No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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, both of whom, at the time this matter was initiated, were inmates at a Connecticut correctional facility.

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The opinion of the Connecticut Supreme Court in *Huertas v. Commissioner*, included in the separate appendix at A-99 (majority), A-106 (concurrence) and A-107 (dissent), is reported at 308 Conn. 516 (2013). The opinion of the Connecticut Superior Court, A-110, is not reported but is available at 2010 WL 4277565.

JURISDICTION

The petitioner, Leo C. Arnone, Commissioner of Correction in Connecticut, invokes this Court's jurisdiction to grant the petition for a Writ of Certiorari to the Connecticut Supreme Court on the basis of 28 U.S.C. § 1257. The Connecticut Supreme Court issued its decisions, which constitute its judgments, on May 14, 2013. Hence, the petition is timely pursuant to Supreme Court Rules 13.1. Additionally, the petition is made pursuant to Rule 12.4, insofar as it seeks review of two judgments of the Connecticut Supreme Court involving identical questions.

CONSTITUTIONAL PROVISION INVOLVED

The question presented implicates the Sixth Amendment to the United States Constitution, which states:

AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of an accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defence.

INTRODUCTION

This is an appeal from the Connecticut Supreme Court's decision in two cases involving identical questions, *Gonzalez v. Commissioner of Correction*, 308 Conn 463, __ A.3d __ (2013), and *Huertas v. Commissioner of Correction*, 308 Conn. 516, __ A.3d __ (2013). In each case, a divided court held that the respondents' attorneys failed to provide the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. The attorneys provided "ineffective assistance," according to the Connecticut Supreme Court's ruling, because, upon the respondents' arrests, they failed to seek a bond increase with respect to earlier, unrelated arrests for which the respondents had posted bond and had been released. Because the respondents were unable to post bond in the latest arrests, credit for their presentence detention was applied to the sentences ultimately received in those cases. However, the failure to obtain a bond increase with respect to the *earlier* arrests meant that, having posted bond in those cases, the presentence detention was not attributable to the earlier cases. Therefore, the respondents received no credit toward the sentences in *those* cases.

The sole issue raised here is whether the Sixth Amendment guarantees counsel's assistance with respect to bail determination proceedings. The Court's precedents have held that the right to counsel is guaranteed at "critical stages" of criminal proceedings. The Court's jurisprudence establishes that, in addition to the trial itself, "critical" *pretrial* events are those that hold potential to impede the

trial and the reliability of its outcome. The Connecticut Supreme Court acknowledged this historical Sixth Amendment application, but reasoned that it was annulled, at least to the extent relevant here, by the Court's decisions in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), and *Missouri v. Frye*, 132 S.Ct. 1399 (2012), which held that plea bargaining is a "critical stage" of criminal proceedings even if there is no infirmity in subsequent trial proceedings.

The question whether the Sixth Amendment guarantees counsel's assistance with respect to bail determinations is an important one, because the trial-consequences test provides a reasonable means of predicting when the Constitution mandates the presence of – or, indeed, the appointment of – counsel at bail determination proceedings. Moreover, there is a split among courts as to whether the Constitution guarantees counsel's assistance with respect to matters pertaining to bail. Finally, these cases provide an ideal vehicle through which to establish whether, in the wake of *Lafler* and *Frye*, a substantive right to counsel exists at *each event* following attachment of the right, regardless of its potential effect on the trial process. For these reasons, certiorari is warranted.

STATEMENT OF THE CASE

I. Relevant Background

Connecticut law, like that in other states, provides that a person who is convicted of and sentenced for a crime receive credit for the time he remained in custody prior to being sentenced. Such

credit is available to that person if he was unable to post bail and obtain release during his pretrial and presentence period. CONN. GEN. STAT. § 18-98d.[1] When such a person is released pending sentencing, either because he posted bail or because a court accepted his promise to appear at future proceedings, there is, of course, no credit to be given. Accordingly, the "presentence confinement credit" is available only if a person remained incarcerated before his sentencing solely because he was unable to post bail.

This case arises from the situation in which a person is able to post bail and, hence, can expect no presentence confinement credit, but is again arrested in an unrelated case during the interim period and is unable to post bail with respect to the second arrest. If that person is ultimately convicted and sentenced in both cases, he will receive presentence confinement credit only with respect to the second case because that is the case in which he was unable to post bail.

