writ of certiorari should also be denied because the decision below in *Gonzalez v. Commissioner of Correction*, 308 Conn. 463 (2013), correctly applied the applicable decisions of this Court to hold that the arraignment at issue in Mr. Gonzalez's case, like certain other arraignments, and the plea and sentencing proceedings at issue in *Huertas v. Commissioner of Correction*, 308 Conn. 516 (2013), are critical stages of a criminal prosecution. Further, the claims of an undecided issue of federal law, and a split in circuit court or state decisions relate to the right to counsel at "bail determination proceedings," and thus are irrelevant to the question actually decided below. In addition, the Connecticut Supreme Court did not hold that "a substantive right to counsel exists as *each event* following the attachment of the right," Petition at 4. The Connecticut Court reached a decision addressing only the specific facts before the Court, and made no sweeping pronouncement. Rather than finding "a substantive right to counsel exists as *each event* following the attachment of the right," *id.*, the Connecticut Court reiterated this Court's conclusion that "counsel is required at every stage of a criminal proceeding where substantial rights of a

criminal accused may be affected." *Gonzalez*, 308 Conn. at 479, quoting *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

The claim actually litigated below does not provide even an adequate platform upon which to attempt to resolve the question presented to this Court, see Petition at i, and is woefully deficient as the basis for a decision on the new, sweeping question whether counsel is guaranteed at every event following the attachment of counsel.[1]

This petition does not present any question concerning bail determination hearings held prior to the appointment and presence of counsel, raised in the amicus brief. Such a hearing is unheard of in Connecticut. Nor does this case concern whether counsel is guaranteed when bail or conditions of release are initially determined by a trial court. This petition arises out of two cases where counsel, at well-recognized critical stages of the criminal proceedings, failed to invoke a routine state procedure (required as the result of court interpretation of a state statute) to ask for a bond *increase* to ensure that a defendant who is physically held in the custody of the Commissioner of Correction is not subject to the fiction that he is simultaneous at liberty. The failure to invoke this state procedure results in an accused being confined longer than the stated length of his sentence, for the Commissioner is bound by the fictional liberty and must be blind to the fact that the person was in his custody. The number of days that that fiction applies is the number of extra days the person must serve to discharge his sentence. Nothing about this state-specific procedure, or the holding that certain arraign-

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[1] The lead opinion in the Connecticut Appellate Court's *Gonzalez* decision rested solely on the attachment of the right to counsel at arraignment and declined to conduct a 'critical stage' analysis. *Gonzalez v. Commissioner of Correction*, 122 Conn. App. 705, 710 n.5 (2010). That approach was rejected by the Connecticut Supreme Court, which employed a 'critical stage' analysis in examining the arraignment, plea and sentencing at issue.

ments are critical stages of a criminal prosecution, as are plea and sentencing proceedings, merits this Court's review. The petition for certiorari should be denied.

COUNTERSTATEMENT OF THE CASE[2]

Mssrs. Gonzales and Huertas were at liberty having posted bond in pending criminal cases. Both were subsequently arrested, and were unable to post bond to obtain release on these later arrests. As the result of the inability to post bond they both were held as presentence detainees in the custody of the Connecticut Commissioner of Correction. By statute[3] presentence detainees are entitled to credit against any subsequent sentence for the number of days they are confined as the result of the inability to post bond. The Connecticut Supreme Court has interpreted this statute to require that a detainee be confined in lieu of bond on each pending docket number, rather than providing for credit for the time an individual is confined against all subsequent sentences imposed after such confinement. If a docket number does not carry an un-posted bond the individual is

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[2] In proceedings below, the Commissioner of Correction is referred to as "the respondent," and Odilio Gonzalez and Jordan Huertas as "the petitioners." In the petition for certiorari, the Commissioner refers to himself as "the petitioner" and Mssrs. Gonzales and Huertas as "the respondents." To avoid confusion, Mssrs. Gonzales and Huertas, who are both the state habeas petitioners and the respondents to the petition for certiorari, will refer to themselves as "Mssrs. Gonzales and Huertas" and to the Commissioner of Correction as "the Commissioner."

