No. 13-204

In The

Supreme Court Of The United States

JAMES E. DZURENDA,
CONNECTICUT COMMISSIONER OF CORRECTION,
Petitioner,

v.

ODILIO GONZALEZ and JOURDAN HUERTAS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

REPLY BRIEF

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QUESTION PRESENTED

Whether the Sixth Amendment guarantees counsel's assistance at bail determination proceedings.

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INTRODUCTION

The respondents' arguments against granting review in this case are unavailing.

First, the respondents argue that the question presented in the petition was neither presented to nor decided by the Connecticut Supreme Court.[1] To be sure, the issue presented in this petition – whether the Sixth Amendment right to counsel extends to bail determination proceedings – was the threshold issue insofar as, had the Connecticut Supreme Court concluded that such a right does not exist, it could not have reached the result that there had been ineffective assistance with respect to the claimed jail credits. Indeed, the bail determination issue is the precise issue upon which the Connecticut Supreme Court's decisions split.

Second, the respondents argue that the petition merely "recycles" matters already decided by this Court in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), and *Missouri v. Frye*, 132 S.Ct. 1399 (2012). This argument misses the mark, completely. The petition presents a question regarding the *reach* of the *Lafler* and *Frye* rulings – are they limited to pretrial plea negotiations because such negotiations resolve most criminal cases? *See Frye*, supra, 132 S.Ct. at 1407. Or, instead, do *Lafler* and *Frye* alter entirely the analysis related to the determination of whether *any*

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[1] The respondents become tangled in the formal title "Bail determination hearings. Bail determinations *are* made in Connecticut, although they may not be formally titled.

pretrial event is a "critical stage" at which the right to counsel's assistance is guaranteed?

Next, the respondents claim that the Connecticut court "merely follow[ed] this Court's decisions and have not decided any new question of federal law." Opp. at 18. In fact, this Court has never decided whether the right to counsel extends to bail determination. Outside of the plea negotiation context, the Court has never extended the right to counsel to an event, like bail determination, that does not hold the potential to derogate from the delivery of a fair trial. Even more than that, extending the Sixth Amendment to presentence detention matters is at odds with the Court's reasoning in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Finally, the respondents dispute that there is a lower court split of authority on the issue presented. This question, however, is based upon, and, hence, a reiteration of, the respondents' claim that the issue raised here was not litigated below.

Certiorari is warranted in this case because the Connecticut Supreme Court's decisions, which split on the issue of whether the Sixth Amendment extends to bail matters, were possible only if it is accepted that there is a right to counsel with respect to bail determination.

ARGUMENT

I. The question of whether the Sixth Amendment right to counsel's assistance extends to bail determination was central to the decisions below

The respondents argue that the Commissioner, in litigating below, did not raise a question about bail determination. Rather, they claim, the Commissioner "focused on the other end of the criminal process and argued that the administrative calculation after conviction and sentencing was not a critical stage." Opp. at 13. Additionally, although they reject the argument that a "critical stage" of the criminal proceedings has historically been defined as one that presents a risk to the fairness of the disposition, they assert that this Court lacks analysis from the Connecticut Supreme Court regarding state bond-related procedures in order to determine whether such risk exists. Opp. at 14.

In fact, whether the Sixth Amendment extends to bond determination was critical to the decisions below and, *a fortiori*, was indeed litigated. Moreover, further analysis of Connecticut bond procedures is not necessary to determine whether the Sixth Amendment extends to the Fourth Amendment bail determination that results in presentence confinement.

A. The issue raised in the petition was litigated below

In seeking review of the habeas court's decision in the Connecticut Appellate Court, the Commissioner raised the following issue in the *Huertas* case:

> Whether the habeas court erred in ruling that there is a constitutional right to effective assistance of counsel on *matters pertaining to pretrial release* ***or*** credit for presentence confinement?