To obtain presentence confinement credits in *both* cases, defendants may ask the trial court, upon the second arrest, to increase the bond amount in the first case, such that it can be said that those defendants were unable to post bail with respect to either arrest. See, generally, *Gonzales*, supra, 308 Conn. 463; see also, *Harris v. Commissioner of Correction*, 271 Conn. 808, 860 A.2d 715 (2004). Such defendants are not entitled to have the trial court grant a bond increase request. *Gonzalez*,

[1] The Court construed an equivalent federal statute (18 U.S.C. § 3585(b)) in *United States v. Wilson*, 503 U.S. 329 (1992).

supra, 308 Conn. at 497 (*Zarella, J.*, dissenting). But, such a request could result in the receipt of presentence confinement credits in both cases if the court, in its discretion, grants the request to increase the bond in the first case.

Both respondents – Odilio Gonzalez and Jourdan Huertas – were in this situation. Huertas had posted bail upon his first arrest, but was arrested a second time and unable to post bail. For Gonzalez, having posted bail upon two earlier arrests, it was his third arrest for which he was unable to post bail. Neither of their attorneys, upon the latest arrests, made a request to the trial court to increase the bond related to their earlier arrests. Had such requests been made – and had they been granted by the court – the respondents would have received seventy-three (73) and seventeen (17) days of presentence confinement credit, respectively, toward the sentences imposed in the earlier cases against each.

Each respondent filed a petition for post-conviction habeas corpus relief, claiming a violation of the Sixth Amendment's Counsel Clause. They asked to be given the presentence confinement credits that they claimed were lost as a result of constitutionally ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, they claimed that their attorneys performed deficiently in failing to seek a bond increase, and that they were prejudiced by lost credit days.

A trial on each habeas petition was heard by a division of the Connecticut Superior Court specially

designated to hear and decide habeas corpus claims. See CONN. GEN. STAT. § 52-466(a)(2). The habeas court granted the petitions in each case, and the petitioner here, the Connecticut Commissioner of Correction (hereinafter, "Commissioner"), appealed.

II. Proceedings in the Connecticut Appellate Court

The Commissioner appealed the habeas court's ruling in the *Gonzalez* case to the Connecticut Appellate Court. The Commissioner argued that the Sixth Amendment guarantee of effective assistance of counsel does not extend to matters pertaining to presentence confinement credit. The Commissioner argued that the administrative calculation of presentence credits, matters of legislative grace rather than constitutional entitlement, are ancillary to the adversarial process that results in judgment or acquittal. Accordingly, given the non-adversarial nature of jail credit determinations, the Commissioner argued, such determinations are not "critical stages" of the proceedings, as this Court had defined that term. Because the Court has held that the Sixth Amendment guarantees the assistance of counsel only at "critical stages," the Commissioner argued that counsel's assistance was not guaranteed with respect to the determination of presentence credits and, thus, no constitutional violation occurred. Brief of Respondent-Appellant (Connecticut Appellate Court).

The Appellate Court, in a split decision, affirmed the finding of ineffective assistance of counsel. *Gonzalez v. Commissioner of Correction*,

122 Conn. App. 705, 1 A.3d 170 (2010). The Appellate Court deemed misguided the Commissioner's "critical stage" focus on whether counsel's assistance was guaranteed at the event at which presentence credits would have been secured. *Id.* at 710-11. In the Appellate Court's view, Gonzalez had a right to counsel at that event (his arraignment) because the right had "attached" by that time. The Appellate Court thus went on to find a violation under *Strickland*. A-67 – A-70.[2]

Judge Schaller dissented. Citing Justice Alito's concurring opinion in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), Judge Schaller agreed with the Commissioner that the proper inquiry is whether a matter pertaining to presentence confinement is a critical stage, because the mere *attachment* of the right to counsel does not mean that there is a substantive right to counsel at a particular event. *Gonzalez*, supra, 122 Conn. App. at 722-23 (*Schaller, J.*, dissenting (citing *Rothgery* supra, 554 U.S. at 214 (*Alito, J.*, concurring))).

Judge Schaller set forth a detailed analysis of this Court's then-extant "critical stage" cases. Judge Schaller concluded that a "critical stage," as this Court had defined one, "depends, not on timing, but on the nature of the matter – in particular, whether it involves protecting the defendant's vital interests by way of defense in the course of the adversarial confrontation between the defendant and

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[2] A concurring judge read respondent's arguments as misguidedly focusing on the post-trial sentence calculation and factual issues not developed below. See *Gonzalez*, supra, 122 Conn. App. at 717-20 (*Bishop, J.*, concurring). A-79 – A-80.

the government." *Gonzalez*, supra, 122 Conn. App. at 724-25 (*Schaller, J.*, dissenting). Because the determination of presentence credits is not part of the adversarial process that results in judgment or acquittal, Judge Schaller agreed with the Commissioner that it is not a "critical stage" of the proceeding and, thus, a right-to-counsel claim cannot stand. A-83 – A-88.

