ZARELLA, J., dissenting. 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 in the pretrial context only with respect to "critical stages" of the prosecution when an accused confronts the possibility of prejudice in the adversarial process. Thus, I cannot agree with the majority that, at an arraignment for a third arrest, an attorney's failure to request an *increase* in his client's bonds relating to two *prior* arrests occurs as part of a critical stage of the proceedings. I am persuaded that the majority's focus on the *arraignment* for the petitioner's third arrest, rather than the *bond proceedings* relating to the two prior arrests, is misplaced. To the extent that the arraignment for the third arrest was a critical stage of the criminal proceedings related to that arrest, the bond determinations made in connection with the petitioner's two prior arrests were not part of a critical stage of those proceedings. Because I am not persuaded that a bond hearing is a critical stage under the sixth amendment, I instead would hold that the petitioner was not denied his constitutional right to the effective assistance of counsel at the time of the purported violation and would reverse the judgment of the Appellate Court. Accordingly, I respectfully dissent.

As the majority sets out more fully in its opinion, this appeal arises from a petition for a writ of habeas corpus filed by the petitioner, Odilio Gonzalez, in which he alleged that his convictions and incarceration were "illegal because they were obtained in violation of his federal constitutional right to the effective assistance of counsel . . . ." At the time of his arrest on January 12, 2007, the petitioner, who had been arrested and released on a promise to appear and on a nonsurety bond, respectively, on two prior occasions, was unable to post bond with respect to his third arrest and was taken into custody following his January 16, 2007 arraignment. On March 30, 2007, the petitioner's counsel requested that the trial court increase the petitioner's bonds with respect to the first and second arrests in order to maximize the petitioner's potential eligibility for presentence confinement credit under General Statutes § 18-98d, which the trial court did. The petitioner entered a guilty plea to two charges on May 21, 2007, pursuant to a plea agreement, and was sentenced on June 11, 2007. Under the terms of the agreement, the petitioner pleaded guilty to counts arising out of his first and second arrests, and the charges related to the third arrest—for which the seventy-three days from January 16 through March 29, 2007, might have been credited—were nolled. The petitioner relies on this seventy-three

day period from his third arrest through the decision of the trial court to raise his bonds in connection with the other two arrests as the basis for his claim of ineffective assistance of counsel.

The petitioner claims that the failure of counsel to request an increase in bond prior to March 30, 2007, constituted ineffective assistance of counsel because it "caused a loss of [seventy-three] days of presentence credit [to which the] petitioner would have been entitled." The respondent, the commissioner of correction, maintains, however, that the petitioner was not deprived of his constitutional right to the effective assistance of counsel at the time of the alleged deficiency because it did not occur within the context of a critical stage of the prosecution. Accepting the petitioner's argument, the majority concludes that the petitioner's counsel, in failing to request an increase in the bonds relating to the first and second arrests at the time of the petitioner's arraignment for the third arrest, performed deficiently in his representation of the petitioner.

I disagree with the majority because I am not persuaded that the injury about which the petitioner complains occurred during a critical stage of the prosecution, which would render the sixth amendment right to the effective assistance of counsel inapplicable. Specifically, I am convinced that the majority improperly focuses on the *arraignment* for the third arrest, rather than the bail determinations relating to the prior arrests, as the relevant procedure for its critical stage analysis. Bail determinations, 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.[1]

In a similar vein, I also disagree with the majority to the extent that it accepts the petitioner's implicit premise that he was *entitled* to an increase in his bonds solely to avail himself of presentence confinement credit,[2] and that counsel's failure to request such an increase rose to the level of constitutionally deficient representation, because the decision to raise or lower bond is within the sound discretion of the trial court, and an increase need not have been granted simply because it was requested by the petitioner's counsel. I address these concerns in turn.

I begin by briefly summarizing the applicable legal principles. First, with respect to the writ of habeas corpus, this court has emphasized that "[h]abeas corpus provides a special and extraordinary legal remedy for illegal detention. . . . The deprivation of legal rights is essential before the writ may be issued." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 815, 786 A.2d 1091 (2002). "Thus, ordinarily a habeas corpus petitioner must estab-

lish some fundamental constitutional violation entitling him to relief." *Safford* v. *Warden*, 223 Conn. 180, 190, 612 A.2d 1161 (1992).

