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

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* STATE OF MICHIGAN IN SUPPORT OF PETITIONER

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Attorneys for *Amicus Curiae*
State of Michigan

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INTEREST OF *AMICUS CURIAE*

As the chief law enforcement officer for the State, the Michigan Attorney General has a direct interest in ensuring that the definition of a critical stage for the assistance of counsel under the Sixth Amendment comports with its history and text. The right to the effective assistance of counsel is a trial-based right. The application of this right at pretrial hearings, plea bargaining, and at sentencing hearings all relate to determinations of guilt or innocence, and the punishment imposed.

The court below has interpreted *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), a decision on the right to counsel during plea negotiations, as expanding the definition of critical stage to include arraignments where only a bond determination is made. Such a reading contradicts the ordinary practice of many states. It is routine in state court to arraign an arrestee, appoint counsel, and set bond. But the bond is set without that counsel being present.

The clarification of the rule cannot await further decisions. More than 90% of criminal felony defendants—more than one million defendants—are prosecuted in state court each year. Michigan seeks to ensure that the jurisprudence on critical stage comports with current practice and not be expanded to mere bail proceedings. Setting bond at the arraignment without counsel present is not illegal.[1]

---

[1] Consistent with Rule 37.1, counsel for the State *amicus* informed the attorneys for Huertas and Gonzalez of the State's intent to file the *amicus* more than 10 days before filing.

INTRODUCTION

The States ask this Court to grant certiorari on this petition for two basic reasons.

First, this Court needs to clarify the relationship between its analysis in *Lafler* and its decision in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). Before *Lafler*, the prevalent, if not prevailing, view was that bond hearings were not a critical stage. The rule is based on *Gerstein*'s holding that a preliminary hearing after the initiation of proceedings to determine probable cause for a pretrial detention is not a critical stage. There is language from this Court's opinion in *Lafler*, however, that suggests that any hearing that affects jail time is a critical stage. The courts below are divided on the question whether a bond hearing is a critical stage.

Second, this Court needs to resolve the question now because it is a basic one—whether the practice of detaining a pretrial defendant after a bail decision without counsel violates the Sixth Amendment right to counsel. Given the need to determine probable cause soon after arrest, it is not uncommon for arraignments to be held where bond decisions occur without counsel present. The issue is whether this practice may continue. Michigan contends that it may, based on the proper understanding of the Sixth Amendment, which provides for counsel to defend against criminal charges. The initial decision on bond—where it may be revisited later with counsel—is different in kind to the hearings that have been found critical to the accused's defense.

ARGUMENT

I. Because of friction between this Court's analyses in *Gerstein* and *Lafler*, the lower courts are divided on the issue about whether a bond hearing is a critical stage.

Although *Lafler* was not a case about what constitutes a critical stage, there is language in the decision from which a court below may infer—as the court did here—that an arraignment where only bond is set requires the presence of counsel. Before *Lafler*, there was a split of authority on the question whether a bond hearing was a critical stage.

But *Lafler* may be a game-changer. *Lafler* raises the question whether setting bond at the initial arraignment without counsel violates the Sixth Amendment. Yet, this is a common practice. The issue is whether a critical stage is defined as any hearing for which representation is necessary to defend the criminal defendant on the merits of the charges and their punishment, or whether it is defined as any hearing that affects a defendant's liberty.

A. The analysis in *Gerstein* is in tension with this Court's analysis in *Lafler*.

The question whether an arraignment at which the court sets bond is a critical stage is an important threshold question. If such a hearing is a critical stage of the criminal proceeding, a state has a constitutional obligation to provide counsel to an indigent defendant at that hearing. *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970).

Traditionally, the Sixth Amendment right to the appointment of counsel for an indigent defendant is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967). The Sixth Amendment right to counsel "attaches" at the initiation of adversarial proceedings, and guarantees the assistance of counsel during "all critical stages." *Montejo* v. *Louisiana*, 556 U.S. 778, 802 (2009). "What makes a stage critical is what shows the need for counsel's presence." *Rothgery* v. *Gillespie County*, 554 U.S. 191, 212 (2008).