[3] Connecticut General Statutes § 18-98d (a) (1) provides in relevant part:

> Any person who is confined ...because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided ... the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement[.]

treated as if he or she had been at liberty in that case even though the individual is physically in the custody of the Commissioner. This interpretation led to the creation of a procedure whereby in the case of an arrest while an individual is out on bond, defense attorneys request, or judges volunteer, that the bond should be raised to ensure that the fiction that the person remains at liberty on the earlier arrest although he is actually confined does not apply. Absent an increase in bond the detainee is regarded as still out on bond in the earlier docket number(s), and not entitled to credit against the sentences imposed under those docket numbers for the days of physical confinement.

Defense counsel for Mssrs. Gonzalez and Huertas failed to make the standard, routinely granted, request that the earlier bonds be increased. As the result of this failure Mssrs. Gonzalez and Huertas were required to serve an additional seventy-three days and seventeen days, respectively, beyond the stated length of the sentences imposed by the court. Mr. Gonzalez's lawyer failed to have the bond increased at the arraignment on the later case. In Mr. Huertas' case the failure occurred at the plea and sentencing hearings. *Huertas, supra*, 521 n. 3.

Mssrs. Gonzalez and Huertas both filed petitions for writ of habeas corpus in the Connecticut Superior Court, alleging that they had been denied the effective assistance of counsel with respect to counsel's duty to ensure that, once they were held in lieu of bond on the later arrest, they were entitled to presentence confinement credit on each of the cases pending against them.[4] In Mr. Gonzalez's case the

[4] Mr. Gonzalez' case was decided, both by the habeas court and by the Connecticut Appellate Court, *Gonzalez v. Commissioner of Correction*, 122 Conn. App. 705 (2010), before Mr. Huertas' habeas trial occurred. In Mr. Huertas' case the habeas court concluded it was bound by the Appellate Court's decision in *Gonzalez, supra.* Based on the parties' stipulation of facts, including the absence of any strategic reason for the failure to ensure the credit at issue and the prejudice of additional days of incarceration, the habeas court found that Mr. Huertas was denied the effective assistance of counsel. *Huertas v Warden*, ____ A.2d ___, 2010 Conn. Super. LEXIS 2445 (Conn. Super., Bright, J., September 27, 2010).

habeas court concluded that the right to effective counsel "extend[ed] beyond guilt or innocence determinations," *Gonzalez v. Warden*, ____ A.2d ___, 2008 Conn. Super. LEXIS 3205 (Conn. Super. Ct., Schuman, J., Feb. 25, 2008).[5] The habeas court further found that the failure to employ the well-established procedure for obtaining an increase in the earlier bonds was deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), and that the additional days incarceration Mssrs. Gonzalez and Huertas were required to serve constituted prejudice under *Strickland.*[6] In each case the habeas court ordered that Mssrs. Gonzalez and Huertas be credited, in the applicable docket numbers, with the number of days they were held in confinement but received no presentence confinement credit.[7] In reaching this decision the habeas court rejected the Commissioner's argument that matters concerning presentence confinement credit were not a 'critical stage' of criminal proceedings and so there was no sixth amendment right to counsel.

Mr. Gonzales appealed to the Connecticut Appellate Court. In a decision released prior to the decisions in *Lafler* and *Frye*, *supra*,

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[5] The habeas court noted it had so held in *Ebron v. Warden,* 2008 Conn. Super. LEXIS 75 (Conn. Super., Schuman, J., January 14, 2008), affirmed in relevant part by *Ebron v. Commissioner of Correction*, 307 Conn. 342 (2012), *cert. denied* by *Arnone v. Ebron*, ___ U.S. ___, 133 S. Ct. 1726 (2013).

[6] At page 19, footnote 4 of the Petition the Commissioner incorrectly states that the finding of ineffective assistance was not made in the docket number in which defense counsel failed to seek to increase the bond and thus ensure that the fiction of liberty ended and the detention would be recognized as part of the service of a subsequently imposed sentence in that docket number. The habeas courts ordered the credits be applied to the docket numbers in which the bonds had not been raised.

[7] Before this Court the Commissioner does not dispute the *Strickland* findings or the remedy ordered by the habeas court.

> [t]he Appellate Court concluded that the petitioner had a right to counsel at the arraignment stage, which included proceedings pertaining to the setting of bond and the calculation of presentence confinement credit, and that the petitioner's trial counsel had been ineffective in his failure to request an increase in bond on two prior charges so that the petitioner could be credited for presentence confinement on those charges.
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> *Gonzalez v. Commissioner of Correction*, 308 Conn. 463, 464 (2013), citing *Gonzalez*, 122 Conn. App. 705, 713, 717.