The constitutional provision on which the petitioner relies is the sixth amendment to the federal constitution. The relevant clause of the sixth amendment, which is made applicable to the states through the due process clause of the fourteenth amendment; see, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel *for his defense*." (Emphasis added.) U.S. Const., amend. VI. "As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 351, 53 A.3d 983 (2012).

The United States Supreme Court has long emphasized that "the [s]ixth [a]mendment right to counsel exists, and is needed, in order to protect the fundamental right to a *fair trial*." (Emphasis added.) *Strickland* v. *Washington*, supra, 466 U.S. 684; see also *Johnson* v. *Zerbst*, 304 U.S. 458, 462–63, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). "Thus, the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the [s]ixth [a]mendment guarantee is generally not implicated. *United States* v. *Cronic*, [466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)]." (Internal quotation marks omitted.) *Lockhart* v. *Fretwell*, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); see also *Nix* v. *Whiteside*, 475 U.S. 157, 175, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (" 'benchmark' " of right to counsel under *Strickland* is "fairness of the adversary proceeding"); *United States* v. *Cronic*, supra, 653 ("[w]ithout counsel, the right to a trial itself would be 'of little avail' "); *United States* v. *Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981) (right to counsel "is meant to [ensure] fairness in the adversary criminal process").

Acknowledging the changes in prosecutorial practice that have occurred since the sixth amendment was crafted, however, the United States Supreme Court gradually has broadened the protections thereunder, finding it applicable not only to an accused's defense at the trial itself, but also to those "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); accord *United States* v. *Ash*, 413 U.S. 300, 310, 93 S. Ct. 2568, 37 L. Ed. 2d

619 (1973). "This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate *pretrial events that might appropriately be considered to be parts of the trial itself*. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." (Emphasis added.) *United States* v. *Ash*, supra, 310. As the United States Supreme Court explained in *Coleman* v. *Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), it "has held that a person accused of crime requires the guiding hand of counsel at every step in the proceedings against him, *Powell* v. *Alabama*, [287 U.S. 45, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932)], and that that constitutional principle is not limited to the presence of counsel at trial. It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the [s]tate at any stage of the prosecution, formal or informal, in court or out, [when] counsel's absence might derogate from the accused's right to a fair trial. *United States* v. *Wade*, supra, [226]. Accordingly, the principle of *Powell* . . . and succeeding cases requires that [the court] 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 as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It [requires the court] to analyze whether potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. Id., [227]."[3] (Internal quotation marks omitted.) *Coleman* v. *Alabama*, supra, 7.

An accused's right to counsel is said to attach "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (Internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 92, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006), quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), and *State* v. *Falcon*, 196 Conn. 557, 560, 494 A.2d 1190 (1985); see also *Rothgery* v. *Gillespie County*, 554 U.S. 191, 198, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) ("[t]he [s]ixth [a]mendment right of the accused to assistance of counsel in all criminal prosecutions is limited by its terms: it does not attach until a prosecution is commenced" [internal quotation marks omitted]); *Brewer* v. *Williams*, 430 U.S. 387, 398, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) ("the right to counsel granted by the [s]ixth and [f]ourteenth [a]mendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him"). Although the United

States Supreme Court has declined to delineate the boundaries of the postattachment right to counsel, it nevertheless has indicated that a key inquiry is whether a critical stage is involved. In *Rothgery*, for instance, the court explained that, "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence." *Rothgery* v. *Gillespie County*, supra, 212. As the court emphasized in *Strickland*, however, the presence of counsel alone is insufficient; "the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 686, quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). By the same token, where there is no right to counsel, the mere presence of counsel does not in and of itself trigger a constitutional right to the effective assistance of counsel when none would exist for an unrepresented defendant. See *Wainwright* v. *Torna*, 455 U.S. 586, 587–88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982).

