ODILIO GONZALEZ *v.* COMMISSIONER OF CORRECTION
(AC 29686)

Bishop, Lavine and Schaller, Js.

Argued September 8, 2009—officially released July 27, 2010

(Appeal from Superior Court, judicial district of Tolland, Schuman, J.)

Michael E. O'Hare, supervisory assistant state's attorney, with whom, on the brief, were *Kevin T. Kane*, chief state's attorney, and *Gail P. Hardy*, state's attorney, for the appellant (respondent).

Robert J. McKay, special public defender, for the appellee (petitioner).

Opinion

LAVINE, J. The respondent, the commissioner of correction, appeals from the judgment of the habeas court granting the second amended petition for a writ of habeas corpus filed by the petitioner, Odilio Gonzalez. On appeal, the respondent claims that the court improperly concluded that the petitioner was denied the effective assistance of trial counsel because (1) the sixth amendment does not confer a right to the effective assistance of counsel in matters pertaining to credit for presentence confinement and (2) the petitioner did not meet his burden of showing deficient performance by his counsel or prejudice as a result of any such deficiency. Counsel renders ineffective assistance in violation of the sixth amendment when, after the right to counsel has attached, he fails to request that bond in connection with his client's prior arrest be increased in order to maximize his client's presentence confinement credit, leading to the deprivation of his client's liberty. Accordingly, we affirm the judgment of the habeas court.[1]

The following facts are relevant to the respondent's claims on appeal. The petitioner was arrested on April 21, 2006, docket number CR-06-0599898-S, and charged with threatening in the second degree in violation of General Statutes § 53a-62 (first arrest). He was released later that same day on a $500 nonsurety bond. On May 31, 2006, the petitioner was arrested again and charged with breach of the peace in the second degree in violation of General Statutes § 53a-181 and criminal violation of a protective order in violation of General Statutes § 53a-223, docket number CR-06-0600923-S (second arrest). The petitioner was arraigned the following day, and the court set bond in the amount of $35,000. He remained in custody until the court reduced his bond on June 16, 2006, to a promise to appear. On January 12, 2007, the petitioner was arrested for a third time, docket number CR-07-0607605-S, and charged with criminal violation of a protective order in violation of § 53a-223 and harassment in the second degree in violation of General Statutes § 53a-183. He was arraigned, with his counsel present, on January 16, 2007, at which time the court set bond in the amount of $65,000 on his January 12, 2007 arrest, and the petitioner remained in custody, unable to post bond (third arrest).

The petitioner's counsel, who represented the petitioner in all three matters, requested, on March 30, 2007, that the bonds in connection with the petitioner's first two arrests be increased so that the petitioner could receive presentence confinement credit for those arrests.[2] The court, *Ward, J.*, ordered that the petitioner's bonds resulting from the first two arrests be increased. On May 21, 2007, the petitioner, pursuant to a plea agreement, pleaded guilty to one count of violation of a protective order, arising out of the second

arrest, and one count of threatening in the second degree, arising out of the first arrest. All other charges against him were nolled. The court, *White*, *J.*, sentenced the petitioner on June 11, 2007, to five years incarceration, execution suspended after one year, followed by three years probation for violation of a protective order to be served concurrently with one year of incarceration for threatening in the second degree. At no time did counsel request that the petitioner receive presentence confinement credit for the seventy-three day period between January 16 and March 30, 2007, for one of his first two arrests.

On January 7, 2008, the petitioner filed his second amended petition for a writ of habeas corpus, claiming that counsel was ineffective in failing to request that the petitioner's bond be increased prior to March 30, 2007, and by not asking the court at any time following March 30, 2007, to credit the petitioner with seventy-three days of presentence confinement credit. He argued that had counsel asked for the bond increase on January 16, 2007, or asked that the petitioner be credited with the seventy-three days of presentence confinement credit, the petitioner would have discharged his sentence seventy-three days earlier than calculated. Following a trial, the habeas court, *Schuman*, *J.*, found that the petitioner met his burden of proving that counsel's performance was deficient and ordered the respondent to credit the petitioner with seventy-three days of presentence confinement credit.[3] The habeas court granted the respondent's petition for certification to appeal, and this appeal followed.