III. This Court's Decisions in *Lafler* and *Frye*

Following the Connecticut Appellate Court's affirmance of the habeas court's ruling in *Gonzalez*, the Commissioner sought – and was granted – discretionary review by the Connecticut Supreme Court. In the meantime, Huertas's habeas petition was granted, and the Connecticut Supreme Court removed that case to itself as well. *Huertas,* supra, 308 Conn. at 516 n. 1. Hence, the two cases went forth on the same parallel.

Prior to argument in the Connecticut Supreme Court, however, this Court released its decisions in *Lafler* and *Frye*. Those cases involved claims of ineffective assistance of counsel where counsel's error leads to the rejection of favorable plea disposition. Up to that time, the Court had defined a "critical stage" of a criminal proceeding as any event – whether at trial or before trial – that potentially derogates from the delivery of a fair trial leading to a reliable judgment. See, e.g., *United States v. Wade*, 388 U.S. 218, 227-28 (1967) (explaining that certain procedures "are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from [the defendant's] right to a fair trial."); *Id.* at 239 (stage may become "non-

critical" if error at that stage is cured at trial and, thus, trial is nonetheless fair).

In *Lafler* and *Frye*, however, the Court held plea negotiations to be a "critical stage" of the criminal proceeding, and that improvident plea rejection can amount to a constitutional violation even if a fair trial follows. The Court reasoned that plea bargaining is a "critical stage" because of its prevalence in the criminal justice system – leading to the vast majority of dispositions in criminal cases. *Frye*, supra, 132 S.Ct. at 1407 ("In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant").

IV. Proceedings in the Connecticut Supreme Court

In the Connecticut Supreme Court, the Commissioner maintained his argument that proceedings pertaining to presentence confinement credits are not "critical stages" and, hence, do not implicate the Sixth Amendment's Counsel Clause. The Commissioner acknowledged that *Lafler* and *Frye* were not consistent with his reading of this Court's earlier "critical stage" cases focusing on whether a particular event had the potential to encumber the trial process. However, the Commissioner argued that *Lafler* and *Frye* did not alter the "critical stage" definition that existed to that point. Rather, the Commissioner argued, *Lafler* and *Frye* established plea negotiations as a "critical stage" by edict, because they uniquely supplant the trial process. Other events, the Commissioner argued, were nonetheless still subject to the Court's

previous definition of "critical stage" – that is, does the event have the potential to derogate from a fair trial and reliable judgment? Brief of Respondent-Appellant; Supplemental Brief of the Commissioner of Correction-Appellant (Connecticut Supreme Court).

The Connecticut Supreme Court affirmed the Appellate Court's ruling upholding the habeas court's grant of relief. Unlike the Connecticut Appellate Court, however, the Connecticut Supreme Court did not reject "critical stage" analysis. The Connecticut Supreme Court acknowledged that this Court's previous cases had defined a "critical stage" of a criminal proceeding as one delimited by the Sixth Amendment's purpose to ensure a fair trial. *Gonzalez*, supra, 308 Conn. at 475-76. (citing *Strickland*, supra, 466 U.S. at 684, and *Maine v. Moulton*, 474 U.S. 159, 170 (1985)). Consistent with this definition, the court also acknowledged that this Court had previously held that only *some* arraignments are critical stages – specifically, those structured such that there exists the potential for arraignment events to derogate from the delivery of a fair trial. *Gonzalez*, supra, at 479 (citing *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961)).

However, the Connecticut court viewed *Lafler* and *Frye* as superseding this Court's earlier definition of "critical stage." More specifically, the court noted that, in contrast to *Hamilton's* rule that only those arraignments with trial consequences constitute "critical stages," *Frye* states that "[c]ritical stages include arraignments . . . ." The Connecticut court thus reasoned that *Lafler* and *Frye* unhitched the "critical stage" definition from its fair

trial/reliable judgment mooring, and held that all arraignments are critical stages without regard to whether arraignment events have the potential to affect trial. *Gonzalez*, supra, 308 Conn. at 479 ("it seems that more recent Supreme Court cases have not limited only certain arraignments to be 'critical stages.'"). The Connecticut court further reasoned, though, that an arraignment in Connecticut bears the same indicia that would have made it a "critical stage" under *Hamilton* in any event. *Id.* at 480. Therefore, because Gonzalez's counsel failed to seek a bond increase at the arraignment – a "critical stage" – related to his last arrest, he was deprived of counsel's effective assistance at that stage. A-7 – A-19.