With these principles in mind, I begin by noting that, although I agree with the majority's conclusion that the petitioner's right to counsel had *attached* at the time of counsel's purported failure to request an increase in bond related to the petitioner's two prior arrests, I disagree that such bail matters would constitute a critical stage and that habeas relief would therefore be appropriate. Cf. *Rothgery* v. *Gillespie County*, supra, 554 U.S. 213–14 (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."). In essence, the majority appears to conclude that, because *arraignment* is a critical stage, and bail matters may be addressed at arraignment, the failure to address bond issues relating to the first two arrests at the arraignment for the third arrest therefore transformed the proceedings relating to *bail and presentence confinement credit* themselves into critical stages. In my view, however, this is an unwarranted leap. Although arraignments are critical stages with respect to the charges for which the accused is being arraigned; see, e.g., *State* v. *Pierre*, supra, 277 Conn. 94; *State* v. *Falcon*, supra, 196 Conn. 563–64; I am not persuaded that this alone is sufficient to transform matters such as the raising or lowering of the bond set for prior arrests into critical stages simply by association. The fact that the arraignment may have afforded the petitioner's counsel an opportunity to make this request does not necessarily mean that any matter potentially raised at that stage should likewise be treated as a critical stage.[4] Accordingly, my resolution of this issue would turn on whether a bond hearing, rather than an arraignment, is a critical stage.

Several of our sister states and various federal courts have concluded that a bond hearing is not a critical stage under the sixth amendment. E.g., *United States* v. *Hooker*, 418 F. Sup. 476, 479 (M.D. Pa.), aff'd mem., 547 F.2d 1165 (3d Cir. 1976), cert. denied, 430 U.S. 950, 97 S. Ct. 1591, 51 L. Ed. 2d 799 (1977); *Fenner* v. *State*, 381 Md. 1, 23, 846 A.2d 1020, cert. denied, 543 U.S. 885, 125 S. Ct. 158, 160 L. Ed. 2d 143 (2004). But see *Higazy* v. *Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) (suggesting in dictum that bail hearing is critical stage under *Coleman* v. *Alabama*, supra, 399 U.S. 9–10); *Hurrell-Harring* v. *State*, 15 N.Y.3d 8, 20, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010) (quoting *Higazy* with approval). The Maryland Court of Appeals, for instance, considered whether an accused was entitled to counsel at a bail review hearing in *Fenner* v. *State*, supra, 19. After considering the principles of sixth amendment jurisprudence, as articulated by the United States Supreme Court; id., 19–20; the court in *Fenner* concluded that it was "not prepared . . . to hold that a bail review hearing is a 'critical stage' of criminal proceedings, at which provided counsel is required. Accordingly . . . generally . . . there exists no [s]ixth [a]mendment right to provided counsel during a bail review hearing . . . ." Id., 23; see also *Padgett* v. *State*, 590 P.2d 432, 436 (Alaska 1979) ("[t]he setting of bail is . . . not an adversary confrontation wherein potential substantial prejudice to the defendant's basic right to a fair trial inheres . . . but rather is limited to the issue of interim confinement"), citing *United States* v. *Wade*, supra, 388 U.S. 227; *State* v. *Williams*, 263 S.C. 290, 295, 210 S.E.2d 298 (1974) (bail hearing not critical stage of criminal prosecution). Similarly, in *People* v. *Collins*, 298 Mich. App. 458, 828 N.W.2d 392 (2012), the Michigan Court of Appeals concluded that a bond revocation hearing "was not a critical stage in the proceeding because it did not have any effect on the determination of [the] defendant's guilt or innocence." (Internal quotation marks omitted.) Id., 470. The United States District Court for the Middle District of Pennsylvania likewise explained that "[a] bail reduction hearing is not a 'critical stage' of the proceedings [during which] the defense on the merits would be impaired without the assistance of counsel. *Gerstein* v. *Pugh*, 420 U.S. 103, 122, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *United States ex rel. Reed* v. *Anderson*, 461 F.2d 739, 742 (3d Cir. 1972)." *United States* v. *Hooker*, supra, 479; see also *Quadrini* v. *Clusen*, 864 F.2d 577, 586 n.8 (7th Cir. 1989).

In *Higazy* v. *Templeton*, supra, 505 F.3d 161, however, the Second Circuit Court of Appeals indicated that the United States Supreme Court had "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 . . . as at the trial itself.' " Id., 172, quoting *Coleman* v. *Alabama*, supra, 399 U.S. 10; accord *Hurrell-Harring* v. *State*, supra, 15 N.Y.3d 20. Such a charac-

terization of *Coleman*, however, both was unnecessary to the holding of *Higazy* and overstated the court's holding in *Coleman*, and, therefore, does not alter my conclusion that a bail hearing is not a critical stage within the meaning of the sixth amendment.[5] In *Coleman*, the United States Supreme Court considered whether a preliminary hearing under Alabama law constituted a critical stage under the sixth amendment. See *Coleman* v. *Alabama*, supra, 3. The Alabama preliminary hearing, however, addressed more than bail; under the applicable state law, "the sole purposes of [the] preliminary hearing [were] 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.

