ODILIO GONZALEZ *v.* COMMISSIONER OF CORRECTION (SC 18688)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Vertefeuille, Js.

Argued May 17, 2012—officially released May 14, 2013

Michael E. O'Hare, supervisory assistant state's attorney, for the appellant (respondent).

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

Opinion

EVELEIGH, J. The respondent, the commissioner of correction, appeals from the judgment of the Appellate Court, affirming the judgment of the habeas court, which had granted the second amended petition for a writ of habeas corpus filed by the petitioner, Odilio Gonzalez. *Gonzalez* v. *Commissioner of Correction*, 122 Conn. App. 705, 707, 1 A.3d 170 (2010). The Appellate Court concluded that the petitioner had a right to counsel at the arraignment stage, which included proceedings pertaining to the setting of bond and the calculation of presentence confinement credit, and that the petitioner's trial counsel had been ineffective in his failure to request an increase in bond on two prior charges so that the petitioner could be credited for presentence confinement on those charges. Id., 713, 717. We granted the respondent's petition for certification to appeal limited to the following issues: "1. Whether the Appellate Court properly ruled that the sixth amendment confers a right to the effective assistance of counsel in matters pertaining to credit for presentence confinement? 2. Whether the Appellate Court properly ruled that the petitioner met his burden of showing deficient performance and prejudice within the meaning of *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)?" *Gonzalez* v. *Commissioner of Correction*, 298 Conn. 918, 919, 4 A.3d 1226 (2010).[1] We affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "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 peti-

tioner 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 [the respondent appealed to the Appellate Court]." *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 707–709.

The Appellate Court, in a divided opinion,[4] concluded that "the petitioner had a sixth amendment right to be represented by counsel at his . . . 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." Id., 713. In reaching its conclusion, the Appellate Court determined that "[t]he 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." Id., 716. The Appellate Court further concluded as follows: "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." Id., 717. Additional facts and procedural history will be supplied as necessary.

I

On appeal to this court, the respondent first claims that the Appellate Court improperly affirmed the habeas court's grant of the petitioner's petition for a writ of habeas corpus on the ground that the petitioner was denied the effective assistance of counsel. Specifically, the respondent asserts that the Appellate Court improperly concluded that the petitioner had a sixth amendment right to the effective assistance of counsel for a matter pertaining to presentence confinement because the calculation of presentence confinement credit is not a critical stage of the criminal proceedings. In response, the petitioner asserts that the Appellate Court properly affirmed the habeas court's grant of his petition for a writ of habeas corpus because he had a sixth amendment right to effective assistance of counsel at his arraignment where the presentence confinement issues arose. We agree with the petitioner.

We begin with the applicable standard of review and the law governing ineffective assistance of counsel claims. "Although the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous, whether those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Citation omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 131, 595 A.2d 1356 (1991); see also *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 706, 23 A.3d 682 (2011) ("[W]hether the representation a defendant received . . . was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." [Internal quotation marks omitted.]).

"A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. *Strickland* v. *Washington*, [supra, 466 U.S. 686]. This right arises under

the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 153, 662 A.2d 718 (1995). . . . 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 . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . *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). . . . To satisfy the prejudice prong, [the petitioner] 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.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 77, 967 A.2d 41 (2009).

The United States Supreme Court's recognition of the sixth amendment right to counsel dates back to at least 1932 in the case of *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). Historically, the Supreme Court focused on the fact that the sixth amendment right to counsel is needed in order to protect the fundamental right to a fair trial. See, e.g., *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

In 1984, the United States Supreme Court decided *Strickland* v. *Washington*, supra, 466 U.S. 686, where it enunciated that "the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) In doing so, the court again focused on the importance of the right to counsel in protecting the right to a fair trial, stating that "[a]n accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." Id., 685.

"In a line of constitutional cases in [the United States Supreme Court] stemming back to the . . . landmark opinion in *Powell* . . . it has been firmly established that a person's [s]ixth and [f]ourteenth [a]mendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama*, [supra, 287 U.S. 57]; *Johnson* v. *Zerbst*, [supra, 304 U.S. 458]; *Hamilton* v. *Alabama*, [368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)]; *Gideon* v. *Wainwright*, [supra, 372 U.S. 335]; *White* v. *Maryland*, [373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963)]; *Massiah* v. *United States*, [377 U.S.