Huertas v. Commissioner of Correction, Case No. AC32822, Brief of the Commissioner of Correction-Appellant to the Connecticut Appellate Court at i (emphasis added). In the *Gonzalez* case, the Commissioner raised the following issue:

> Whether the habeas court erred in ruling that the [respondent Gonzalez] was denied his right to effective assistance of counsel when his attorney *failed to request that his bond be raised* after he was arrested and held in lieu of bond in another case.

Gonzalez v. Commissioner of Correction, Case No. AC29686, Brief of the Commissioner of Correction-Appellant to the Connecticut Appellate Court at i (emphasis added) (hereinafter, "Gonzalez Appellate Brief"). Each of these issues clearly implicates bail determination (from which pretrial release flows)

rather than a mere calculation of jail credits, as the respondents claim.

In the Connecticut Appellate Court, the Commissioner argued, as he does here, that it was error to rule that respondent Gonzalez's counsel was ineffective "in failing to seek an increase in the bonds securing his pretrial release . . . ." *Gonzalez* Appellate Brief at 9. In the *Huertas* case, the Commissioner argued, as he does here, that the respondents were not conferred a right to Counsel "in matters pertaining to credit for presentence confinement" by *Lafler* and *Frye*. Then, as now, the Commissioner argued that those cases do not "suggest[ ] that the right to effective assistance extends to any pretrial procedure other than plea negotiation that does not, at least potentially, affect the defendant's right to a fair trial." *Huertas v. Commissioner of Correction*, Case No. SC18818, Supplemental Brief of the Commissioner of Correction-Appellant at 2.

It is true that the logical extension of these arguments under the facts of this case is that the Sixth Amendment does not secure the presentence confinement credits that would have flowed from a bond increase. Thus, it is also true that the question certified by the Connecticut Supreme Court, in granting discretionary review of the Connecticut Appellate Court's decision, was whether there exists a Sixth Amendment right "in matters pertaining to credit for presentence confinement." *Gonzalez v. Commissioner of Correction*, 298 Conn. 918, 4 A.3d

1226 (2010) (order granting discretionary review).[2] The respondents seek to divorce the "credit" from the "confinement," and assert that only the "credit" was at issue in the litigation below. But it is the simple reality that the credit is driven by the confinement which results from the bail determination.

Accordingly, the crux of the argument relates to the attorney's action related to the bond – or bail – determination. An error by counsel with respect to that determination is a necessary predicate to a cognizable claim that ineffective assistance deprived a defendant of lost credit days. Hence, underlying the Connecticut Supreme Court's decision that these respondents should recover the lost credit days is an acceptance of the premise that they were entitled to counsel's assistance with respect to bail.

The Connecticut Supreme Court's decisions reflect this reality. The majority of the Connecticut Supreme Court stated that:

> [T]he question in the present case is whether the arraignment *during which the petitioner's counsel failed to request that bond . . . be increased* in order to maximize the petitioner's presentence confinement credit was a "critical stage.

Pet. Appx. A-11. The majority concluded that such a request – which the majority stated was "the request

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[2] The Connecticut Supreme Court later ordered the parties to file supplemental briefs regarding whether *Lafler* and *Frye* conferred such a right.

at issue in the present case" – had to be made at arraignment or forever be forfeited. Pet. Appx. A-17.

To be sure, the majority in respondent Gonzalez's case held that counsel's assistance was guaranteed with regard to the bail issue which was determined at arraignment, which the court reasoned is a critical stage. The majority then reasoned that, "because [petitioner Gonzalez's] counsel failed to timely request that [his] bond . . . be raised, [he] was required to spend more time in jail than otherwise would have been required." This led the Connecticut court "to the inescapable conclusion that the arraignment in this matter was a critical stage of the proceedings." Pet. Appx. A-19. Thus, the finding that the arraignment was a critical stage rested in the most relevant way upon the determination that counsel failed in his advocacy with regard to bail at that arraignment.