Thus, *Coleman* could not have settled the issue of whether a bail hearing, rather than a proceeding such as a preliminary hearing under Alabama law, constitutes a critical stage. Indeed, *Coleman*'s express reliance on *Wade* belies such an argument. See id., 9. As the United States Supreme Court emphasized in *Wade*, the primary inquiry is "whether the presence of [the defendant's] counsel is necessary to preserve the defendant's basic right to a fair trial . . . ." *United States* v. *Wade*, supra, 388 U.S. 227. This principle led the Supreme Court to conclude that a preliminary hearing in Alabama is a critical stage, not because bail may be set therein, but because "the guiding hand of counsel at the preliminary hearing is essential to protect [an] . . . accused against an erroneous or improper prosecution." *United States* v. *Coleman*, supra, 399 U.S. 9. For this reason, I am likewise unpersuaded by the decision of the New York Court of Appeals in *Hurrell-Harring* v. *State*, supra, 15 N.Y.3d 20, which adopts *Higazy*'s characterization of *Coleman*. Accordingly, under the foregoing principles, I would conclude that a bond hearing is not a critical stage under the sixth amendment.

Because my focus is on bond, rather than on arraignment, I am persuaded that the decisions in *Lafler* v. *Cooper*, U.S. , 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), and *Missouri* v. *Frye*, U.S. , 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012), which were decided by a divided United States Supreme Court while the present appeal was pending, are consistent with my conclusion that a bond hearing is not a critical stage of the prosecution. *Lafler* and *Frye* both addressed the scope of the sixth amendment right to counsel in the context of plea offers that are rejected as a result of allegedly deficient legal advice. See *Missouri* v. *Frye*, supra, 1404; *Lafler* v. *Cooper*, supra, 1383. The United States Supreme Court determined that the consideration and negotiation of plea bargains that are allowed to lapse or are rejected could constitute a "critical stage" for sixth amendment purposes, even when the defendant later receives a trial free of constitutional defects, as in *Lafler*, or subsequently pleads guilty, but on less favorable terms, as

in *Frye*. See *Missouri* v. *Frye*, supra, 1407 ("[i]n today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant"); *Lafler* v. *Cooper*, supra, 1384 ("[d]efendants have a [s]ixth [a]mendment right to counsel, a right that extends to the plea-bargaining process").

Although *Lafler* and *Frye* expanded the scope of the sixth amendment right to counsel, a point that the dissenting justices in those decisions took pains to highlight; see *Missouri* v. *Frye*, supra, 132 S. Ct. 1414 (Scalia, J., dissenting); *Lafler* v. *Cooper*, supra, 132 S. Ct. 1391–92 (Scalia, J., dissenting); the United States Supreme Court nevertheless justified this expansion by observing the modern trend toward resolving the vast majority of criminal cases outside of the courtroom. As the court explained, "[97] percent of federal convictions and [94] percent of state convictions are the result of guilty pleas. . . . The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the [s]ixth [a]mendment requires in the criminal process at critical stages." (Citations omitted.) *Missouri* v. *Frye*, supra, 1407.

Plea bargaining, therefore, is a quintessential trial substitute, as it "settle[s] the accused's fate" and obviates the need for trial. *United States* v. *Wade*, supra, 388 U.S. 224. The same cannot be said of the failure of counsel in the present case to request that bail be raised on the two prior arrests at the petitioner's January 16, 2007 arraignment. Unlike the plea bargains in *Lafler* and *Frye*, both of which involved "pretrial events that might appropriately be considered to be parts of the trial itself"; *United States* v. *Ash*, supra, 413 U.S. 310; the pretrial event at issue in the present case could have no bearing on the length of the sentence imposed, and the bonds at issue related to separate charges rather than the one for which the petitioner was being arraigned. As such, it did not serve as a trial substitute for the petitioner in any regard. Cf. *Missouri* v. *Frye*, supra, 132 S. Ct. 1407; *Lafler* v. *Cooper*, supra, 132 S. Ct. 1388.