201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)]; *United States* v. *Wade*, [388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)]; *Gilbert* v. *California*, [388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967)]; *Coleman* v. *Alabama*, [399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970)].

"This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. The *Powell* case makes clear that the right attaches at the time of arraignment, and the [United States Supreme Court has also] held that it exists also at the time of a preliminary hearing. *Coleman* v. *Alabama*, supra [399 U.S. 9–10]. But the point is that, while members of the [c]ourt have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 688–89, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

"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 government and 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. See *Powell* v. *Alabama*, [supra, 287 U.S. 66–71]; *Massiah* v. *United States*, [supra, 377 U.S. 201]; *Spano* v. *New York*, [360 U.S. 315, 324, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959)] (Douglas, J., concurring)." *Kirby* v. *Illinois*, supra, 406 U.S. 689–90.

More recently, the United States Supreme Court has explained as follows: "The [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.' *McNeil* v. *Wisconsin*, [501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158] (1991); see also *Moran* v. *Burbine*, [475 U.S. 412, 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410] (1986). We have, for purposes of the right to counsel, pegged commencement to ' "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," ' *United States* v. *Gouveia*, [467 U.S. 180, 188, 104 S. Ct. 2292, 81 L. Ed. 2d 146] (1984) (quoting *Kirby* v. *Illinois*, [supra, 406 U.S. 689 (plurality opinion)]. The rule is not 'mere formalism,' but a recognition of the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and

defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.' *Kirby* [v. *Illinois*, supra, 689]." *Rothgery* v. *Gillespie County*, 554 U.S. 191, 198, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008).

In *Rothgery* v. *Gillespie County*, supra, 554 U.S. 211–212, a plurality of the United States Supreme Court clarified as follows: "Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute . . . . Once 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. Thus, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself."

Although the Supreme Court made the distinction between the attachment and "critical stage" analysis in *Rothgery*, it clarified that "[w]e do not here purport to set out the scope of an individual's postattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis." Id., 212 n.15.

Accordingly, the question in the present case is whether the arraignment during which the petitioner's counsel 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 was a "critical stage." The respondent asserts that the right to counsel is not implicated by every issue raised, or every consequence of, a criminal proceeding. The respondent further claims that since the calculation and application of jail credits are a posttrial, administrative matter, counsel's performance with respect to such credits cannot fall within the sixth amendment's guarantee of effective counsel at a criminal prosecution. We disagree. We agree, instead, with the Appellate Court when it stated that "[t]he 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." *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 710 n.4.

The Supreme Court has held that "the assistance of counsel cannot be limited to participation in a trial," and extended the protection to "earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' " *Maine* v. *Moulton*, 474 U.S. 159,

170, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), quoting *United States* v. *Wade*, supra, 388 U.S. 224.

An examination of Supreme Court cases regarding which proceedings constitute critical stages in the criminal justice process is helpful in framing our analysis of the respondent's claim on appeal. First, in 1967, in *United States* v. *Wade*, supra, 388 U.S. 236–37, the Supreme Court held that there was a right to counsel at a pretrial identification lineup. In so concluding, the court reasoned that "there is grave potential for prejudice . . . in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for [the defendant] the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to [the aid of counsel] . . . as at the trial itself.' " Id.

In 1973, however, the Supreme Court limited the application of *Wade*. In *United States* v. *Ash*, 413 U.S. 300, 321, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973), the court refused to extend the right to counsel to a photographic identification procedure conducted in the absence of the defendant. In reaching its conclusion, the court recognized that the sixth amendment right to counsel did not apply to a pretrial photographic identification procedure, because where "accurate reconstruction [of a pretrial confrontation] is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be critical." Id., 316. Because the court believed that any defects in the photographic identification procedure could be exposed at trial, it concluded that the procedure was not a critical stage. Id., 321.

