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PALMER, J., concurring. I agree with the majority that the Appellate Court properly affirmed the judgment of the habeas court, which concluded that the petitioner, Odilio Gonzalez, is entitled to seventy-three days of presentence confinement credit (presentence credit) under General Statutes § 18-98d because the petitioner's trial counsel rendered ineffective assistance in failing to obtain a modification of his bond so that he would receive that credit. I also agree with the majority that the determination of whether the petitioner was entitled to the effective assistance of counsel with respect to that presentence credit turns on whether trial counsel's failure to obtain the bond modification at issue implicated a critical stage of the criminal proceeding, because a defendant has a sixth amendment right to the assistance of competent counsel at all critical stages of a criminal prosecution. See, e.g., *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). I part company with the majority, however, insofar as it concludes that arraignment is the critical stage implicated by the petitioner's claim. In my view, the proceeding that gives rise to a right to counsel is not arraignment, which may or may not provide a convenient time for counsel to seek a bond modification but, rather, a bail hearing, the proceeding at which bond may be modified.¹ From my perspective, therefore, the question presented by this appeal is whether a bail hearing is a critical stage of a criminal prosecution, for that is the proceeding implicated by the petitioner's claim and during which counsel improperly failed to seek a bond modification for the purpose of securing presentence credit for the petitioner.

Although the issue is not entirely free from doubt, I believe that a bail hearing is such a critical stage. In *Coleman v. Alabama*, 399 U.S. 1, 7–9, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), the United States Supreme Court considered whether Alabama's preliminary hearing constituted a critical stage for sixth amendment purposes. The court explained that "the sole purposes of a preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury, and, if so, to fix bail if the offense is bailable." *Id.*, 8. The court also observed, as the Alabama Court of Appeals had explained, that, "[a]t the preliminary hearing . . . the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case. Also [binding precedent] . . . bars the admission of testimony given at a pre-trial proceeding [in which] the accused did not have the benefit of cross-examination by and through counsel. Thus, nothing occurring at the preliminary hearing in [the] absence

of counsel can substantially prejudice the rights of the accused on trial.” (Citation omitted; internal quotation marks omitted.) *Id.* The court nevertheless concluded that, contrary to the determination of the Alabama Court of Appeals, the preliminary hearing constituted a critical stage at which the defendant was entitled to counsel. *Id.*, 9–10. In reaching its conclusion, the court identified four reasons why the “guiding hand of counsel at the preliminary hearing is essential”; *id.*, 9; one of which was that “counsel can also be influential at the preliminary hearing in *making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.*” (Emphasis added.) *Id.* It seems unlikely that the court would have made express reference to counsel’s important role “in making effective arguments for the accused on . . . the necessity for . . . bail”; *id.*; if the court did not intend for the bail hearing component of the preliminary hearing to be considered a critical stage under the sixth amendment.

Indeed, in *Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007), the United States Court of Appeals for the Second Circuit recently characterized *Coleman* as holding that a bail hearing is a critical stage at which a defendant is entitled to counsel. The court in *Higazy* explained: “In the [s]ixth [a]mendment context, the [United States] Supreme Court found that a bail hearing is a critical stage of the [s]tate’s criminal process at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself. *Coleman v. Alabama*, [supra, 399 U.S. 9–10] This accords with [Second Circuit] case law on bail hearings. In *United States v. Abuhamra*, 389 F.3d 309, 323 (2d Cir. 2004), [the court] wrote that [b]ail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial. There, [the court] explained that . . . [b]ail hearings, like probable cause and suppression hearings, are frequently hotly contested and require a court’s careful consideration of a host of facts about the defendant and the crimes charged. . . . Bail hearings do not determine simply whether certain evidence may be used against a defendant at trial or whether certain persons will serve as trial jurors; bail hearings determine whether a defendant will be allowed to retain, or [be] forced to surrender, his liberty during the pendency of his criminal case. *Id.* [323–24].” (Citation omitted; internal quotation marks omitted.) *Higazy v. Templeton*, supra, 172–73. I agree with these observations of the Second Circuit Court of Appeals, whose decisions we generally give special consideration when applying federal law. E.g., *State v. Dyou*s, 307 Conn. 299, 318–19, 53 A.3d 153 (2012).

Other courts have reached the same conclusion. See, e.g., *Smith v. Lockhart*, 923 F.2d 1314, 1319 (8th Cir. 1991) (observing that “[a]t least two of [the defendant’s] motions constituted important matters in which the

assistance of counsel could have been of critical importance . . . [including the] motion to reduce bail, which the prosecutor vigorously resisted,” and concluding that hearing on those motions constituted critical stage of proceedings because, inter alia, “[t]he [United States] Supreme Court [in *Coleman v. Alabama*, supra, 399 U.S. 9] . . . recognized the special role played by counsel at preliminary hearings in which bail reduction motions are considered”); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 20, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010) (following *Higazy* and concluding that “[t]here is no question that a bail hearing is a critical stage of the [s]tate’s criminal process” [internal quotation marks omitted]).

The United States Supreme Court has stated that the term “‘critical stage’ . . . denote[s] a step of a criminal proceeding . . . that [holds] significant consequences for the accused.” (Citations omitted.) *Bell v. Cone*, 535 U.S. 685, 695–96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). Because the primary purpose of a bail hearing is to determine whether a defendant will remain incarcerated or be released in advance of trial, the defendant’s liberty interest is directly implicated, and, therefore, the hearing most certainly holds “significant consequences” for the defendant. *Id.*, 696. Those consequences are especially great because a defendant who is released from confinement pending trial may be better able to assist counsel in preparing for that trial, or to maintain employment so as to afford counsel of choice, or both. In sum, given the nature and importance of the interests at stake, I see no reason why a defendant should not be entitled to the assistance of counsel at a bail hearing, and I therefore would affirm the judgment of the Appellate Court. Accordingly, I concur in the result.

¹ In this regard, I agree generally with the analysis of the dissenting justice, who, in his dissenting opinion, explains in greater detail why a bail hearing and not arraignment is the stage of the proceedings implicated by the petitioner’s claim.