In *Gerstein*, this Court addressed whether a preliminary hearing to determine if there was probable cause to "detain[ ] the arrested person pending further proceedings" was a critical stage. The answer was that it was not. The controlling analysis isolated the fact that the preliminary hearing at issue in *Gerstein* was "addressed *only* to pretrial custody" but would not impair the accused's ability to defend himself on the merits of the charge. *Gerstein*, 420 U.S. at 123 (emphasis added).

The *Gerstein* analysis considers the relationship of the hearing to the accused's ability to advance a substantive defense against the charge, not whether the hearing causes the accused a loss of liberty, i.e., whether the accused is detained in jail. This analysis is consistent with other decisions of this Court finding a critical stage in a pretrial setting because the setting affected the substantive defense. *Estelle* v. *Smith*, 451 U.S. 454 (1981) (pretrial psychiatric examination); *Argersinger* v. *Hamlin*, 407 U.S. 25

(1972) (guilty plea); *United States* v. *Wade*, 388 U.S. 218 (1967) (pretrial corporeal lineup); *Massiah* v. *United States,* 377 U.S. 201 (1964) (pretrial interrogation); *White* v. *Maryland*, 373 U.S. 59 (1963) (arraignment where a non-binding plea could be used later at trial even if withdrawn); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (arraignment where legal defenses not raised are abandoned).

In contrast, this Court's decision in *Lafler* provides an analysis on critical stage that emphasizes that the Sixth Amendment right to counsel is not designed "simply to protect the trial." *Lafler*, 132 S. Ct. 1385. See also *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) ("the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant"). According to this analysis, critical stages include sentencing hearings, because "any amount of additional jail time has Sixth Amendment significance." *Id*. at 1385–86 (internal quotes and brackets omitted), citing *Glover* v. *United States*, 531 U.S. 198 (2001). The shift in the framework to determine what is a critical stage from defending against the charge to jail time is a significant one.

One possible inference to draw from *Lafler* is that any hearing that affects the criminal defendant's custody is a critical one. That is the conclusion that the Connecticut Supreme Court reached below in these two cases. *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463; 68 A.3d 624, 637 (2013) ("the arraignment in the present case is 'critical stage'" where the issue of bond from a prior arrest must be addressed); *Huertas* v. *Commissioner of*

Correction, 308 Conn. 516; 64 A.3d 766, 768 (2013) (rejecting State's argument that "matter pertaining to presentence confinement" was not a critical stage).

The Connecticut cases, of course, are cases in which the issue is about jail credit, not punishment. In every case in which a criminal defendant is given a bond that he cannot post, he is subject to a detention. And even if not a part of the sentence, the basic point of *Gonzalez* and *Huertas* is that any limitation on a defendant's liberty may occur only at a hearing (after the initiation of adversarial proceedings) where the defendant is represented by counsel. E.g., *Gonzalez*, 64 A.3d at 482–83 ("Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail").

And the interpretation offered by the Connecticut Supreme Court of *Lafler* is not a novel one. The seminal treatise on criminal procedure has noted the same point. After quoting the analysis in *Lafler* in which it references critical stage and "additional jail time," the treatise then notes that the "setting of bail" might be a critical stage:

> If the Sixth Amendment similarly protects against "any amount of additional pretrial detention," the setting of bail would in itself constitute a critical stage.

3 LaFave, Israel, King & Orr, Criminal Procedure, § 11.2(b), p. 54 (3d ed. 2012–13 supplement). That is, if "gaining pretrial release is in itself protected by the right to counsel," then any longer detention imposed at a hearing without counsel would violate the Sixth Amendment. *Id*. at 53.

The problem with this line of analysis is that it conflicts directly with *Gerstein*. In rejecting the need for counsel for a pretrial preliminary hearing on probable cause, this Court expressly noted that the hearing only related to *pretrial custody*. *Gerstein*, 420 U.S. at 123. The description of the obligation under the Fourth Amendment even suggested an "extended" restraint on the criminal defendant's liberty. *Id*. at 113–14 ("the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to *extended* restraint of liberty following arrest") (emphasis added). The detention would last obviously more than one day even if revisited later by the criminal defendant after the appointment of counsel.