Justice Palmer concurred in the decision insofar as it held that respondent Gonzalez was deprived of the effective assistance of counsel. However, Justice Palmer disagreed with the majority's focus on the arraignment as a critical stage. Justice Palmer's focus was on whether a *bail hearing* is a critical stage. Justice Palmer noted that the arraignment "may or may not be a convenient time for counsel to seek a bond modification," and that it is the bail hearing "at which bond may be modified." *Gonzalez*, supra, 308 Conn. at 491. Justice Palmer concluded, in any event, that a bail hearing is a critical stage, but noted that "the issue is not entirely free from doubt." *Id.* Accordingly, Justice Palmer agreed with the majority that Gonzalez was deprived of effective assistance at that stage. A-34 – A-38.

Justice Zarella dissented, stating:

> The majority opinion effectively broadens the scope of the Sixth Amendment beyond what is recognized under either the language of the amendment or the jurisprudence of the United States Supreme Court, which has applied the right to counsel when an accused confronts the possibility of prejudice in the adversarial process.

Gonzalez, supra, 308 Conn at 494 (*Zarella, J.*, dissenting).

Like Justice Palmer, Justice Zarella found the majority's focus on arraignment to be misplaced. The proper focus, according to Justice Zarella, is not the arraignment for the latest arrest, but the bail determination proceeding related to the prior arrests. "Bail determinations," Justice Zarella wrote, "although often addressed concurrently with arraignments, also can be addressed at other times, and the fact that an arraignment is a critical stage of a prosecution cannot transform an ancillary proceeding, such as a bail determination, into a critical stage simply by association." *Id.* at 496.

Unlike Justice Palmer, Justice Zarella concluded that a bail proceeding is *not* a critical stage for Sixth Amendment right-to-counsel purposes. This is so, according to Justice Zarella's opinion, because the bail proceedings attendant to prior arrests are unrelated to the fairness of the adversary process that the right to counsel is intended to guard.

Justice Zarella acknowledged that *Lafler* and *Frye* expanded the scope of the Sixth Amendment right to counsel. He noted, however, that this Court justified that expansion by observing that plea bargaining has become "a quintessential trial substitute." *Gonzalez*, supra, 308 Conn. at 507 (*Zarella, J.*, dissenting). Thus, a fair reading of Justice Zarella's dissent indicates that, like the Commissioner, his view is that *Lafler* and *Frye* – though they expand the *scope* of the Sixth Amendment right – do not expand the *definition* of "critical stage" by eliminating the trial-consequences test applied to pretrial events. Rather, *Lafler* and *Frye* proclaimed plea bargaining to be a parallel "critical stage" – although falling outside the historical definition – because it has essentially supplanted trial in the criminal justice system. See *Frye*, supra, 132 S.Ct. at 1407 (plea bargaining "*is* the criminal justice system"). A-39 – A-58.

The Connecticut Supreme Court found the *Huertas* case indistinguishable from *Gonzalez*, and upheld the habeas court's decision in that case, as well. *Huertas*, supra, 308 Conn. at 519.[3] A-99. For the same reasons set forth in their *Gonzalez*

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[3] The Connecticut Supreme Court focused on the arraignment in *Gonzalez*, concluding that arraignment is a "critical stage." Gonzalez claimed his counsel should have sought bond increase at his arraignment. In contrast, Huertas claimed his attorney should have sought bond increase upon his guilty plea. See *Huertas*, 308 Conn. at 517 n.2. This petition asks whether counsel's assistance is guaranteed in matters pertaining to bail, regardless of when they arise. Accordingly, the difference in the cases is inconsequential.

opinions, Justice Palmer concurred (A-106), and Justice Zarella dissented (A-107).

REASONS FOR GRANTING THE PETITION

This case asks whether there is a Sixth Amendment right to the assistance of counsel with respect to bail matters, without regard to whether those matters arise at arraignment or at other times. This petition should be granted because the Connecticut Supreme Court has decided a question important to the administration of criminal justice which has not been, but should be, settled by this Court. In addition, as Justice Zarella set forth in his dissenting opinions, there is a split among courts regarding whether a bail hearing is a "critical stage" of criminal proceedings at which the right to counsel is guaranteed.

I. The Question Whether Bail Determination Proceedings are "Critical Stages" at Which Counsel's Assistance is Guaranteed Ought to be Settled by this Court

It is important to resolve the question whether the Sixth Amendment guarantees counsel with respect to bail determination proceedings. This is so because the answer is critical to determining whether there is "an obligation to appoint an attorney to represent [a defendant] within some specified period after his magistration," *Rothgery*, supra, 554 U.S. at 216 (*Alito, J.*, concurring), and, if so, whether bail determination is an event that triggers that obligation.