In the Connecticut Appellate Court the Commissioner argued the calculation of credits as a "posttrial, administrative matter," and that the Sixth Amendment did not confer a right to counsel "in matters pertaining to credit for presentence confinement[.]" *Gonzalez*, 122 Conn. App., at 710.[8] The Court rejected the Commissioner's claim that matters pertaining to credit for presentence confinement were outside the reach of the Sixth Amendment right to counsel because they did not have the potential to undermine the fairness of a criminal trial.

The Connecticut Supreme Court granted discretionary review in *Gonzalez* to review whether "the Appellate Court properly ruled that the sixth amendment confers a right to the effective assistance of counsel in matters pertaining to credit for presentence confinement?" *Gonzalez v. Commissioner of Correction*, 298 Conn. 918, 919 (2010).[9] Following the habeas court's decision, the Connecticut Supreme Court transferred *Huertas* directly to its own docket. 308 Conn. 516, 517, n.1.

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[8] *See also id.*, at 17-19 (Bishop, J., concurring); *id.*, at 722 (Schaller, J., dissenting) (acknowledging Commissioner's claim that there was no right to counsel "for a matter pertaining to pretrial confinement credit because the calculation of presentence confinement credit is a posttrial matter, and therefore the issue cannot be a critical stage of the proceedings, regardless of when it arises.")

[9] The Connecticut Supreme Court also agreed to review whether Mr. Gonzalez had proven his claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). That issue has not been presented for this Court's review. Petition, Question presented, p. i.

The Commissioner did not present any claim concerning "bail determination hearings" to the Connecticut Supreme Court. Rather, the Commissioner again argued that that "the right to counsel exists to protect the right to a fair trial and that unless the claimed deficiency on the part of counsel affects the reliability of the trial, the sixth amendment is not implicated." Supplemental Brief of the Commissioner of Correction, *Huertas v. Commissioner of Correction*, Docket # S.C. 18818, at 1-2, citing Brief of the Commissioner of Correction, *Huertas v. Commissioner of Correction*, Docket # S.C. 18818, at 7-8, 14-18, 18-25; see Commissioner's Supplemental Brief at 9; Commissioner's Supplemental Brief at 5. The Commissioner argued that Mssrs. Gonzalez and Huertas had no sixth amendment right to the effective assistance of counsel for a 'matter pertaining to presentence confinement' because the postconviction calculation of presentence confinement credits could not be a 'critical stage' because it could not impair the fairness of the trial.[10] is not a critical stage of the criminal proceedings. *Gonzalez*, 308 Conn. at 474. "The [Commissioner] argued that the decisions of the United States Supreme Court have emphasized that the right to counsel exists to protect the right to a fair trial and that unless the claimed deficiency on the part of counsel affects the reliability of the trial, the sixth amendment is not implicated." Supplemental Brief of the Commissioner of Correction, *Huertas v. Commissioner of Correction*, Docket # S.C. 18818, at 1-2, citing Brief of the Commissioner of Correction, *Huertas v. Commissioner of Correction*, Docket # S.C. 18818, at 7-8, 14-18, 18-25; see Commissioner's Supplemental Brief at 9; Commissioner's

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[10] From this postconviction event the Commissioner has now switched his focus to bail determinations whenever they occur during a criminal prosecution. Petition at 14 n.3. The arguments presented by the *amicus* focus on a procedure even further removed from the postsentencing calculation of presentence confinement credits, that is, a pre-appointment bail determination hearing (which does not exist in Connecticut).

Supplemental Brief at 5. The Commissioner argued that despite *Lafler* and *Frye, supra,* the sixth amendment right to counsel did not "extend[ ] to any pretrial procedure other than plea negotiations that did not, at least potentially, affect the defendant's right to a fair trial." Commissioner's Supplemental Brief at 2; *see id.*, at 3-10.[11] The Commissioner maintained that *Lafler* and *Frye* did not mandate a right to effective counsel with regard to pretrial confinement credit, *Id.*, at 9, and emphasized that such credits are "determined by factors that are unrelated to the validity of his conviction or the lawfulness of his sentence, ... [and] awarded by the Commissioner ... after the imposition of sentence and the conclusion of the criminal proceedings." *Id.* The Commissioner's narrow construction of *Lafler* and *Frye* arose from the Commissioner's belief that "the majority [in *Frye*] believed that the right to the effective assistance must extend to all plea negotiations ... because so many criminal cases are resolved through the plea bargaining process." Commissioner's Supplemental Brief at 2, citing *Frye*, ___ U.S. ___, 132 S.Ct. at 1407-08. The Connecticut Supreme Court rejected the argument that *Lafler* and *Frye* were based solely on the idea that pleas and supplanted trials as the main event in the criminal process. *Gonzalez*, 308 Conn. at 477. The Connecticut Supreme Court pointed to the *Lafler* Court's rejection of the argument that "the sole purpose of the sixth amendment is to protect the right to a fair trial," and errors "that do not affect the fairness of the trial itself are not cognizable under the sixth amendment." 308 Conn. at 477. The *Gonzalez* Court concluded that the