The centrality of the bail determination to the Connecticut Supreme Court's decisions is also evidenced in the split of opinion. Justice Palmer, in his concurring opinion, stated that: *"[T]he question presented by this appeal is whether a bail hearing is a critical stage of a criminal prosecution."* Pet. Appx. A-34. In dissent, Justice Zarella reasoned that the "bail determination" in this case could not be transformed into a Sixth Amendment "critical stage" because it was made concurrent with the arraignment. Pet. Appx. A-41. Accordingly, Justice Zarella would have reversed the habeas court decision granting relief (the credit days) to the respondents here. That relief is foreclosed if there is no right to counsel with regard to bail determinations.

It is true, as the petitioners argue, that the proceeding in each of their cases at which counsel was faulted for not seeking a bond increase was not called a "bond determination hearing." The Commissioner has not suggested otherwise. In fact, in his petition, the Commissioner was clear that the proceedings at which the events in issue occurred were an arraignment (in respondent Gonzalez's case), and a plea hearing (in respondent Huertas's case). *See* Petition at 14 n. 3. But just as assuredly, it was at these proceedings that bail determinations *were* made. This case asks whether the bail determination is a critical stage regardless of whether it accompanies other events.

In short, contrary to the respondents' assertion, the arguments made here were made to the Connecticut Supreme Court.

B. No further analysis of state bond procedures is necessary for this Court to review this case

Next, the respondents argue that there is insufficient analysis in the Connecticut Supreme Courts' decision regarding state-specific bond procedures to permit this Court to review this case.

The respondents have argued that the Sixth Amendment right to counsel is implicated here because it extends beyond matters "affecting the determination of actual guilt," Opp. at 16. Thus, the respondents claim it does not matter whether the bail determination affects the fairness of the trial. Opp. at 8-9, 16. Yet, they argue in the alternative that the Court should not review this case because it

lacks information about state bond procedures necessary to determine whether those events risk a fair determination of guilt or otherwise impede the fairness of the trial or other disposition. Opp. at 14 (citing *Hamilton v. Alabama*, 368 U.S. 52 (1961)). "This is precisely why," they claim, "the *Hamilton* Court held that only some arraignments were a critical stage of the criminal proceedings."

In fact, it is the *Commissioner's* point that *Hamilton* held to be critical stages only those arraignments at which there is risk of harm to the fairness of a subsequent trial. The Commissioner's argument is that bail determination, posing no risk to trial fairness, cannot by definition be a "critical stage." At least, that is, insofar as the definition of "critical stage" existed prior to *Lafler* and *Frye* and, for that reason, this case asks the extent to which *Lafler* and *Frye* have changed that definition.

The respondents argue that the Connecticut court did not provide sufficient analysis from which to determine whether bail proceedings in Connecticut can affect a fair determination on the merits. The respondents themselves do not explain how Connecticut bail procedures might derogate from fair criminal dispositions and determinations of guilt. Nor do they delineate any *specific* information that has been left out of the Connecticut court's analyses in *these* cases that would otherwise show the bail procedures here came with such risks. Bail determination, as this Court recognized in *Gerstein*, relates only to presentence confinement and, thus, does not implicate the Sixth Amendment specifically because it does not pose a risk to fair disposition. There is no additional information specific to the

determinations made here which is necessary for this Court to decide whether the Sixth Amendment right to counsel's assistance extends to bail determinations.

II. The petition does not "recycle" matters resolved in *Lafler* and *Frye*

The respondents claim that the petition merely "recycles arguments rejected in *Lafler* . . . and *Frye* . . . ." Opp at 16. In making this argument, the respondents mischaracterize the arguments made in support of the petition for certiorari.

The petitioners aver that the Court has already rejected the Commissioner's arguments when it stated, in *Lafler*, that the Sixth Amendment's protections extend beyond trial "to pretrial critical stages that are part of the whole course of a criminal proceeding." *Id.* (quoting *Lafler*, supra, 132 S.Ct. at 1385). The Commissioner does not dispute that the right to counsel exists at all pretrial critical stages. The Commissioner's query, however, is whether bail determination constitutes such a "pretrial critical stage." As such, *Lafler* and *Frye* do not provide an answer.