As these cases demonstrate, historically, the Supreme Court's focus in a sixth amendment effective assistance of counsel case has centered on protecting the defendant's right to a fair trial. *Strickland* v. *Washington*, supra, 466 U.S. 684. The *Wade* and *Ash* cases established that a pretrial proceeding in a criminal case constituted a critical stage for the purpose of the sixth amendment only where the presence of counsel was necessary to ensure that the defendant received a fair trial. See *Maine* v. *Moulton*, supra, 474 U.S. 170.

The United States Supreme Court recently decided two cases that guide our analysis of the petitioner's claim regarding whether he was entitled to effective assistance of counsel at an arraignment in which a matter pertaining to presentence confinement should have been addressed. In *Lafler* v. *Cooper*, U.S. , 132 S. Ct. 1376, 1384, 182 L. Ed. 2d 398 (2012), and *Missouri* v. *Frye*, U.S. , 132 S. Ct. 1399, 1405, 182 L. Ed. 2d 379 (2012), the United States Supreme Court concluded that a criminal defendant has a sixth amendment right to effective assistance of counsel during plea

negotiations, including when he or she rejects a plea bargain as a result of poor legal advice. Writing for the majority in *Frye*, Justice Kennedy concluded that "[i]t is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The '[s]ixth [a]mendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings.' *Montejo* v. *Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) . . . . Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." (Citation omitted.) *Missouri* v. *Frye*, supra, 1405.[5]

Frye was a case in which the Missouri Court of Appeals had held that the defendant's trial counsel was ineffective for failing to inform him of a plea offer that was more favorable than the one that he later accepted. Id. In affirming the Missouri Court of Appeals, the Supreme Court stated that "[t]he [s]ixth [a]mendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings." (Internal quotation marks omitted.) Id. The Supreme Court recognized that its prior decision in *Hill* v. *Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), established that claims of ineffective assistance of counsel in the plea bargaining context are governed by the two part test set forth in *Strickland*. *Missouri* v. *Frye*, supra, 132 S. Ct. 1405. The Supreme Court concluded, therefore, that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the [s]ixth [a]mendment right to effective assistance of counsel." (Internal quotation marks omitted.) Id., 1406, quoting *Padilla* v. *Kentucky*, U.S. , 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010). The Supreme Court stated that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." (Internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 1407. Therefore, the court held that "criminal defendants require effective counsel during plea negotiations. Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." (Internal quotation marks omitted.) Id., 1407–1408, quoting *Massiah* v. *United States*, supra, 377 U.S. 204.

In *Lafler* v. *Cooper*, supra, 132 S. Ct. 1384, the Supreme Court vacated and remanded the judgment of the United States Court of Appeals for the Sixth Circuit, but agreed that the petitioner therein was denied effective assistance of counsel because his attorney provided the petitioner with erroneous advice that led him to reject a plea and go to trial. The court agreed that the petitioner suffered prejudice because he "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him." (Internal quotation marks omitted.) Id. The Supreme Court further concluded that "[t]he constitutional guarantee applies to

pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." Id., 1385. Therefore, the court held that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Id., 1387. Our review of *Lafler* and *Frye* reveals a recognition by the Supreme Court that the right to a fair trial has expanded to include the right to adequate representation during plea negotiations. Indeed, the Supreme Court has long recognized that counsel 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, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967). The central question in determining "whether a particular proceeding is a critical stage of the prosecution focuses on 'whether potential substantial prejudice to the [petitioner's] rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.' " *Jackson* v. *Miller*, 260 F.3d 769, 775 (7th Cir. 2001). The "focus of the constitutional protection of [the] right to counsel relates to the adversary character of criminal proceedings and the particular process involved." *United States* v. *Jackson*, 886 F.2d 838, 843 (7th Cir. 1989).

In *Rothgery*, the Supreme Court further recognized that "[t]he cases have defined critical stages as proceedings between an individual and agents of the [s]tate (whether 'formal or informal, in court or out,' see *United States* v. *Wade*, [supra, 388 U.S. 226]) that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary,' *United States* v. *Ash*, [supra, 413 U.S. 312–13]; see also *Massiah* v. *United States*, [supra, 377 U.S. 201]." *Rothgery* v. *Gillespie County*, supra, 554 U.S. 212 n.16. The Supreme Court further explained that "what makes a stage critical is what shows the need for counsel's presence." Id., 212.