> sixth amendment... is not so narrow in its reach. ... The sixth amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect

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[11] The Commissioner argued that *Lafler* and *Frye* did "not address the central question before [the Connecticut Supreme Court – whether the right to effective assistance of counsel ... extends to matters that are of significance only to the calculation of presentence confinement credit." Commissioner's Supplemental Brief at 2-3.

> the trial, even though 'counsel's absence in these stages may derogate from the accused's right to a fair trial.' *United States v. Wade*, supra, 388 U.S. 226. The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.
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> *Gonzalez*, 308 Conn. at 477.

The *Gonzalez* Court also relied upon the *Lafler* Court's discussion of the right to counsel in the posttrial settings of sentencing and appeal. *Gonzalez*, supra, citing *Lafler v. Cooper, supra*, 132 S. Ct. 1385-86. The *Gonzalez* Court concluded that *Lafler*'s reliance on the right to counsel at posttrial events demonstrated that Lafler's determination that plea negotiations were a critical stage "was not solely based on the idea that plea bargaining is a substitute for trial." *Gonzalez*, 308 Conn. at 477.

The Commissioner acknowledged that "critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." Commissioner's Supplemental Brief, at 6 (citations omitted). His "critical stage" analysis was based upon the fact that "the calculation and application of jail credits are a posttrial, administrative matter," so "counsel's performance with respect to such credits cannot fall within the sixth amendment's guarantee of effective counsel at a criminal prosecution." *Gonzalez*, 308 Conn. at 474.

Mr. Gonzalez argued that "he had a sixth amendment right to counsel at his arraignment where the presentence confinement issues arose." *Id.*, at 469. The Connecticut Supreme Court identified the issue before it as whether the arraignment during which Mr. Gonzalez' counsel failed to request that bond in connection with his prior arrests be increased in order to maximize the petitioner's presentence confinement credit was a 'critical stage.' Id., at 474 The Court analyzed the history of the Sixth Amendment right to counsel back to 1932 in the case of *Powell v. Alabama*, 287 U.S. 45 (1932) to *Strickland v. Washington*, 466 U.S. 668

(1984) to *Rothgery v. Gillespie County*, 554 U. S. 191 (2008) up to and including the Court's more recent decisions in *Padilla v. Kentucky*, 559 U.S. 356 (2010), *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1384 (2012) and *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012). The Court properly distinguished between attachment and critical stage analyses. *Id.*, at 473-74. The Court observed that "historically, the Supreme Court's focus in a sixth amendment effective assistance of counsel case has centered on protecting the defendant's right to a fair trial. *Strickland v. Washington*, ... 466 U.S. [668,] 684 [(1984)]." *Gonzalez*, 308 Conn. at 475-76. The Court next addressed *Lafler*, *supra*, and *Frye*, supra, which were released while *Gonzalez* and *Huertas* were pending in the Connecticut Supreme Court. The *Gonzalez* majority noting that the *Frye* majority stated, "It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. ... Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Frye*, ___ U.S. ___, 132 S. Ct. at 1405. The Connecticut Court discussed the *Frye* decision and its analysis of *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) as establishing that there is a sixth amendment right to counsel "in the plea bargaining content.' *Gonzalez*, 308 Conn. at 476. The Connecticut Court also examined *Lafler* and this Court's statement that "'the constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.'" *Gonzalez*, 308 Conn. at 477. The Connecticut Court concluded that *Lafler* and *Frye*

> reveal[ ] a recognition by the Supreme Court that the right to a fair trial has expanded to include the right to adequate representation during plea negotiations. Indeed, the Supreme Court has long recognized that "counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."
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> *Gonzalez*, 308 Conn. 479 (citation omitted).