I

The respondent first claims that the habeas court improperly concluded that the petitioner was denied the effective assistance of counsel because he had no sixth amendment right to the effective assistance of counsel for a matter pertaining to presentence confinement. Specifically, the respondent argues that the petitioner did not have a right to the effective assistance of counsel because the calculation of presentence confinement credit is not a critical stage of the proceedings.[4] The respondent mischaracterizes the issue to be decided, and his claim is therefore rejected.

The respondent argues that the petitioner was not entitled to effective assistance of counsel for matters pertaining to presentence confinement credit. He further contends that because the calculation and application of jail credits are posttrial administrative matters, the January 16, 2007 court proceeding was not a critical stage of the petitioner's prosecution for which he is guaranteed effective assistance of counsel. The respondent's focus on whether a matter pertaining to presentence confinement is a critical stage misses the mark.[5] The appropriate inquiry is whether the petitioner was entitled to the effective assistance of counsel at his

January 16, 2007 arraignment and, if he had counsel, whether counsel was effective.

"'The [s]ixth [a]mendment guarantees that [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defence. . . . This right attaches only at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or *arraignment*. . . . The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of [the] government and [the] defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the criminal prosecutions to which alone the explicit guarantees of the [s]ixth [a]mendment are applicable. . . . We also have noted that the time of the attachment of the right to counsel under the federal constitution is no different under article first, § 8, of the constitution of Connecticut. . . .

"The United States Supreme Court has indicated that the sixth amendment's core purpose is to assure that in any criminal prosecutio[n] . . . the accused shall not be left to his own devices in facing the prosecutorial forces of organized society. . . . By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the intricacies . . . of law . . . is needed to assure that the prosecution's case encounters the crucible of meaningful adversarial testing. . . . In this regard, [w]e have consistently adopted the reasoning of the United States Supreme Court with respect to when the sixth amendment right to counsel attaches in a criminal proceeding, finding that [n]o right to counsel attaches until prosecution has commenced." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 92–93, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

"[I]t is the state's decision to move forward with the prosecution of the crimes charged in the information document, by *arraigning* the suspect and filing the information with the court, that signifies the state's commitment to prosecute as well as the initiation of the adversary judicial proceedings that trigger a defendant's right to counsel under the sixth amendment." (Emphasis added.) Id., 95. Our Supreme Court has cited with approval *Hamilton* v. *Alabama*, 368 U.S. 52, 54–55, 82 S. Ct. 157, 7 L. Ed. 2d. 114 (1961), for the proposition that a criminal defendant enjoys the right to counsel

at arraignment. *State* v. *Falcon*, 196 Conn. 557, 563–64, 494 A.2d 1190 (1985). "It is at this point in the process that the 'prosecutorial forces of organized society' aligned against the defendant, and the defendant actually found himself 'immersed in the intricacies of substantive and procedural criminal law,' thus warranting protection under the sixth amendment." *State* v. *Pierre*, supra, 277 Conn. 97. The petitioner's constitutional right to counsel had attached by the time of his arraignment.

Furthermore, "the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984); *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). "The right to counsel . . . would be meaningless unless it also implied the right to effective assistance of such counsel." *Andrades* v. *Commissioner of Correction*, 108 Conn. App. 509, 515, 948 A.2d 365 (concluding that indigent criminal defendant has right to appointed counsel at sentence review), cert. denied, 289 Conn. 906, 957 A.2d 868 (2008).

Here, the petitioner had a sixth amendment right to be represented by counsel at his January 16, 2007 arraignment. He was represented by counsel at that arraignment. Because he had a right to counsel and was represented by counsel, the petitioner had a sixth amendment guarantee to the effective assistance of counsel. Having arrived at this conclusion, it must now be determined whether the habeas court was correct in finding that petitioner was denied the effective assistance of counsel.