This critical-stage emphasis on a criminal defendant's liberty—as against his defense against the criminal charges—would also conflict with this Court's analysis in *Rothgery*. In *Rothgery*, this Court noted the difference between the attachment of the right and the actual presence of counsel. 554 U.S. at 212 n.15 ("It is enough for present purposes to highlight that the enquiry into that right [i.e., presence of counsel] is a different one from the attachment analysis"). In jurisdictions like Connecticut—and Michigan under Mich. Ct. Rules 6.005 and 6.106—where bond issues are addressed at the initial arraignment, the analysis from *Gonzalez* and *Huertas* would collapse this inquiry into one. Under that view, when the right attaches is when the right to the entitlement to the presence of counsel begins.

The analysis from *Gonzalez* and *Huertas* also directly conflicts with Justice Alito's concurrence in *Rothgery*. 554 U.S. at 213 (Alito, J., concurring). The concurrence elaborated on the distinction between the attachment of the right and the entitlement to the presence of counsel. *Id*. In making this point, the concurrence agreed with the substance of the *Rothgery* majority opinion, and in each opinion, there was no suggestion that the Texas hearing procedure where bond was set was a critical stage. The criminal literature has recognized the same. 3 LaFave, Criminal Procedure, §11.2(b), p. 52 (Supp.) ("[S]tatements in both the majority and concurring opinions [in *Rothgery*] strongly suggest that where a first appearing involves no more than making an ex parte probable cause determination, giving notice of the charges, and setting bail, it does not constitute a 'critical stage'").

B. The lower courts are divided on the question whether a bond hearing is a critical stage.

As noted in the petition itself, there is a conflict on the issue whether a bond hearing is a critical stage. Pet. 25–29. The apparent majority of courts have rejected the claim. See, e.g., *People* v. *Collins*, 298 Mich. App. 458, 470; 828 N.W.2d 392 (2012); *Fenner* v. *State*, 381 Md. 1, 23; 846 A.2d 1020 (2004); *Padgett* v. *State*, 590 P.2d 432, 436 (Alaska 1979). The most recent decision from the Michigan Court of Appeals is indicative of the analysis:

> Under the Sixth Amendment, an accused has the right to counsel for his defense during all critical stages of a criminal prosecution.

> When this right is violated it constitutes a structural, constitutional error requiring automatic reversal. However, the bond revocation hearing was not a "critical stage" in the proceeding because it did not have any effect on the determination of defendant's guilt or innocence. . . . Because the bond revocation hearing was not a critical stage in the proceeding, and was completely independent from defendant's jury trial, the presence of counsel was not constitutionally required.

Collins, 828 N.W.2d at 399 (citations omitted).

In contrast, the courts that have found there to be a violation have generally relied on this Court's decision in *Coleman*. See, e.g., *Higazy* v. *Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) ("a bail hearing is a 'critical stage of the State's criminal process at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself'") (quoting *Coleman*, 399 U.S. at 9–10). Accord *Hurrell-Harring* v. *State of New York*, 15 N.Y.3d 8; 904 N.Y.S.2d 296 (2010) (where the arraignment consider "matters affecting the defendant's pretrial liberty," it is a critical stage).

Based on the decision below, the matter has taken on a renewed urgency because of the prevalence of arraignments that only address bond issues. As this Court noted in its survey of states in *Rothgery*, for the 43 states it identified that appoint counsel based on the first hearing, they do so "before, at, *or just after initial appearance*." 554 U.S. at 205 (emphasis added).

For those jurisdictions where the appoint-ment occurs afterward, the conditions of bond will not have been subject to contest by a criminal defendant with counsel. And in those states that appoint counsel "at" the arraignment, like Michigan under Mich. Ct. Rule 6.005(c), the appointed counsel does not actually appear at that hearing. The requirement that counsel must be present for that initial hearing would be a substantial change in law. See Argument II.

C. The right answer is that a bond hearing is not a critical stage.

And on the merits of the question, the State of Connecticut has the better of the argument, both in text and in the history of the Sixth Amendment. The "defen[s]e" against criminal charges is distinct from pretrial custodial considerations. U.S. Const. amend VI. Whether a criminal defendant is held without bond is *not* part-and-parcel of the merits of his defenses and challenges to the evidence against him. All of the other pretrial and post-trial hearings that are critical stage all relate to the merits of the criminal charges. Not so with pretrial custody.