We note that in *Hamilton* v. *Alabama*, supra, 368 U.S. 54, the Supreme Court stated only certain arraignments are a "critical stage." In *Hamilton*, the Supreme Court concluded that although an arraignment in Alabama was a "critical stage," it acknowledged that whether it was a "critical stage" in other jurisdictions depended on the role of an arraignment in that particular jurisdiction. Id. It is important to note, however, that in more recent cases, the Supreme Court has acknowledged that "[c]ritical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Missouri* v. *Frye*, supra, 132 S. Ct. 1405. Therefore, it seems that more recent Supreme Court cases have not limited only certain arraignments to be "critical stages."

Nonetheless, an examination of *Hamilton* supports

our conclusion that the arraignment in the present case is a critical stage. In finding that an arraignment constitutes a "critical stage" in Alabama, the Supreme Court relied on the fact that, in that state, "[i]t is then that the defense of insanity must be pleaded . . . or the opportunity is lost. . . . Thereafter that plea may not be made except in the discretion of the trial judge, and his refusal to accept it is not revisable on appeal. . . . Pleas in abatement must also be made at the time of arraignment. . . . It is then that motions to quash based on systematic exclusion of one race from grand juries . . . or on the ground that the grand jury was otherwise improperly drawn . . . must be made." (Citations omitted; internal quotation marks omitted.) *Hamilton* v. *Alabama*, supra, 368 U.S. 53–54.

Similarly, in Connecticut, at an arraignment, a defendant must plead certain defenses and make certain requests or the opportunity is lost. Indeed, the request at issue in the present case—that the petitioner's bond in connection with his prior arrests be increased—needed to be made at the petitioner's arraignment or the right to the bond increase would be lost and it would be at a judge's discretion to grant the request at a later date. Certainly, the petitioner served additional time in prison because the request was not made. Accordingly, we conclude that under the test developed in *Hamilton*, the arraignment in the present case is a "critical stage."[6]

Moreover, this court has recognized that a defendant is entitled to counsel at an arraignment. In *State* v. *Falcon*, 196 Conn. 557, 560, 494 A.2d 1190 (1985), the defendant asserted that he was entitled to counsel at his extradition hearing. In concluding that he was not entitled to counsel at the extradition hearing, Chief Justice Peters, writing for the court stated as follows: "Contrary to the defendant's argument, the hearing at which he waived formal extradition was not akin to an arraignment at which he would have been entitled to counsel. *Hamilton* v. *Alabama*, [supra, 368 U.S. 54–55]. At an arraignment, a defendant is advised of the charges against him and enters a plea. Practice Book § [37-7]." *State* v. *Falcon*, supra, 563–64.[7]

In addition, as the United States Supreme Court stated in *Rothgery* v. *Gillespie County*, supra, 554 U.S. 212, "what makes a stage critical is what shows the need for counsel's presence." In the present case, it is evident that the petitioner's counsel could have helped him cope with legal problems, namely, making the appropriate requests to ensure that he received adequate credit for his presentence confinement. See *United States* v. *Ash*, supra, 413 U.S. 313 ("[t]his review of the history and expansion of the [s]ixth [a]mendment counsel guarantee demonstrates that the test utilized by the [c]ourt has called for examination of the event in order to determine whether the accused required aid

in coping with legal problems or assistance in meeting his adversary").[8]