By focusing its critical stage analysis on arraignment, rather than the bond determinations, the majority loses sight of the guiding principle of *Lafler* and *Frye*, namely, that, with such a significant portion of cases disposed of through plea agreements, plea negotiations themselves are trial substitutes to which the sixth amendment's guarantees apply. Because this principle does not apply with respect to bond proceedings, I would adopt the conclusion of several of our sister states that a bond hearing is not a critical stage for purposes of the sixth amendment and decline to expand the sixth amendment

by way of this analogy.[6] See, e.g., *Fenner* v. *State*, supra, 381 Md. 23.

Finally, I disagree with the majority regarding both the implicit premise that the petitioner was constitutionally entitled to an increase in his bonds and the nature of the interest at stake in this case. As I noted previously, the petitioner's claim is premised on his counsel's purported failure to request that bond be increased with respect to two prior arrests after the petitioner was arrested for a third time. Such an omission, in the petitioner's view, constituted ineffective assistance of counsel because it "caused a loss of [seventy-three] days of presentence credit [to which the] petitioner would have been entitled," resulting in a longer period of imprisonment than otherwise might have been necessary. This claim therefore implies that, but for counsel's failure to make such a request, the petitioner would have received the increase in bond that he describes. The majority, however, refers to no constitutional provision, rule of practice, or any other authority that demonstrates the petitioner's right to have his bond *increased*.

Returning to sixth amendment principles, "what makes a stage critical is what shows the need for counsel's presence." *Rothgery* v. *Gillespie County*, supra, 554 U.S. 212. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it *affects his ability to assert any other rights* [*that*] *he may have*." (Emphasis added; internal quotation marks omitted.) *United States* v. *Cronic*, supra, 466 U.S. 654. As Justice Samuel Alito observed in his concurrence in *Rothgery*, the United States Supreme Court has "held that [the term 'defense' in the sixth amendment] means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery* v. *Gillespie County*, supra, 216 (Alito, J., concurring), citing *United States* v. *Gouveia*, 467 U.S. 180, 190, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984); see also *United States* v. *Ash*, supra, 413 U.S. 309. Thus, what makes an arraignment a critical stage, for example, is its potential effect on the accused's right to a fair trial because "certain rights may be sacrificed or lost"; *Coleman* v. *Alabama*, supra, 399 U.S. 7; and an accused might otherwise be denied "effective representation by counsel at the only stage when legal aid and advice would help him" to vindicate constitutional rights. (Internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 132 S. Ct. 1408, quoting *Massiah* v. *United States*, 377 U.S. 201, 204, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). Similarly, the expansion of the sixth amendment to cover the plea negotiation process, as discussed in *Lafler* and *Frye*, guards against the defendant's uninformed rejection of a plea offer that results in a longer sentence than otherwise would have been imposed, because, following the rejection of such an offer, the defendant may have "lost out on

an opportunity to plead guilty and receive the lower sentence that was offered to him" in lieu of trial. (Internal quotation marks omitted.) *Lafler* v. *Cooper*, supra, 132 S. Ct. 1384.

In the present context, however, the matters pertaining to bail and presentencing confinement do not result in a longer sentence being imposed, nor do they implicate a constitutional right. Although the United States Supreme Court's "jurisprudence suggests that any amount of actual jail time has [s]ixth [a]mendment significance" where the imposition of a longer sentence is concerned; *Glover* v. *United States*, 531 U.S. 198, 203, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); the same cannot be said when, as in the present case, no dispute as to the length or the validity of the sentence imposed exists. As this court previously has explained, presentence confinement credit is a legislative grace, not a constitutional right. E.g., *Hammond* v. *Commissioner of Correction*, 259 Conn. 855, 878, 792 A.2d 774 (2002) ("credit sought . . . under § [18-98d], statutorily created, is a matter of legislative grace . . . and, therefore, does not give rise to a fundamental right" [citation omitted; internal quotation marks omitted]). To reach its holding, the majority goes beyond declaring such credit to be a right; it effectively extends the full force of the sixth amendment to increases in bonds in unrelated dockets to maximize the presentence confinement credit that a defendant may obtain. Because I do not accept the premise that an accused is *entitled* to such an increase upon request, I disagree that counsel's failure to make such a request at the earliest possible moment could amount to constitutionally deficient representation.

The majority likewise refers to an increase in bond on earlier charges as a right of an accused who faces new charges at a later date. Our case law is clear, however, that "[t]he determination of an appropriate pretrial bond is a matter within the sound discretion of the trial court." (Internal quotation marks omitted.) *State* v. *McDowell*, 241 Conn. 413, 415, 696 A.2d 977 (1997). Therefore, an accused is not entitled to a modification in bond simply because, in the majority's view, trial courts often accommodate requests to increase bond, a finding not in the record before us. See footnote 6 of the majority opinion.