The Commissioner's argument does not involve a rehash of the question resolved in *Lafler* and *Frye* – that is, whether the Sixth Amendment Counsel Clause is implicated when a criminal defendant makes a decision regarding a plea offer regardless whether he thereafter receives a constitutionally sound trial. The question presented here does, however, inquire as to the *reach* of *Lafler*

and *Frye*. Specifically, have *Lafler* and *Frye* altered the analysis for determining whether a stage is "critical," for Sixth Amendment purposes, *outside* the plea bargaining context?

There is a sound basis for this question. In *Frye*, the Court acknowledged the force of the State's arguments against recognition of Sixth Amendment protections over plea negotiations that ultimately are followed by an otherwise fair disposition. *Frye*, supra, 132 S.Ct. at 1407. Nonetheless, the Court went on to reject the State's arguments because plea bargains have become central to criminal justice administration.

This recognition of plea bargaining's centrality, however, does not provide reason to conclude that the Court has altered the "critical stage" calculus in all other contexts. This is especially evident because the Court, in *Lafler* and *Frye*, did not set forth a new definition of "critical stage," substituting its previous definition as an event that holds potential to derogate from the delivery of a fair trial. *See United States v. Wade*, 388 U.S. 218, 227-28 (1967) (certain procedures not critical stages because "minimal risk that his counsel's absence at such stages might derogate from [the defendant's] right to a fair trial."). Thus, it seems logical to conclude that when the Court held plea negotiations to be critical stages because of their centrality to the criminal justice system, it was an anomaly limited on that basis alone solely to the plea bargaining context. In sum, the Commissioner does not "recycle" any argument regarding the role of counsel in plea negotiations, as the respondents suggest.

Nor does the Commissioner argue that "the presence of discretion . . . disqualif[ies] a proceeding in the criminal process from being a 'critical stage.'" Opp. at 17. The Commissioner points out that any credit resulting from presentence detention following a bail determination is not itself of constitutional dimension. Petition at 19.

The Commissioner's argument is straightforward. Outside of the plea negotiation context involved in *Lafler* and *Frye*, in which the Court held that plea negotiation is a "critical stage" even if followed by a fair trial because plea bargaining "is the criminal justice system," *Frye*, supra, 132 S.Ct. at 1407, the Court has never held a pretrial event to be a "critical stage" unless "the presence of counsel [at that event] is necessary to preserve the defendant's right to a fair trial . . . ." *United States v. Wade*, 388 U.S. 218 (1967). Indeed, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court clearly stated that matters addressing only pretrial confinement do not implicate the Sixth Amendment.

Thus, the only question raised here regarding *Lafler* and *Frye* is whether they have, *sub silentio*, overruled *Gerstein* and a host of other precedent by holding more universally that pretrial events need not risk derogating a fair trial in order for the counsel guarantee to be implicated.

III. The respondents' remaining arguments are inapposite

The respondents argue that the Connecticut Court merely followed precedent in finding the arraignment and plea to be critical. Opp. at 18.

The Commissioner has not argued that the Connecticut Supreme Court erred in determining the Connecticut arraignment to be critical (in respondent Gonzalez's case), or in inferring that the plea entry was critical (in respondent Huertas's case). The Commissioner has argued that the bail determination, a separate and distinct matter regardless of when it is made, is not critical for Sixth Amendment purposes. The respondents' argument that the Connecticut court adhered to this Court's precedents in deciding that an arraignment and a plea are "critical" is thus inapposite.[3]

Additionally, the respondents' complaint that amicus improperly focuses on "a type of bail proceeding unknown in Connecticut," Opp. at 20, is similarly misguided. The Connecticut Supreme Court reasoned that arraignment in respondent Gonzalez's case was a critical stage because it was then that counsel failed to garner favorable bond, and he "was required to spend more time in jail than otherwise would have been required." Pet. Appx. A-19. If that is the case, then *any* event at which bond is established resulting in detention – including the type discussed by amicus – becomes critical. The

[3] For the same reason, respondents' contention that there is no conflict of authority is similarly inapposite.

issue presented is thus not the Connecticut-specific quandary the respondents seek to portray.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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