This analysis was persuasively summarized by Justice Alito in his concurrence in *Rothgery*. 554 U.S. at 218 ("Weaving together these strands of authority, I interpret the Sixth Amendment to require the appointment of counsel only after the defendant's prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial."). This concurrence evaluates the fabric of the law to show that this principle serves as a thread throughout the case law. *Rothgery*, 554 U.S. at 217–18, citing *United States* v. *Gouveia*, 467 U.S. 480, 190

(1984) (the right to counsel "exists to protect the accused during trial-type confrontations"). Accord *United States* v. *Ash*, 413 U.S. 300, 309 (1973) ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial"). The pretrial stage cases were joined together by considerations of the merits of the trial. See, e.g., *Rothgery*, 554 U.S. at 216, (Alito, J., concurring) (citing *Gouveia*, 467 U.S. at 191 (preindictment investigator), and *Gerstein*, 420 U.S. at 122–23 (probable cause hearing)).

Given *Gerstein*'s express reliance on the fact that "pretrial custody" did not implicate the Sixth Amendment right to counsel, 420 U.S. at 122–23, it is not clear how this precedent could remain valid if this Court determined that bail hearings were critical stages. *Lafler* was not a critical stage case, and certainly reading it in concert with prior cases would recommend a reading that preserves *Gerstein*.

The post-trial critical stage cases also support this view. This Court has upheld the right to counsel at sentencing and on appeal based on its relation to challenging the merits of the charge. For sentencing, the right to counsel enables the defendant to challenge the consequences of trial—the punishment. See *Mempa*, 389 U.S. at 136 ("absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal" that might identify an error in the conviction). The same is true with respect to the Sixth Amendment right counsel on appeal. See *Douglas* v. *California*, 372 U.S. 353, 356 (1963) ("the appellate court passes on the merits of his case only after having the full benefit of written briefs and oral argument by counsel").

II. The obligation to provide counsel at the first arraignment would change current practice in many states.

As a general matter, the first appearance, or arraignment, occurs within a short period after a criminal defendant's arrest. This is because state procedure ordinarily coordinates its processes to meet the *Gerstein* requirement that a probable cause determination occur within 48 hours of arrest for a defendant's who is detained pretrial. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991).

The conditions of pretrial release are generally set at the first appearance. 3 LaFave, Criminal Procedure, § 11.2(b), p. 55 n.43.12 (Supp.). As a result, the conclusion that bail hearings are critical stages creates a practical problem for those jurisdictions where counsel is not present at the first appearance:

> The practical "consequence" of such a position [i.e., that a bail hearing is a critical stage] is unclear. *If the state is unable to provide counsel at the first appearance, does that necessarily mean that defendant must be released?*

Id. (emphasis added). The untenable nature of that conclusion is apparent. And in those jurisdictions where the first hearing is later held with counsel within a few days, allowing the attorney to revisit the question of bond, the question at stake would remain the intervening detention.

Accordingly to the 2006 table of criminal defendants sentenced each year for a felony, cited in *Rothgery*, 554 U.S. at 203–04, the number of felony criminal defendants topped one million annually. Felony Sentences in State Courts, 2006 –Statistical Tables, p. 1.[2] This comprises more than 90% of all felony defendants in the nation. See Sourcebook of Criminal Justice Statistics Online, p. 1 (listing 87,895 criminal defendants in federal district court in 2006). Needless to say, the question whether the states may constitutionally continue to arraign criminal defendants, appoint counsel, and set bail (while counsel is not present) is a vital one, which cannot be delayed.

It is one of the basic steps in the criminal process. The issue requires this Court's immediate review.

---

[2] http://www.bjs.gov/content/pub/pdf/fssc06st.pdf (last accessed September 9, 2013).

CONCLUSION

This Court should grant the State of Connecticut's petition for certiorari.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General
Michigan Department of
Attorney General

Attorneys for *Amicus Curiae*
State of Michigan

Dated: SEPTEMBER 2013