Moreover, when an accused faces subsequent charges and is unable to post bond, our law does not mandate that judges increase bond that an accused already has satisfied simply to increase the presentence confinement credit to which the accused might become entitled. To the contrary, our rules of practice provide clear guidance for trial courts in exercising their discretion regarding appropriate bond determinations. See generally Practice Book § 38-4. Section 38-4 (a),[7] for instance, emphasizes that the key consideration is to ensure "the person's appearance in court . . . ." To

that end, § 38-4 (a) supplies a number of conditions of release that range in severity from a written promise to appear to a cash bond, with direction to the judicial authority to select the first such condition of release that is "sufficient reasonably to assure the person's appearance in court . . . ." Likewise, § 38-4 (b)[8] provides additional criteria regarding the factors that the judicial authority may "consider" in determining "what conditions of release will reasonably assure the appearance of the defendant in court . . . ."

In light of this framework, the majority's conclusion that an attorney's failure to request an *increase* in bail[9] amounts to a constitutionally deficient level of representation inappropriately extends the reach of the sixth amendment. Defendants have neither a right to nor an expectation of an increase in bond to secure credit for presentence confinement, and not even a tortured reading of the sixth amendment could justify the conclusion that the petitioner's rights were violated because he was *not* incarcerated on the charges pending against him. Even if the petitioner's attorney in the present case immediately had requested an increase in the bonds pertaining to the petitioner's other charges during the petitioner's arraignment for his third arrest, the trial judge would have been under no obligation to grant such an increase for the reasons that I noted previously; indeed, doing so would in effect deviate from the framework set forth in the rules of practice because it would not further the policy of ensuring the petitioner's eventual presence in court. See Practice Book § 38-4.

Because I would answer the first certified question[10] in the negative, I need not reach the second certified question, namely, did the purported violation meet the standard for ineffective assistance of counsel under *Strickland* v. *Washington*, supra, 466 U.S. 668. See *Gonzalez* v. *Commissioner of Correction*, 298 Conn. 918, 919, 4 A.3d 1226 (2010). Even if I were to accept the majority's position that the petitioner's sixth amendment right to counsel was violated in the present case, however, I nevertheless would reject the petitioner's claim of ineffective assistance of counsel under *Strickland* because there is no evidence that demonstrates that the petitioner actually spent any additional time in custody. The petitioner simply assumes that neither the court, in sentencing him, nor the parties, in negotiating his plea agreement, considered the seventy-three days of confinement for which he now seeks credit. In view of the wide discretion afforded a sentencing judge when imposing an appropriate sentence; see *State* v. *Eric M.*, 271 Conn. 641, 649, 858 A.2d 767 (2004); and the complete dearth of evidence that the trial court did not consider the seventy-three days of incarceration at sentencing, I would conclude that the petitioner failed to meet his burden of establishing prejudice under *Strickland*. Although the majority does reach the second certified question, it fails to address this obser-

vation.

Because the petitioner was not entitled to an increase in bail, I cannot agree that the failure of his counsel to request such an increase for the sole purpose of maximizing the presentence confinement credit to which the petitioner might be entitled could constitute deficient representation at a critical stage of the prosecution or could warrant the granting of a writ of habeas corpus. I cannot agree with the majority's determination that an arraignment in a third criminal case serves as a critical stage in the two prior, unrelated cases. In my view, the majority's decision constitutes an unprecedented expansion of the sixth amendment right to counsel, one that I do not believe is supported by the text of the sixth amendment or the related jurisprudence of the United States Supreme Court.

Accordingly, I respectfully dissent.