In the present case, it is clear that "potential substantial prejudice to the [petitioner's rights inhered]" to the arraignment proceedings and the petitioner's counsel had "the ability . . . to help avoid that prejudice . . . ." *Jackson* v. *Miller*, supra, 260 F.3d 775. Specifically, because the petitioner's counsel failed to timely request that the petitioner's bond on the first arrest and second arrest be raised, the petitioner was required to spend more time in jail than otherwise would have been required. The petitioner was thus denied an essential liberty interest as the result of his counsel's deficient performance. This liberty interest easily could have been protected at either the pretrial arraignment stage or subsequent proceedings prior to trial by a request made by counsel to increase the petitioner's bonds on the first two cases. The fact that counsel's performance affected the denial of this liberty interest leads us to the inescapable conclusion that the arraignment in this matter was a critical stage of the proceedings. Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail. The fact that counsel's ineffective performance, as found by the habeas court, led to the denial of liberty for some seventy-three days, only exacerbates the classification that this was a critical stage of the proceedings. On the basis of the foregoing, we conclude that the Appellate Court properly concluded that the petitioner had a sixth amendment right to effective assistance of counsel at the arraignment stage in which proceedings pertaining to the setting of bond and credit for presentence confinement occurred because it is clear that potential substantial prejudice to the petitioner's right to liberty inhered to the arraignment proceedings and the petitioner's counsel had the ability to help avoid that prejudice by requesting that the bond on his first arrest and second arrest be raised at the arraignment on his third arrest. See Id.[9]

II

We next address the respondent's claim that the Appellate Court improperly concluded that the petitioner met his burden of showing deficient performance and prejudice within the meaning of *Strickland* v. *Washington*, supra, 466 U.S. 667. Specifically, the respondent claims that the record fails to establish either that the performance of the petitioner's counsel was defective or that the petitioner was prejudiced. In response, the petitioner claims that the Appellate Court correctly concluded that the performance of the petitioner's counsel was deficient and that the petitioner was prejudiced by such deficient performance. Specifically, the petitioner asserts that the failure to request an increase in the bonds on the first arrest and second arrest clearly demonstrated deficient performance and the increased jail

time, which the petitioner is required to serve as a result thereof, demonstrates prejudice. We agree with the petitioner.

We begin by setting forth the standard of review applicable to this claim. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The issue, however, of [w]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. *Strickland* v. *Washington*, [supra, 466 U.S. 698]. As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"[Under] the familiar two part test for ineffective assistance of counsel enunciated by the United States Supreme Court in *Strickland* . . . the . . . [c]ourt determined that the claim must be supported by evidence establishing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . The first prong requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. . . .

"In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . [J]udicial scrutiny of counsel's performance must be highly deferential. . . . [Moreover], a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." (Citations omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 62–63, 951 A.2d 520 (2008).

A

The respondent first claims that the Appellate Court improperly concluded 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." *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App.

716. The respondent asserts that on January 12, 2007, when the petitioner was arrested for violation of a protective order, a class D felony, he was already facing prosecution for the same offense from a previous incident with the same victim, as well as prosecution on several misdemeanors. The foremost concern of any competent defense attorney at this point, the respondent contends, would have been avoiding a lengthy period of incarceration for his client and not maximizing his client's credit for presentence confinement. The respondent claims, therefore, that although the failure to seek an increase in the previous bonds was an oversight, it was hardly an error so serious that the petitioner's counsel was not acting as the " 'counsel' " guaranteed by the sixth amendment. *Strickland* v. *Washington*, supra, 466 U.S. 687. The respondent further contends that, despite the petitioner's repeated arrests for similar offenses involving the same victim, his counsel was able to negotiate a disposition of all the charges against him that required only a relatively brief period of incarceration. The respondent asserts, therefore, that the representation provided to the petitioner by his counsel did not fall below an objective standard of reasonableness. Id., 688. We disagree.

During the habeas trial, Bruce McIntyre, a criminal attorney, testified that he believed, that "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."[10] The habeas court found 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." Therefore, we reject the respondent's argument that this was a mere oversight by defense counsel that was within the range of competency not to have been addressed by the petitioner's attorney and, accordingly, conclude that the Appellate Court properly determined that the petitioner met his burden of demonstrating that his counsel's performance was deficient.

Our conclusion is further buttressed by General Statutes § 18-98d,[11] which establishes the procedure through which a confined prisoner receives credit for his presentence confinement. Certainly, an attorney's knowledge of all existing state statutes that could be an aid to his client in either providing a defense or reducing the amount of time his client spends in prison is necessary to providing effective assistance. Therefore, we agree with the Appellate Court that "[t]he 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." *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 716.[12]

B

We next examine whether the Appellate Court properly concluded that the petitioner established the prejudice prong. *Strickland* v. *Washington*, supra, 466 U.S. 694. The respondent claims that the Appellate Court improperly concluded that the deficient performance of the petitioner's counsel was prejudicial because it extended the period of time that the petitioner must remain in prison to complete his sentence. Instead, the respondent maintains that the loss of presentence confinement credit does not constitute prejudice within the meaning of *Strickland*.