The Connecticut Court found that "[t]he central question in determining 'whether a particular proceeding is a critical stage of the prosecution focus on "whether potential substantial prejudice to the [accused's] rights inheres in the confrontation and the ability of counsel to help avoid that prejudice." ' " *Gonzalez*, 308 Conn. at 479-80 (citation omitted). The Court "note[d] that in *Hamilton v. Alabama*, ... 368 U.S. [52,] 54 [(1961)], the Supreme Court stated only certain arraignments are a 'critical stage.'" *Gonzalez*, 308 Conn. at 480. The Court interpreted the language of *Frye*, 132 S.Ct., at 1405, to the effect that critical stages include arraignments, etc., as seeming to suggest "that more recent Supreme Court cases have not limited only certain arraignments to be 'critical stages.' " *Gonzalez*, 308 Conn., at 480. This musing was merely dicta, and the Connecticut Court then analyzed *Hamilton* and the factors that led this Court to conclude that the Alabama arraignment at issue there was a critical stage. Comparing those features with a Connecticut arraignment, the Connecticut Court "conclude[d] that under the test developed in *Hamilton*, the arraignment in the *Gonzalez* case is a 'critical stage.' " *Gonzalez*, 308 Conn., at 481.

The Court found support for its conclusion in the statement in *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008) that "'what makes a stage critical is what shows the need for counsel's presence.'" *Gonzalez*, 308 Conn., at 482. The Court found further support in *United States v. Ash*, 413 U.S. 300, 313 (1973). *Gonzalez*, 308 Conn. at 482. The Court coupled the statement in *Rothgery* with the *Ash* Court's observation that the history of the sixth amendment right to counsel "demonstrates that the test utilized by the court [in its 'critical stage analysis] had called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary.' " *Gonzalez*, 308 Conn. at 482-83. The Court concluded that "potential substantial prejudice to [Mr. Gonzalez'] right to liberty inhered to the arraignment

proceedings[12] and [his] counsel had the ability to help avoid that prejudice by requesting that the bond on his [earlier arrests] be raised at the arraignment on his third arrest." *Id.* The Connecticut Supreme Court thus applied the holdings of *Lafler v. Cooper*, supra, and *Missouri v. Frye*, supra that the critical stage analysis, and concluded that the sixth amendment right to counsel is not limited to stages of the prosecution where counsel's absence would endanger the fairness of the trial.[13]

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED IN THE PETITION WAS NOT PRESENTED TO THE CONNECTICUT SUPREME COURT OR DECIDED BY THAT COURT

The lower court was not presented with, and did not decide the question"[w]hether the Sixth Amendment guarantees counsel's assistance at bail determination proceedings." Petition at i. The majority opinion in each case does not even mention the phrase. *See Gonzalez,* 308 Conn., at 464-91; *Huertas,* 308 Conn., at 17-21. In assessing whether to grant certiorari the Court must "determine the actual basis for the state court's decision[.]" *Evans v. Chavis*, 546 U.S. 189, 207 (Stevens, J., dissenting), *rehearing denied*, 547 U.S. 1014 (2006). and must "focus[ ]

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[12] The concurring justice concluded that "the proceeding that gives rise to a right to counsel is not arraignment, ... but, rather a bail hearing, the proceeding at which bond may be modified." *Gonzalez*, 308 Conn., at 493 (Palmer, J., concurring). The concurring justice concluded that a bail hearing is a critical stage. *Id.*

[13]The dissenting justice focused on bond proceedings, not arraignment, but would have employed a trial-focused definition of a 'critical stage.' The dissent reiterated the arguments rejected in *Lafler* and *Frye*, and would have held that the sixth amendment right to counsel was intended only to protect a defendant's right to a fair trial, so Mssrs. Gonzalez and Huertas were not entitled to counsel at bond proceedings.

on what the state court actually decided," *id.*, at 206, rather than the Commissioner's reinvention (with the aid of new counsel) of his claim.

In *Gonzalez* the Connecticut Court held that the state arraignments at issue in these cases were critical stages of the criminal proceedings. The Court did not make any decision as to whether a "bail determination hearing" was a critical stage because such a hearing was not at issue. The absence of any determination concerning "bail determination hearings" is explained by the fact that the Commissioner focused on the other end of the criminal process and argued that that administrative calculation after conviction and sentencing was not a critical stage.[14] The *Gonzalez* Court concluded that the Commissioner's argument that the postconviction calculation of presentence confinement credit is not a critical stage of the proceedings mischaracterized the issue to be decided, and his claim is therefore rejected.