The attachment of the Sixth Amendment right to counsel marks the beginning of the adversarial process in criminal proceedings. *Rothgery,* supra, 554 U.S. at 211-12. The attachment of the right to counsel during the adversarial process, however, is distinct from the substantive right to counsel during that time. *Id.* at 212. The Court has said that, once the right to counsel has attached, the Sixth Amendment's Counsel Clause guarantees to a defendant the assistance of counsel only at "critical stages." *Moulton*, supra, 474 U.S. at 170.

As the Connecticut Supreme Court noted, in determining whether pre-trial events are "critical stages," this Court has historically defined a critical stage as any event at which there exists the potential to impair the trial's fairness and the reliability of its outcome. *United States v. Wade*, 388 U.S. 218 (1967) (Court "scrutinize[s] any pretrial confrontation . . . to determine whether the presence of counsel is necessary to preserve the defendant's right to a fair trial . . . .").

Thus, "critical stages," the Court said in *Wade*, are those events "where counsel's absence might derogate from the accused's right to a fair trial." *Wade*, supra, 388 U.S. at 226. Such events are "trial-type confrontations" between the accused and the prosecutor, which may affect the defendant's ability to "obtain a *fair decision on the merits*" of the criminal case against him. *United States v. Gouveia*, 467 U.S. 180, 188-90 (1984) (emphasis added) (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)); *Evitts v. Lucey*, 469 U.S. 387, 395 (1985). Bail determination proceedings, standing alone, do not implicate the Sixth Amendment's counsel

guarantee because they are not adversarial proceedings critical to a fair decision on the merits.

A. "Any amount of [additional] jail time has Sixth Amendment significance"

At the outset, the Commissioner recognizes that respondents claim a Sixth Amendment violation because counsels' errors resulted in additional days of detention. The Court has said that "any amount of additional jail time has Sixth Amendment significance." *Lafler*, supra, 132 S.Ct. at 1386. In so stating, though, the Court was concerned that punitive sentences meted out upon conviction would be more severe for those defendants standing trial than those pleading guilty. *Id.* ("defendant who goes to trial instead of taking a more favorable plea may be prejudiced from . . . the imposition of a more severe sentence."). Put another way, the additional jail time which the Court has said has Sixth Amendment significance refers to longer *sentences* emanating from judgments in criminal cases.

The pre-sentence period of detention at issue in bail proceedings, however, does not emanate from the adversarial process culminating in judgment and sentence. See *Gonzalez*, supra, 308 Conn. at 507 (*Zarella, J.,* dissenting) ("the pretrial event at issue in the present case could have no bearing on the length of the sentence imposed."). Indeed, ultimately, there may be no finding of guilt, or there may be imposed some punishment other than incarceration. Hence, there may be no sentence of incarceration against which to credit pre-trial detention. During this period before trial and sentencing (assuming conviction), it is a

constitutionally sound probable cause determination – rather than judgment – that the Court has said justifies detention to ensure a defendant's appearance at trial. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

The Fourth Amendment probable cause determination, *Gerstein* made clear, is not "adversarial" and, hence, not a "critical stage" of the criminal proceedings implicating the Sixth Amendment's right to counsel, *specifically because it addresses only pretrial confinement*. *Id.* at 123 ("The Fourth Amendment probable cause determination is addressed only to pretrial custody"). In fact, even though detention during this period could have *some* impact on trial, the Court reasoned in *Gerstein* that it "does not present the high probability of substantial harm [to the fairness of the trial] identified as controlling in *Wade* and *Coleman* [v. Alabama, 399 U.S. 1 (1970)]," and, hence, the probable cause determination resulting in detention is not a "critical stage" of the proceedings.

A defendant, of course, may be admitted to bail in lieu of detention, and then to the degree that it preserves the interest in ensuring that the defendant will appear before the Court. See *Reynolds v. United States*, 80 S.Ct. 30, 32 (1959) ("The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court."). But, that interest is generally weighed against other factors to ensure a *fair* bail and the ultimate bail determination is typically subject to review. See *Carlisle v. Landon*, 73 S.Ct. 1179, 1182 (1953).