In order 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." Id. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 686. "[Prejudice] resulted from a breakdown in the adversary process that renders the result unreliable." Id., 687. "The purpose of the [s]ixth [a]mendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome in the proceeding. . . . Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the [c]onstitution [of the United States]." Id., 691–92.

In the present case, the respondent contends that the petitioner has failed to demonstrate prejudice because he did not claim that his conviction was unreliable or that his sentence was unlawful. Rather, the respondent asserts that the petitioner's only claim is that he did not receive presentence confinement credit for all of the time that he was in custody while awaiting disposition of the charges against him. The respondent asserts that, because "presentence credit is a creature of statute and that . . . such credit is not constitutionally required," it cannot form the basis for a claim of ineffective assistance of counsel. (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 833, 860 A.2d 715 (2004). The respondent contends that, because the application of presentence credit is governed by § 18-98d, it is determined by factors that are unrelated to the validity of his conviction or the lawfulness of his sentence. Moreover, the respondent further claims that, under § 18-98d, presentence confinement credit is awarded by the respondent after the imposition of sentence and the conclusion of the

criminal proceedings. Thus, the respondent maintains, the failure to receive presentence confinement credit is too remote a consequence of the prosecution to be considered a "result of the proceeding" for the purposes of *Strickland*. *Strickland* v. *Washington*, supra, 466 U.S. 694. We are not persuaded.

When 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. If the petitioner's counsel had 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. We agree with the Appellate Court that "[t]here 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." *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 717. The respondent asserts that the petitioner has failed to demonstrate prejudice because presentence confinement credit is an administrative task that takes place after sentencing. This claim is unavailing because the issue herein does not concern whether the respondent properly calculated the petitioner's presentence confinement credit but, rather, involves the failure of the petitioner's counsel to take the necessary and available steps during critical stages of the proceedings to protect his client's statutory right to receive his full presentence confinement credit. Accordingly, we conclude that the Appellate Court properly affirmed the judgment of the habeas court, determining that the petitioner had established prejudice within the meaning of *Strickland* v. *Washington*, supra, 466 U.S. 694.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and NORCOTT and VERTEFEUILLE, Js., concurred.

[1] The present case was briefed prior to the March 12, 2012 release of the United States Supreme Court 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). On April 4, 2012, to afford the parties the opportunity to address the import of these cases, we issued the following order: "The parties are hereby ordered, sua sponte, to file simultaneous supplemental briefs addressing the impact of *Lafler* v. *Cooper*, [supra, 1376] and *Missouri* v. *Frye*, [supra, 1399] on the state's claim that there is no right to effective assistance of counsel for matters pertaining to presentence confinement credit. The briefs, which are not to exceed ten . . . pages, must be filed on or before April 25, 2012."

On February 7, 2013, we asked the parties to brief the question of whether this appeal was rendered moot by the expiration of the petitioner's sentence. Upon review of the briefs, we are convinced that the present appeal is not moot because the petitioner would have to serve the seventy-three days for which he received credit if the decision of the habeas court was reversed.

[2] General Statutes § 18-98d provides in relevant part: "(a) (1) Any person who is confined to a community correctional center or a correctional institu-

tion 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] Judge Schaller dissented from the majority's decision affirming the judgment of the habeas court. *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 720. He would have found that the petitioner was not entitled to counsel because the calculation of presentence confinement credit is not a critical stage of the proceedings. Id., 726–27. Further, even assuming that the petitioner was entitled to counsel under the sixth amendment for these matters, he would have concluded that the failure by the petitioner's counsel to seek increased bail did not rise to the level of a constitutional deficiency. Id., 728–29.