[1] Although the concurring justice focuses, as I do, on whether a bond hearing is a critical stage, he reaches the opposite conclusion because of his emphasis on the trial preparation advantages that a defendant may obtain when he is represented adequately at a bond hearing. Notably, the concurring justice emphasizes that "a defendant who is released from confinement pending trial may be better able to assist counsel in preparing for . . . trial or to maintain employment so as to afford counsel of choice, or both." Such considerations are undoubtedly important to a defendant, but I disagree that they implicate the defendant's sixth amendment right to counsel. See, e.g., *United States* v. *Stanford*, 722 F. Sup. 2d 803, 811 (S.D. Tex. 2010) (rejecting contention that pretrial detention violated defendant's "[s]ixth [a]mendment right to prepare for trial with assistance of counsel"), aff'd, United States Circuit Court of Appeals, Docket No. 10-20466 (5th Cir. August 31, 2010); see also *United States* v. *Poulsen*, United States District Court, Docket No. CR02-06-129 (S.D. Ohio January 15, 2008) (although defendant's expertise was necessary with respect to preparation for trial, "[t]he [c]ourt [was] not convinced . . . that [the defendant's] need to be centrally involved in mapping out his defense [could not] be comfortably accommodated with appropriate modifications to the terms of his incarceration"); cf. *Rothgery* v. *Gillespie County*, 554 U.S. 191, 216, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (Alito, J., concurring) (observing that United States Supreme Court has "held that [the term 'defense' in the sixth amendment] means defense at trial, not defense in relation to other objectives that may be important to the accused").

[2] The majority correctly indicates that the basis of the petitioner's claim is grounded in § 18-98d, which allows for pretrial confinement credit when an accused cannot or does not post bond. That statute, however, does not give an accused the right to an increased bond on charges for which he already has posted bond and has been released.

[3] "Applying this test, the [United States Supreme] Court has held that 'critical stages' include the pretrial type of arraignment [during which] certain rights may be sacrificed or lost, *Hamilton* v. *Alabama*, 368 U.S. 52, 54 [82 S. Ct. 157, 7 L. Ed. 2d 114] (1961), see *White* v. *Maryland*, 373 U.S. 59 [60, 83 S. Ct. 1050, 10 L. Ed. 2d 193] (1963), and the pretrial lineup, *United States* v. *Wade*, supra [388 U.S. 236–37]; *Gilbert* v. *California*, [388 U.S. 263, 272, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)]. [Compare] *Miranda* v. *Arizona*, 384 U.S. 436 [469, 86 S. Ct. 1602, 16 L. Ed. 2d 694] (1966), [in which] the [c]ourt held that the privilege against compulsory self-incrimination includes a right to counsel at a pretrial custodial interrogation." *Coleman* v. *Alabama*, supra, 399 U.S. 7.

[4] The majority concludes that the manner in which I analyze this issue "parses the sixth amendment right to counsel at an arraignment too narrowly." Footnote 7 of the majority opinion. I am persuaded, however, that the majority's interpretation of an arraignment is inappropriately broad for purposes of its critical stage analysis. In fact, the majority itself explains that, "[a]t an arraignment, a defendant is advised of the charges against him and enters a plea." Text accompanying footnote 7 of the majority opinion; see also General Statutes § 54-1b (governing arraignment of accused persons).

Notably, the majority's definition of arraignment does *not* include any requirement that bond matters relating to arrests for which an accused already has been arraigned be reconsidered in light of the new arrest. Instead, the elements that the majority describes are what make an arraignment a critical stage under our law, because "certain rights may be sacrificed or lost" if an accused were to proceed without the effective assistance of counsel. *Coleman* v. *Alabama*, supra, 399 U.S. 7.

In the present case, however, the petitioner already had been arraigned in connection with both of his prior arrests, and there is no indication that, at either of those earlier arraignments, the petitioner's counsel failed to advise the petitioner of the charges against him, failed to assist him in entering a plea, or otherwise provided constitutionally deficient representation. Unlike the majority, which "see[s] no reason why the fact that the prejudice in this matter related to the petitioner's other charges should impact the 'critical stage' analysis"; footnote 8 of the majority opinion; I find the fact that the purported prejudice was unrelated to the arraignment for the third arrest to be of vital importance to the analysis, because this further suggests that the alleged violation could not have occurred within the context of a critical stage. Requests for bond increases in other cases, although *potentially* addressed at an arraignment for an unrelated arrest, need not occur at that time, and are not what makes an arraignment a critical stage; the absence of such a request at an arraignment, as in the present case, thus cannot give rise to a sixth amendment violation.