This Court is "'a court of final review and not first view.' *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 ... (2001) (*per curiam*) (internal quotation marks omitted). Ordinarily the Court "do[es] not consider claims neither raised nor decided below[.]" *Clingman v. Beaver*, 544 U.S. 581 (2005) citing *Cooper Indus. v. Aviall Servs.*, 543 U.S. 157, 163-169 (2004); see *Zivotofsky v. Clinton*, ___ U.S. ___, 132 S. Ct. 1421 (2012). This is especially true where the newly raised argument is fact-dependant or "requires a factual determination better suited for resolution by the [lower c]ourt in the first instance." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, ___ U.S. ___, 130 S. Ct. 2433 (2010) (Sotomayor, J., dissenting); *see 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). The question whether an event is a critical stage depends upon the facts, that is, what exactly happens at

[14] The issue raised by the amicus with respect to early bail hearings prior to the appearance of counsel focuses even further toward the front end of criminal proceedings.

that stage. "[L]acking precise information, [the Court] might ordinarily decline to consider this claim." *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1 (U.S. 2009), citing *Clingman, supra*, 544 U.S. at 597-598. Proceedings differ from jurisdiction to jurisdiction. This is precisely why the *Hamilton* Court held that only some arraignments were a critical stage of the criminal proceedings.

This Court lacks analysis by the *Gonzalez* Court of the particular state procedures used in various bond-related events and procedures. A record of such procedures would include (1) the absence of any such hearings prior to the appointment of counsel, (2) the adversarial nature of bond determinations, (3) the harm resulting an accused's pretrial detention (such as the longer incarceration in these cases) above and beyond the impairment of his ability to assist in the preparation of the defense, and (4) how bond-related events undermine the fairness of the subsequent trial or other disposition, and (5) how bond-related events undermine the fairness and reliability of other dispositions by causing defendant's who dispute their guilt (and the prosecution's ability to obtain a guilty verdict) plead guilty nonetheless to gain release from that confinement where the other alternative is extended detention (sometimes longer than any authorized sentence) to await trial.

In the absence of such analysis the Court cannot meaningfully review a decision the lower court never made, and would be left in the untenable position of rendering what would, in essence, be an advisory opinion. "This factual uncertainty, unless somehow clarified, [sh]ould lead ... to [the] den[ial] certiorari in this case in order that this Court not render an advisory opinion[.] on what may be an important double jeopardy question." *Finch v. United States*, 433 U.S. 676, 678 (1977) (Rehnquist, J. dissenting from summary disposition of case).

Challenges to the lower court's decisions must be based upon claims presented to those courts. In contrast, a"prevailing party may ... 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'" *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). Even in affirming on alternative grounds "this Court will affirm on grounds that have "'not been raised below . . . "only in exceptional cases." *Id.* (citations omitted). Typically, however, even alternative grounds for affirmance are "forfeited" if they are not raised below. *Id.*, citing *Rita v. United States*, 551 U.S. 338, 360 (2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n. 4 (2002). Consideration of alternative grounds for affirmance is one thing. It is quite a different matter for the Court to consider newly raised grounds to reverse a lower Court because it did not answer a question it was never asked. That is precisely what the Commissioner seeks.

The failure to raise or fully brief any claims concerning "bail determination proceedings" resulted in the Connecticut Supreme Court rendering no decision concerning "bail determination proceedings." The fact that a newly raised issue was not fully briefed below is also grounds for this Court to refuse to review the claim. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). In the lower court the Commissioner provided no briefing on the issue of the sixth amendment right to counsel at 'bail determination proceedings.' Similarly in *Huertas* the Court did not hold that a "bail determination hearing" was a critical stage. The Connecticut Court held that Mr. Huertas' plea and sentencing proceedings case were critical stages of the criminal proceedings. The Commissioner claim otherwise in the Connecticut Supreme Court, and here does not dispute that a defendant has a sixth amendment right to counsel at the proceedings.

The fact that the Commissioner's new 'bail determination hearing' claims and his claim in the Connecticut Supreme Court both involve 'critical stage'

analysis in insufficient to make them the same claim. In the Connecticut Courts the Commissioner argued that the postsentence calculation of presentence confinement credits was not a critical stage because it (1) occurred after the conclusion of the prosecution, and did not potentially impair the fairness of the (nonexistent) criminal trial. He did not assert that "bail determination" proceedings, whenever they occur, are not 'critical stage' of the criminal proceedings.