[5] The dissent asserts that *Lafler* and *Frye* "are consistent with [its] conclusion that a bond hearing is not a critical stage of the prosecution." In support of its claim, the dissent relies on the fact that, unlike the request that bail be raised, plea bargaining often serves as a trial substitute and these cases can, therefore, be seen as a reasonable extension of the general principle that the sixth amendment right to counsel is intended to protect the right to a fair trial. Instead, in determining whether a bond hearing is a "critical stage," the dissent relies on much older cases, such as *Gerstein* v. *Pugh*, 420 U.S. 103, 122–23, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (concluding probable cause hearing not "critical stage"), and Justice Alito's concurrence in *Rothgery* to guide its analysis of whether the arraignment in the present case is a "critical stage."

First, it is important to remember that the plurality opinion in *Rothgery* clearly explained that "[w]e do not here purport to set out the scope of an individual's post-attachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis." *Rothgery* v. *Gillespie County*, supra, 554 U.S. 212 n.16. Therefore, we are not persuaded that *Rothgery* is our best source of guidance on the "critical stage" question, let alone Justice Alito's concurrence in *Rothgery*.

Moreover, *Lafler* and *Frye* represent the Supreme Court's most recent statement on what constitutes a "critical stage" for purposes of the sixth amendment. A review of these cases demonstrates that, although the central focus was on plea negotiations, the Supreme Court did lay out the state of the law on "critical stage" analysis.

In *Frye*, the Supreme Court stated: "It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The '[s]ixth [a]mendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings.' *Montejo* v. *Louisiana*, [supra, 556 U.S. 786] (quoting *United States* v. *Wade*, [supra, 388 U.S. 227–28]). Critical stages include arraignments, postindictment interrogations,

postindictment lineups, and the entry of a guilty plea. See *Hamilton* v. *Alabama*, [supra, 368 U.S. 52] (arraignment); *Massiah* v. *United States*, [supra, 377 U.S. 201] (postindictment interrogation); [*United States* v. *Wade*, supra, 227] (postindictment lineup); *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972) (guilty plea)." *Missouri* v. *Frye*, supra, 132 S. Ct. 1405.

In *Lafler*, the Supreme Court stated as follows: "[The] petitioner and the [s]olicitor [g]eneral claim that the sole purpose of the [s]ixth [a]mendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the [s]ixth [a]mendment unless they affect the fairness of the trial itself. . . . The [s]ixth [a]mendment, however, is not so narrow in its reach. Cf. [*Missouri* v. *Frye*, supra, 132 S. Ct. 1399] (holding that a defendant can show prejudice under *Strickland* even absent a showing that the deficient performance precluded him from going to trial). The [s]ixth [a]mendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though 'counsel's absence [in these stages] may derogate from the accused's right to a fair trial.' *United States* v. *Wade*, [supra, 388 U.S. 226]. The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., *Halbert* v. *Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Evitts* v. *Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover* v. *United States*, 531 U.S. 198, 203–204, 121 S. Ct. 696, 148 L. Ed. 2d 604 (2001); *Mempa* v. *Rhay*, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967), and capital cases, see *Wiggins* v. *Smith*, 539 U.S. 510, 538, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because 'any amount of [additional] jail time has [s]ixth [a]mendment significance.' " *Lafler* v. *Cooper*, supra, 132 S. Ct. 1385–86.

As the foregoing language demonstrates, the Supreme Court's reasoning in *Lafler* and *Frye*, was not solely based on the idea that plea bargaining is a substitute for trial, and is, therefore, a "critical stage" for purposes of the sixth amendment. To the contrary, the Supreme Court relied on the right to counsel during sentencing as grounds for its holding, recognizing that sentencing does not protect the defendant's right to a fair trial. We conclude that we cannot ignore the most recent Supreme Court cases on the sixth amendment right to counsel and, instead, conclude that they provide meaningful relevant guidance to our analysis of the present appeal.