In addition, it is true that the issue here does not arise from the assertion of a right to bail or bail in a particular amount. The issue here relates to the application of presentence detention as a credit toward the ultimate sentence should conviction ensue. Such accreditation, though, is a matter of the legislative prerogative and not a constitutional mandate. See, e.g., *Gonzalez*, supra, 308 Conn. at 510 (*Zarella, J.*, dissenting); *Patino v. South Dakota*, 851 F.2d 1118, 1120 (8th Cir. 1988) ("Application of presentence jail time to a subsequent sentence is legislative grace and not a constitutional guarantee"); *Lewis v. Cardwell*, 609 F.2d 926, 928 (9th Cir. 1979) (no constitutionally cognizable claim regarding application of presentence credits). Accordingly, this Court's jurisprudence appears to distinguish claims related to the duration of *sentences* (as in *Lafler* and *Frye*) from claims arising from pre-conviction detention. See, e.g., *Murphy v. Hunt*, 455 U.S. 478 (1982) (emphasis in original) ("Hunt's claim to *pretrial* bail was moot once he was convicted").[4]

In any event, *Gerstein* counsels that, whether detained or admitted to bail, matters related to pretrial detention and, *a fortiori*, matters related to bail, are not "critical stages" of the adversarial process at which the Sixth Amendment's right to counsel is implicated.

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[4] Under the facts of these cases, any accreditation does not go to the sentence related to the case in which there has been a claim of ineffective assistance of counsel. The attorneys here are faulted for failing to seek bond increase with respect to earlier, *unrelated* arrests.

B. Bond determination proceedings, standing alone, are not "critical stages" at which the Sixth Amendment is implicated because they are not adversarial proceedings that have potential to affect the trial process.

The Court's traditional "critical stage" analysis would exclude bail determination proceedings from those stages at which the right to counsel is guaranteed. This is so because such events do not have the potential to affect the outcome of trial.

Early on, the Court found to exist a "critical stage," at which counsel's assistance is guaranteed, even *before* arraignment (i.e., even *before* the attachment of the right to counsel), where counsel's absence affected the defense at trial. *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964), citing *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (emphasis added) (extending Sixth Amendment guarantee to pre-indictment interrogation because "[w]hat happened at this interrogation could certainly 'affect the whole trial'").[5]

Indeed, focusing on trial consequences, the Court has reasoned that efforts to cure at trial any defects that occurred at critical pre-trial stages could render those stages "non-critical" and, thus, counsel's absence at those pre-trial stages inconsequential. *Wade*, supra, 388 U.S. at 239

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[5] The Court later narrowed the *Escobedo* holding. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Nonetheless, the rationale for determining the pre-arraignment stage to be critical remained unchanged.

(emphasis added) (efforts to "eliminate the risks . . . at trial may also *remove the basis for regarding the stage as 'critical'*."); *Ash*, supra, 413 U.S. at 316 (emphasis added) ("the opportunity to cure defects at trial causes the confrontation to *cease to be 'critical'*.").

The opposite is also true. An event that is normally "non-critical" can become a critical stage, implicating the Counsel Clause, if it is found to have trial consequences. In *White v. Maryland*, 373 U.S. 59 (1963), the Court reasoned that Maryland's arraignment procedures may normally hold no trial consequences, but, nonetheless, *became critical* under the facts of that case. That was so because the *White* defendant pleaded guilty at the Maryland arraignment, and that plea was used against him *at* a subsequent trial, after he successfully withdrew the earlier plea. *White*, 373 U.S. at 60.

Accordingly, equivalent procedures may, or may not, be "critical stages," depending upon whether they have potential trial consequences. The post-indictment identification procedure (a line-up) in *Wade*, for example, was a critical stage because of its "grave potential for prejudice . . . which may not be capable of reconstruction *at trial*." *Wade*, supra, 388 U.S. at 236-37 (emphasis added). But, the post-indictment photo identification procedure in *Ash* was not a critical stage implicating the right to counsel because it did not pose the same risk of harm at trial. *Ash*, supra, 413 U.S. at 321.

Historically, the same has been true regarding initial presentments. In *Coleman*, supra, 399 U.S. 1, the Court found Alabama's arraignment to be a

"critical stage" *not because it is an arraignment*, but because it can impact the trial by operation of Alabama law. Specifically, the Court reasoned that arraignment in Alabama is a critical stage, *even though it may not be in other states*, because "the suspect's *defense on the merits* could be compromised if he has no legal assistance" at the Alabama arraignment due to the procedures employed there. *Gerstein,* supra, 420 U.S. at 123 (emphasis added); see *Hamilton*, supra, 368 U.S. at 53-54; *Coleman*, supra, 399 U.S. at 9-10. But, as stated earlier, where *Gerstein's* probable cause hearing addressed only matters of pretrial custody, it was deemed non-adversarial, and, thus, not a "critical stage" in the prosecution that would require the appointment of counsel. *Gerstein*, supra, 420 U.S. at 122.

Like *Gerstein's* probable cause hearing, matters pertaining to bail similarly address only pre-trial custody, and do not bear on the merits of a case nor carry the potential to impede the fairness of a trial or the reliability of its result. Hence, under the historic "critical stage" definition, the event by which bail is set does not constitute a "critical stage" at which the Sixth Amendment guarantees the assistance of counsel.