[5] We previously have explained that "decisions of the Second Circuit, while not binding [on] this court, nevertheless carry particularly persuasive weight in the resolution of issues of federal law when the United States Supreme Court has not spoken on the point. See *Szewczyk* v. *Dept. of Social Services*, 275 Conn. 464, 475, 881 A.2d 259 (2005) (statutory interpretation); *Schnabel* v. *Tyler*, 230 Conn. 735, 742–43, 646 A.2d 152 (1994) (qualified immunity under 42 U.S.C. § 1983)." (Internal quotation marks omitted.) *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 783–84, 23 A.3d 1192 (2011). This principle is inapposite in the present case, however, because the court's statement in *Higazy* that a bail hearing is a critical stage was dictum and also was premised on an incomplete construction of *Coleman*. Indeed, although *Higazy* briefly analyzed other constitutional provisions by way of analogy, its holding related to an arrestee's fifth amendment right against compulsory self-incrimination and whether a bail hearing was an element of the "criminal case" against him. *Higazy* v. *Templeton*, supra, 505 F.3d 173.

[6] The majority interprets the foregoing discussion of *Lafler* and *Frye* as a recommendation that this court "ignore the most recent Supreme Court cases on the sixth amendment right to counsel" in deciding the present case, and further determines that my position is unsound because it is instead chiefly premised "on much older cases . . . ." (Citation omitted.) Footnote 5 of the majority opinion. This characterization, however, misconstrues my analysis. Indeed, as my discussion of *Lafler* and *Frye* makes clear, I agree that these cases should be carefully examined for purposes of the critical stage determination in the present case, because, as the majority notes, these cases "represent the [United States] Supreme Court's most recent statement on what constitutes a 'critical stage' for purposes of the sixth amendment." Id. It is not the majority's reliance on these cases to which I object but, rather, its strained application of those cases well outside the context in which they arose, namely, plea bargaining. I am persuaded that the majority's application of *Lafler* and *Frye* to justify finding a sixth amendment violation in the present case extends these cases beyond that for which they reasonably can be read.

As for the majority's puzzling objection to my reliance on "much older cases"; id.; in addition to the recent *Lafler* and *Frye* decisions, I note that the majority likewise relies on older cases in its discussion of the right to counsel, and appropriately so, as an analysis of the right to counsel likely would be incomplete without considering the Supreme Court's sixth amendment jurisprudence from *Powell* to the present.

[7] Practice Book § 38-4 (a) provides in relevant part: "When any defendant is presented before a judicial authority, such authority shall, in bailable offenses, promptly order the release of such person upon the first of the following conditions of release found sufficient reasonably to assure the person's appearance in court and, when the crimes charged or the facts and circumstances brought to the attention of the judicial authority suggest that the defendant may pose a risk to the physical safety of any person, that the safety of any person will not be endangered:

"(1) The defendant's execution of a written promise to appear without special conditions;

"(2) The defendant's execution of a written promise to appear with nonfinancial conditions;

"(3) The defendant's execution of a bond without surety in no greater amount than necessary;

"(4) The defendant's deposit with the clerk of the court of an amount of cash equal to 10 percent of the amount of the surety bond set, pursuant to Section 38–8;

"(5) The defendant's execution of a bond with surety in no greater amount than necessary;

"(6) The defendant's execution of a cash bond and his or her deposit with the clerk of the court of cash in the amount of the bond set by the judicial authority in no greater amount than necessary. . . ."

[8] Practice Book § 38-4 (b) provides: "The judicial authority may, in determining what conditions of release will reasonably assure the appearance of the defendant in court, consider factors (1) through (7) below, and, when the crimes charged or the facts and circumstances brought to the attention of the judicial authority suggest that the defendant may pose a risk to the physical safety of any person, the judicial authority may also consider factors (8) through (10) below:

"(1) The nature and circumstances of the offense, including the weight of the evidence against the defendant;

"(2) The defendant's record of previous convictions;

"(3) The defendant's past record of appearance in court after being admitted to bail;

"(4) The defendant's family ties;

"(5) The defendant's employment record;

"(6) The defendant's financial resources, character, and mental condition;

"(7) The defendant's community ties;

"(8) The defendant's history of violence;

"(9) Whether the defendant has previously been convicted of similar offenses while released on bond; and

"(10) The likelihood based upon the expressed intention of the defendant that he or she will commit another crime while released."

[9] I emphasize that an increase in bail is not necessarily contemplated under either General Statutes § 18-98d or Practice Book § 38-4.

[10] This court certified the following question for appeal: "[Did] the Appellate Court properly [rule] that the sixth amendment confers a right to the effective assistance of counsel in matters pertaining to credit for presentence confinement?" *Gonzalez* v. *Commissioner of Correction*, 298 Conn. 918, 919, 4 A.3d 1226 (2010).