II

The respondent claims that the habeas court improperly concluded that the petitioner was denied the effective assistance of trial counsel because the petitioner did not meet his burden of showing deficient performance by his counsel or prejudice resulting from any such deficiency. This claim must be rejected.

The following facts are relevant to the respondent's claim. During the habeas trial, attorney Bruce McIntyre, a criminal lawyer, testified on behalf of the petitioner.[6] McIntyre testified that he believed "it is within the range of competency for an attorney to address the bond issue with every client and, where appropriate, to have it raised to preserve and increase his pretrial credit."[7]

In its oral decision, the habeas court noted: "The consequences to a petitioner are grave if he is detained in jail as opposed to being released. I don't see any difference in this case where the issue of bail had not been addressed the first time.[8] It still continued and should have been raised—it should have been raised the first time, actually. It was raised the second time in March, but it should have been raised in January." The court then stated that it could "see no strategic

reason why [the] petitioner's defense counsel would not have asked for an increase of bond on January 16, 2007, when the petitioner was arraigned on the newest charges." Having found that the petitioner was denied his constitutional right to the effective assistance of counsel, the court ordered that the respondent credit the petitioner with seventy-three days of presentence confinement.[9]

"We begin our discussion by noting that the effectiveness of an attorney's representation of a criminal defendant is a mixed determination of law and fact that . . . requires plenary review . . . . The sixth amendment to the United States constitution guarantees a criminal defendant the assistance of counsel for his defense. U.S. Const., amend. VI. It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 525, 903 A.2d 169 (2006). "It is well settled that [a] reviewing court can find against a petitioner on *either* ground, whichever is easier." (Emphasis in original; internal quotation marks omitted.) *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 832–33, 950 A.2d 1220 (2008).

A

"Turning first to the performance prong, we note that the petitioner must show that [counsel's] representation fell below an objective standard of reasonableness in order to establish ineffective performance. . . . In other words, the petitioner must demonstrate that [counsel's] representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . In analyzing [counsel's] performance, we indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . The petitioner bears the burden of overcoming this presumption." (Citations omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 460, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006).

"Counsel . . . can . . . deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance . . . ." (Citations omitted;

internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 686. This case does not deal with an assertion that counsel failed to raise an exotic legal theory or pursue a groundbreaking strategy. Nor does this case deal with a failure having only inconsequential impact. This case deals with an oversight that directly and adversely impacted the defendant's liberty. See *Bowen* v. *Johnston*, 306 U.S. 19, 26, 59 S. Ct. 442, 83 L. Ed. 455 (1939) ("[i]t must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired"); *Santiago* v. *Commissioner of Correction*, 39 Conn. App. 674, 679, 667 A.2d 304 (1995) ("[o]ur Supreme Court found that [t]he writ of habeas corpus . . . does not focus solely upon a direct attack on the underlying judgment or upon release from confinement . . . but is available as a remedy for issues of fundamental fairness implicating constitutional rights" [citation omitted; internal quotation marks omitted]).

The habeas court found that there was "no strategic reason why [the] petitioner's defense counsel would not have asked for an increase of bond on January 16, 2007, when the petitioner was arraigned on the newest charges."

The habeas court correctly determined that a reasonably competent attorney not only would have known to ask for an increase in bond, but also would have asked for bond to be increased during the petitioner's third arraignment, not two and one-half months later. No evidence to the contrary was presented at the habeas trial. Counsel's conduct fell below an objective level of reasonableness, as it was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law. The prejudicial effect of his performance must now be considered.

B

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *State* v. *Brown*, supra, 279 Conn. 525. General Statutes § 18-98d (a) (1) provides in relevant part: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or 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 (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after

such presentence confinement; and (B) 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 . . . ." After the bonds in connection with the first two arrests were increased, the petitioner was unable to obtain bail and was eligible to receive presentence confinement credit for the time he spent in jail from March 30, 2007, until sentencing. Had counsel requested that the bonds be increased at the third arraignment on January 16, 2007, the petitioner would have been entitled to seventy-three additional days of presentence confinement credit. There can be no dispute that counsel's failure to request that the bonds be raised at the third arraignment prejudiced the petitioner by exposing him to seventy-three additional days in jail for which he received no credit. This being the case, the petitioner has satisfied his burden of proving that he was prejudiced by counsel's representation.[10]

The judgment is affirmed.