C. *Gerstein* or *Lafler*?

Two terms ago, in *Lafler* and *Frye*, the Court held that the event of plea offer rejection constitutes a "critical stage" of proceedings even if the subsequent trial is fair and leads to a reliable outcome. In so determining, the Court stated that "[c]ritical stages include arraignments,

postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Frye*, supra, 132 S.Ct. at 1405 (citations omitted).[6] This more encompassing language was read by the Connecticut Supreme Court as removing, at least to some degree, the trial-consequences test when determining whether a stage is "critical." See *Gonzalez*, supra, 308 Conn. at 479 (citing *Frye*, supra, 132 S.Ct. at 1405, and stating that "it seems that more recent Supreme Court cases have not limited only certain arraignments to be "critical stages."). On that basis, the Connecticut court determined there to be a right to counsel with respect to the increase in the respondents' bond amounts related to their pretrial custody.

Whether the pretrial bail event constitutes a "critical stage" of criminal proceedings is an important question that ought to be settled. The historic definition of "critical stage" provides a reasonable means by which courts (and prosecutors) can predict the need for defense counsel to be

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[6] With respect to the determination that arraignments (*Hamilton* and *Coleman*), lineups (*Wade*) and the entry of a guilty plea (*Hill v. Lockhart*, 474 U.S. 52 (1985)) constitute critical stages, the focus has been on the effect of the event upon the trial. The exception to that focus is with respect to postindictment interrogations. However, as the Court noted in *Kansas v. Ventris*, 556 U.S. 586 (2009), the interest sought to be protected in interrogation cases is the Fifth Amendment right against self-incrimination. In Sixth Amendment claims, however, the constitutional right sought to be protected is the right to a fair trial. *Id.* at 592. Thus, the focus historically has been on trial consequences. See *United States v. Cronic*, 466 U.S. 648, 658 (1986) ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.").

present – if the event carries the potential to affect the trial or its outcome, then counsel's assistance is guaranteed. Without this definition, it is not possible to predict those stages at which the right to counsel is guaranteed. As a practical matter, all post-attachment events would be subject to being termed "critical," and the distinction between the attachment of the right to counsel and the substantive right to counsel would be erased. Contra *Rothgery*, 554 U.S. at 211-212; see also, *Id.* at 213 (*Alito, J.*, concurring) ("[A]ttachment signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel.").

The Commissioner's position is that *Lafler* and *Frye* have not eliminated the trial-consequences test for determining whether a stage is "critical," thus implicating the Counsel Clause. As Justice Zarella wrote, *Lafler* and *Frye* recognized that plea negotiations are "critical stages" without regard to subsequent trial effects because they are, uniquely, "quintessential trial substitutes." Those cases thus carved out a special recognition with respect to plea negotiations. Plea bargaining is "critical" vis-à-vis the Counsel Clause not necessarily because it has the potential to affect trial (even a constitutionally sound trial does not ameliorate the prejudice from improvident plea rejection, the Court has said), but because plea bargaining "*is* the criminal justice system." *Frye*, supra. 132 S.Ct. at 1407.

Bail determination does not have the same significance in the criminal justice system. Unlike plea bargaining, it does not supplant the trial

process. Like the probable cause determination in *Gerstein*, it is a pretrial event that is non-adversarial and, hence, does not have Sixth Amendment implications. The question of whether matters pertaining to bail are "critical stages" that implicate the Sixth Amendment's Counsel Clause is thus important to the administration of criminal justice, and certiorari is warranted. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

II. The Connecticut Supreme Court has Rendered a Decision that Conflicts with Decisions of Other Courts

In this case, the Connecticut Supreme Court decided that the matters pertaining to the respondents' bail (specifically, events at which increases would be sought in order to obtain presentence credits) constitute "critical stages" of the criminal proceedings such that the Sixth Amendment's Counsel Clause is implicated. There is a split among courts as to whether counsel's assistance is, in fact, guaranteed at bail determination proceedings.

Disagreement over whether bail proceedings are critical stages typically turns on alternate readings of this Court's decision in *Coleman*, supra, 399 U.S. 1. *Coleman* applied the historical trial consequences test to determine whether the arraignment at issue there constituted a "critical stage." *Coleman* recognized that "in addition to counsel's presence at trial, the accused is guaranteed [counsel's assistance] at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial." *Coleman*, supra, 399

U.S. at 7 (quoting *Wade*, supra, 388 U.S. at 226). Thus, *Coleman* reasoned that, in determining whether an event is a critical stage, it is necessary to "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial. . . ." *Id.* Applying such scrutiny, *Coleman* held that the arraignment there was indeed a critical stage.