The failure to present the 'bail determination proceedings to the Connecticut supreme Court is ample reason for this Court to deny the petition. The Court should do so.

II. THE PETITION RECYCLES ARGUMENTS REJECTED IN *LAFLER v. COOPER* AND *MISSOURI v. FRYE*

The Commissioner's argument that the Sixth Amendment serves only to protect the fairness of a criminal trial has repeatedly been rejected by this Courtrejected by this Court, most recently in *Lafler* and *Frye*. In *Lafler* the Court "decline[d] to hold either that the guarantee of effective assistance of counsel ... attaches only to matters affecting the determination of actual guilt." *Lafler*, 132 S.Ct. at 1388, quoting *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). Rather the Court rejected that proposed narrow, trial-focused, interpretation of the 'critical stages' at which counsel is guaranteed, *Lafler*, 132 S.Ct. at 1386, and held that the Sixth Amendment's

> protections are not designed simply to protect the trial, even though "counsel's absence in these stages may derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U. S. 218, 226... (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., *Halbert v. Michigan*, 545 U. S.

> 605... (2005); *Evitts v. Lucey*, 469 U. S. 387... (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U. S. 198, 203-204... (2001); *Mempa v. Rhay*, 389 U. S. 128... (1967), and capital cases, see *Wiggins v. Smith*, 539 U. S. 510, 538... (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover*, supra, at 203[.]
>
> *Lafler*, 132 S.Ct. at 1385-86.

In addition, the Court has already rejected two supporting arguments presented in the petition. The Court has rejected the claim that only pretrial events can be a critical stage of the criminal process, Petition at 3, in its holdings that a defendant has a Sixth Amendment right to counsel at sentencing and on appeal. *Lafler, supra.*

The Commissioner emphasizes that the trial court has the power to refuse the request to increase the bond (thereby requiring that the fiction of simultaneous liberty and incarceration continue). According to the Commissioner the existence of that discretion, and the fact that presentence confinement credit is a creature of statute, establishes that the Sixth Amendment is not implicated. This discretion argument assumes that unless a defendant is legally entitled to the benefit he claims to have been deprived, there is no sixth amendment right to counsel with respect to that benefit. The Court found the right to counsel on direct appeal analogous. There is no constitutional right to appeal, *see Evitts*, 469 U. S. 387, but "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Lafler*, 132 S. Ct., at 1387, quoting *Evitts*, 469 U.S., at 401. Thus the presence of discretion does not disqualify a proceeding in the criminal process from being a 'critical stage.' In addition, the Court has concluded that the existence of discretion is "beside the point" because the issue of prejudice from counsel's deficient

performance "simply does not arise" if no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge. *Lafler*, 132 S.Ct., at 1387.

The discretion argument is really an argument that there is no prejudice to support a claim of ineffective assistance under *Strickland*. *Lafler*, 132 S.Ct., at 1384, 1388; *Frye*, 132 S.Ct., at 1406, 1410. As such it is irrelevant to this case because the Commissioner has not presented any challenge to the prejudice determinations made below.

III. THE CONNECTICUT SUPREME COURT'S FACT-SPECIFIC DECISION BROKE NO NEW GROUND

If the Commissioner does not seek review of the Connecticut Supreme Court's actual holdings. If the Commissioner were seeking review of the actual decisions by Connecticut Supreme Court, those decisions would not warrant because they merely follows this Court's decisions and have not decided any new question of federal law. The conclusion that certain arraignments, as well as plea and sentencing proceedings, are critical stages of a criminal prosecution is not new. That principle was established in *Hamilton*, supra. The lower court examined the *Hamilton* criteria and properly concluded that the arraignment at issue was a 'critical stage.' *Gonzalez*, 308 Conn., at 481. Similarly it is well established that the court appearance at which a plea is entered is a 'critical stage,' just as sentencing is.

> The United States Supreme Court has already decided that the entry of a guilty plea is a critical stage in the proceedings. *Argersinger v. Hamlin*, 407 U.S. 25, 34, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). Further, in *Glover v. United States*, 531 U.S. 198, 203-204, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001), the United States Supreme Court held that there is a right to counsel in a sentencing hearing[.]
>
> *Huertas*, 308 Conn., at 520, n.3.