BISHOP, J. concurred in the result.

[1] At oral argument, this court requested that the parties submit supplemental briefing addressing the issue of whether this case was moot because no relief could be granted. After considering those briefs, we conclude that the case is not moot. Accordingly, we address the respondent's claims.

[2] General Statutes § 18-98d provides in relevant part: "(a) (1) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, under a mittimus or 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 (A) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (B) 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 . . . .

"(c) The Commissioner of Correction shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person's sentence; provided in no event shall credit be allowed under subsection (a) of this section in excess of the sentence actually imposed."

[3] The petitioner, in his habeas petition, alleged that counsel was ineffective not only in failing to request that the bonds for the petitioner's first two arrests be raised at the January 16, 2007 arraignment, but also in failing to request at sentencing that the petitioner be credited with seventy-three days of presentence confinement. The habeas court's decision, however, does not address this allegation. Although counsel, at sentencing, could have asked the court to take the petitioner's presentence confinement into account when calculating his total effective sentence; see *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 829 n.19, 950 A.2d 1220 (2008) (in determining term of sentence to impose, even if defendant has no right to credit for presentence incarceration, it is within trial court's discretion to consider such incarceration in its sentencing determination); the conclusion in this case rests solely on the argument that counsel was ineffective when, at the January 16, 2007 arraignment, he failed to request that bond in connection with the petitioner's prior arrests be increased in order to maximize the petitioner's presentence confinement credit.

[4] The court acknowledges that the calculation of presentence confinement credit is administered by the department of correction. What is at issue in this case, however, is not the calculation itself but the claimed failure of counsel to take necessary steps during proceedings to protect his client's statutory right to receive his presentence confinement credit.

[5] The dissent accepts the respondent's characterization of the issue on appeal and analyzes the case accordingly. Cases that undertake a critical stage analysis, including *Rothgery* v. *Gillespie County*, U.S. , 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008), the case primarily relied on by the dissent, normally involve matters in which a defendant was denied access to counsel, did not have counsel present or was not himself present, at a critical stage of trial. See *United States* v. *Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (presumption that counsel's assistance is essential requires conclusion that trial unfair if accused denied counsel at critical stage of trial); *Rushen* v. *Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983) (right to personal presence at critical stages of trial is fundamental right of criminal defendant).

This case, however, deals not with a petitioner who was denied access to counsel, but rather with a petitioner whose counsel failed to provide him effective assistance after his right to counsel had attached and counsel was present. The court therefore does not agree with the dissent that this claim presents a critical stage issue and declines to undertake any critical stage analysis.

[6] The petitioner sought to have McIntyre deemed "an expert in the practice of criminal law and procedure in the part B and part A courts." The court explained that, according its understanding of the Connecticut Code of Evidence, it was unnecessary to label a person an expert. The court did, however, refer to McIntyre as an expert during the trial.

[7] The petitioner was the only other witness during the habeas trial. He testified that he had told counsel, prior to his accepting the plea agreement, that he would only plead guilty if he got his presentence confinement credit. He further stated that had he known he would not be credited with his presentence confinement, he would not have pleaded guilty and instead would have gone to trial.

[8] The court's terminology of "the first time" refers to the January 16, 2007 arraignment.

[9] The seventy-three days represent the time period between the petitioner's third arraignment on January 16, 2007, and the time when his counsel requested that the bonds be raised for the first two arrests on March 30, 2007. The petitioner accrued presentence confinement credit from March 30, 2007, through the date he was sentenced. That time period is not at issue in this appeal.

[10] The respondent makes no claim on appeal that the habeas court lacked the authority to order that the respondent credit the petitioner for his presentence confinement.