[6] We agree with the dissent 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). When asked to set the same bond on other charges as set in the charge on which the defendant is being arraigned, however, judges routinely grant the request. Further, it is not uncommon for judges in criminal court, upon a recognition of other pending charges, to ask counsel if he or she would like the bond raised in the other case. Certainly arraignment is a "critical stage" because "substantial prejudice . . . inheres in the . . . confrontation and counsel [may] help avoid that prejudice." (Internal quotation marks omitted.) *Rothgery* v. *Gillespie County*, supra, 554 U.S. 217 (Alito, J. concurring), quoting *Coleman* v. *Alabama*, supra, 399 U.S. 9. In this case, the substantial prejudice is that the petitioner must serve extra time in prison as the result of his attorney's deficient performance.

[7] The dissent avoids the issue that this court has previously concluded that a defendant is entitled to counsel at an arraignment, by framing the issue as whether "counsel's purported failure to request an increase in bond related to the petitioner's two prior arrests . . . would constitute a critical stage . . . ." We conclude that the dissent's approach parses the sixth amendment right to counsel at an arraignment too narrowly. We cannot conclude that a defendant is entitled to effective assistance of counsel for some matters at an arraignment and not others that arise during the same arraignment.

[8] We further note that the prejudice in this matter did not involve the case in which the petitioner was currently being arraigned. The prejudice involved the other two matters for which the petitioner did not receive his presentence confinement credit. We do not consider this fact to affect the analysis of whether this arraignment was a critical stage for purposes of the sixth

amendment. Notably, the same attorney had filed an appearance in all three cases. The United States Supreme Court has already identified pretrial negotiations to be a "critical stage" for purposes of the sixth amendment. See *Missouri* v. *Frye*, supra, 132 S. Ct. 1405; *Lafler* v. *Cooper*, supra, 132 S. Ct. 1384. It is not uncommon that pretrial negotiations would involve multiple separate offenses and that the separate offenses would then be packaged into one global plea. Accordingly, we see no reason why the fact that the prejudice in this matter related to the petitioner's other charges should impact the "critical stage" analysis. As long as the same attorney is representing the defendant on all the charges there is no concern about the lack of information the attorney may possess on one case as opposed to another. Certainly, where there are multiple charges, the petitioner's need for legal advice to help him cope with legal problems becomes even more acute.

[9] In support of this conclusion we rely upon the language of the United States Supreme Court in *Mempa* v. *Rhay*, supra, 389 U.S. 134, that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." Clearly, it cannot be questioned that since the petitioner spent extra time in jail as the result of his attorney's error, substantial rights were affected during both the arraignment stage and subsequent hearings when his counsel failed to request a higher bond on the other two cases. Further, it is incongruous to us that the United States Supreme Court would hold that "[a petitioner's] right to effective assistance of counsel applies to certain steps before trial . . . [which] include arraignments, postindictment interrogations, postindictment lineup, and the entry of a guilty plea"; (citation omitted; internal quotation marks omitted) *Missouri* v. *Frye*, supra, 132 S. Ct. 1405; and parse that right so that it only applied to matters strictly relating to the criminal trial. Indeed, the petitioner's confinement while he awaits trial, and his potential release based upon a determination of bond, affect the denial of liberty as much as a criminal trial that results in a judgment of conviction. To paraphrase *Frye*, the right to be represented at arraignment is not some adjunct to the criminal justice system, "it is the criminal justice system." (Internal quotation marks omitted.) *Missouri* v. *Frye*, supra, 1407.

[10] As noted by the Appellate Court, "[t]he 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." *Gonzalez* v. *Commissioner of Correction*, supra, 122 Conn. App. 713 n.7.

[11] See footnote 2 of this opinion for the relevant text of § 18-98d.

[12] The respondent cites *Commissioner of Correction* v. *Rodriquez*, 222 Conn. 469, 478, 610 A.2d 631 (1992), for the proposition that the petitioner herein "was not entitled to error free representation, only representation falling within the range of competence demanded of attorneys in criminal cases . . . ." (Internal quotation marks omitted.) Although we agree that a defendant is not entitled to error free representation, the evidence presented at the habeas trial demonstrated that a competent criminal attorney would have sought to have the petitioner's bond on the first arrest and the second arrest raised at the third arraignment. Accordingly, we find *Commissioner of Correction* v. *Rodriquez*, supra, 478, inapplicable to the present case.