The claim that the decision below held that the Sixth Amendment created a right to counsel at 'bail determination proceedings,' and thereby created a conflict with *Gerstein v. Pugh*, *supra*, is nonsense. Saying that the Connecticut Supreme Court ruled on the right to counsel at bail determination hearings does not make it true.

The Connecticut Court correctly applied established standards in concluding that the arraignments at issue in these cases were critical stages of the prosecution. The Commissioner has not claimed otherwise. Nor does the Commissioner claim that the Connecticut Court was wrong to conclude that plea and sentencing are 'critical stages' of criminal proceedings.

This Court has frequently recognized a layperson's need for the assistance of counsel. In *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938), the Court recognized that the sixth amendment right to counsel

> embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.

An accused's need for counsel when facing the intricate procedures of the criminal process of potential for substantial prejudice is equally well established. See *United States v. Wade*, 388 U.S. 218 (1967); *Mempa v. Rhay* 389 U.S. 128 (1967); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) ("whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice"); *Evitts v. Lucey*, 469 U.S. 387, 394 n.6 (1985) (one aspect of counsel's role is "that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures").

The Connecticut Supreme Court identified and applied the relevant decisions of this Court to a fact-specific claim arising from a state statute. The actual decision of the *Gonzalez* Court (as opposed to the Commissioner's and the amicus' invention of a decision address 'bail determination hearings') is not broadly applicable to different procedures and proceedings arising in other jurisdictions because "[a]rraignment has differing consequences in the various jurisdictions[.]" *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). The Connecticut Supreme Court did not hold that *Lafler* extended the Sixth Amendment right to counsel to all arraignments or to any proceeding involving a potential loss of liberty. *Huertas* is similarly limited because it, like *Gonzalez*, arises from a specific state procedure that developed in response to a state court interpretation of a state stature.

IV. THERE IS NO RELEVANT CONFLICT OF AUTHORITY IN THE LOWER COURTS

The claimed conflict of authority cited by the Commissioner and the amicus is based upon its mistaken claim that the Connecticut Supreme Court decided something about bail determination hearings. It did not. It held that Mr. Gonzalez's arraignment, and Mr. Huertas' plea and sentencing were all 'critical stages' of the criminal proceedings. The cases citing as conflicting with the *Gonzalez* and *Huertas* decisions address the right to counsel with respect to setting bail. Bail hearings played no role in the Connecticut Court's decisions below and as a result none of the cited cases show a split of authority. The amicus conjures up a claim concerning a type of bail proceeding unknown in Connecticut, and wholly divorced from the question of credit for presentence confinement that was litigated below. The claimed conflict between *Gerstein v. Pugh*, 420 U.S. 103; 95 S. Ct. 854 (1975) and a right to counsel at bail proceedings held prior to the appointment of counsel is not presented here because the Connecticut Court did not hold there was

a sixth amendment right to counsel at bail proceedings and the bail hearings described by the *amicus* are foreign to Connecticut procedure. At best the purportedly conflicting cases show different factual situations arising from different procedures[15] in different jurisdictions all with respect to bail, which is not at issue here because it was not part of the decision below. Whatever the import of any variation or conflict in state bail procedures or decisions concerning those procedures, this case is not the vehicle in which to address them.

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[15] The Commissioner does cite some cases concerning initial appearances versus arraignments. Even these cases do not support a claim of conflicting decisions. For example, in Montana the "initial appearance is not a "critical stage" of the prosecution" but the arraignment is. *Montana v. Dieziger* 200 Mont. 267, 270 (1982). Both the decisions below and *Dieziger* applied that same analysis, asking whether there is potential substantial prejudice to the defendant. Similarly in Indiana, an initial hearing "unlike arraignment, is not a critical stage of the process requiring the presence of counsel." *Hayre v. Indiana*, 495 N.E.2d 550, 552 (1986); *Benner v. State*, 580 N.E.2d 210, 210-212 (Ind. 1991),

CONCLUSION

This case presents no important or compelling reason for granting the writ. In fact it does not even present this Court with an issue that was litigated below. The question the Commissioner asks the Court to decide (whether the Sixth Amendment guarantees counsel's assistance "at bail determination proceedings") is twice removed from the decision below. It is not what the Commissioner claimed below, and it is not what the Connecticut Court decided. The Court should deny the petition for certiorari.

Respectfully submitted,

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