Notwithstanding *Coleman's* application of the trial-consequences test, courts that find bail proceedings to be critical stages read *Coleman* as holding that *all* arraignments are critical. For example, in *Higazy v. Templeton*, 505 F.3d 161 (2nd Cir. 2007), the Second Circuit Court of Appeals applied this Court's ruling in *Coleman,* supra, 399 U.S. 1, and found a bail hearing to be a critical stage implicating the right to counsel. In *Higazy*, the District Court judge expressed at a bail hearing that inconsistent government representations militated against detaining the defendant. Nonetheless, counsel did not object to a government request that bail be denied, and the defendant was ordered detained.

The *Higazy* proceeding at which the bail matter arose "was an initial appearance on the criminal complaint, and the determination of bail was part of that proceeding." *Id.* at 172. The Second Circuit viewed *Coleman* as finding a bail hearing to be a critical stage "at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself." *Id.* (citing and quoting *Coleman*, supra, 399 U.S. at 9-10).

Similarly, the Eighth Circuit Court of Appeals, referring to *Coleman*, has stated that "[t]he [United States] Supreme Court has recognized the special role played by counsel at preliminary hearings in which bail reduction motions are considered." *Smith v. Lockhart*, 923 F.2d 1314, 1319-20 (8th Cir. 1991) (citing *Coleman*, supra, 399 U.S. at 9). The Eighth Circuit thus went on to hold that an omnibus hearing at which a defendant moved to reduce his bail constituted a "critical stage." *Id.*

Other courts, however, have disagreed that bail matters are "critical stages." In *South Carolina v. Williams*, 263 S.C. 290, 210 S.E.2d 298 (1974), the Supreme Court of South Carolina, applying the historical "critical stage" definition, held that a bond hearing was not one such stage at which counsel's assistance was guaranteed. In that case, a hearing was held the day after arrest to determine the defendant's right to bail under the charges he faced. Without counsel present, bail was set. The defendant later claimed that the bail hearing was a "critical stage" and the denial of counsel was unconstitutional. The South Carolina court concluded that there was neither a showing nor even a contention that events at the bail hearing "affected or prejudiced" – or was likely to affect or prejudice – the subsequent trial. *Id.* at 295. Accordingly, the bail hearing was not a "critical stage" and the defendant, therefore, was not entitled to the assistance of counsel.

Similarly, the Montana Supreme Court has rejected the claim that this Court, in *Coleman*, "designate[d] the setting of bail as a critical stage

thus entitling the defendant to assistance of counsel." *Montana v. Farnsworth*, 240 Mont. 328, 333, 783 P.2d 1365, 1368 (1989); *Cf.*, *Benner v. Indiana*, 580 N.E.2d 210, 212 (Ind. 1991) (Indiana Supreme Court holding that initial hearing is not a critical stage); Nebraska v. Scheffert, 279 Neb. 479, 491, 778 N.W.2d 733, 743 (2010) (Nebraska Supreme Court stating "arraignment itself is not necessarily a critical stage requiring counsel.").

In *Hebron v. Maryland*, 13 Md. App. 134, 281 A.2d 547 (1971), the defendant argued that a hearing to set bail implicated his right to counsel's assistance under *Coleman*. *Id.* at 136. The Maryland Court of Special Appeals concluded, however:

> We do not believe that the absence of counsel for Hebron at the hearing derogated from his right to a fair trial. We do not feel that the proceeding to set bail as here conducted was a critical stage of the criminal proceedings with the constitutional concept of that term contemplated by *Coleman*. . . . We conclude that the assistance of counsel was not constitutionally mandated.

Id. at 139-40. More recently, the Maryland Court of Appeals, again applying *Coleman*, reaffirmed that the Counsel Clause is not implicated at a bail hearing. *Fenner v. Maryland*, 381 Md. 1, 846 A.2d 1020 (2004). Although the court recognized, as it had earlier, that "counsel may be influential in making effective argument *as to the necessity of bail*," the court nonetheless concluded that a hearing

at which the only purpose was to "ascertain the appropriate *amount of bail*" did not give rise, under *Coleman*, to a constitutional guarantee. *Id.* at 22-23 (emphasis added) (citing *Hebron*, supra, 13 Md. App. at 138-40).

Here, the Connecticut Supreme Court held that the Sixth Amendment's counsel guarantee extended to events at which bail matters were determined. Its holding thus reflects a split among courts regarding the issue of whether counsel's assistance is guaranteed at bail determination proceedings. Certiorari is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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