SCHALLER, J., dissenting. I respectfully disagree that the petitioner, Odilio Gonzalez, is entitled to habeas corpus relief on the basis of his claim of ineffective assistance of counsel. In his habeas petition, the petitioner claimed that he was denied the effective assistance of counsel because his attorney failed (1) to request increases in the petitioner's bail in two pending cases (docket number CR-06-0600923-S and docket number CR-06-0599898-S), in which the attorney had represented him, as soon as bond was set in a third case (docket number CR-07-0607605-S), in order to qualify him for presentence confinement credit with respect to the two earlier cases and (2) to request, at sentencing, that the petitioner receive presentence confinement credit for the period of time between January 16 and March 29, 2007. The petitioner claimed that, as a result of counsel's failure to act, he was deprived of seventy-three days of presentence confinement credit, representing the period of time that elapsed before counsel obtained an increase in bail in the earlier two cases.

The habeas court granted the petition for a writ of habeas corpus, finding in its oral decision that counsel's performance was deficient and that it caused prejudice to the petitioner. In addressing counsel's performance, the habeas court focused its attention on counsel's performance at the bail hearing. The court found that counsel promptly should have asked for an increase in bail in the first two of the three cases. As to prejudice, the habeas court stated: "I should make clear that not only have I found deficient performance, but I have found prejudice and the prejudice is the loss of the seventy-three day jail credit in the Hartford cases." In sum, the habeas court premised its determination solely on the rationale that the petitioner's constitutional right to the effective assistance of counsel under the *Strickland* test[1] applied to the initial bail hearing, as well as all subsequent bail hearings. It is noteworthy that, although the habeas court, thereby, addressed the issue of when sixth amendment rights *attach* in a criminal proceeding, it made no mention of whether qualifying the petitioner for later presentence confinement credit at a bail hearing constituted a *critical stage* of the criminal proceeding. As a remedy, the habeas court determined that "[t]he most commensurate remedy here is to order the respondent warden . . . to credit the petitioner with the seventy-three days of pretrial time . . . ."

In challenging the habeas court's decision, the respondent first claims that the petitioner had no right to the effective assistance of counsel for a matter pertaining to pretrial confinement credit because the calculation of presentence confinement credit is a posttrial matter and, therefore, the issue cannot be a critical

stage of the proceedings, regardless of when it arises.[2] The respondent also claims that counsel's performance was not deficient and did not cause prejudice to the petitioner.

I

Unlike the principal opinion, I believe that the respondent's characterization of the issue, of whether a matter pertaining to presentence confinement is a critical stage, is the appropriate inquiry to determine whether the petitioner was entitled to counsel under the sixth amendment, and, therefore, entitled to effective assistance of counsel. I believe that two separate and distinct inquiries must be made in determining whether the petitioner was entitled to counsel under the sixth amendment. See *Rothgery* v. *Gillespie County*, U.S. , 128 S. Ct. 2578, 2591, 171 L. Ed. 2d 366 (2008) ("[t]he question whether arraignment signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel" [internal quotation marks omitted]); see also id., 2592 (Alito, J., concurring) ("[T]he term 'attachment' 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."). These two inquiries are, first, whether the sixth amendment right to counsel has attached and, second, if the sixth amendment right to counsel has attached, whether the events alleged constitute a critical stage of the proceedings.[3]

A

I agree with the principal opinion's statement, based on relevant case law, that "the petitioner's constitutional right to counsel had attached by the time of his arraignment." Having determined that the sixth amendment right attaches at arraignment, the appropriate inquiry is whether the function of counsel to maximize the later calculation of the presentence confinement credit constitutes a critical stage if it occurs during pretrial or trial proceedings. See *Rothgery* v. *Gillespie County*, supra, 128 S. Ct. 2591 ("[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel *during any 'critical stage'* of the postattachment proceedings" [emphasis added]).

B

The appropriate inquiry in this case is to determine the narrow question of whether the function of counsel to maximize a future calculation of the petitioner's presentence confinement credit constitutes a critical stage if it occurs during pretrial or trial proceedings. See id. ("what makes a stage critical is what shows the need for counsel's presence").

Whether a particular matter rises to the *critical stage* level depends, not on timing, but on the nature of the matter—in particular, whether it involves protecting

the defendant's vital interests by way of defense in the course of the adversarial confrontation between the defendant and the government. In this regard, the Supreme Court of the United States has stated that "cases have defined critical stages as proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,' see *United States* v. *Wade*, 388 U.S. 218, 226, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 [1967]) that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary . . . .'" (Citations omitted.) *Rothgery* v. *Gillespie County*, supra, 128 S. Ct. 2591 n.16. The purpose of the sixth amendment right to counsel is "to protect the fundamental right to a fair trial." (Internal quotation marks omitted.) *Lockhart* v. *Fretwell*, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), quoting *Strickland* v. *Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Supreme Court also has explained the purpose of extending the right to counsel before trial. Specifically, in *United States* v. *Ash*, 413 U.S. 300, 309–12, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973), the court stated: "This historical background suggests that the core purpose of the counsel guarantee was to assure Assistance at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. Later developments have led this Court to recognize that Assistance would be less than meaningful if it were limited to the formal trial itself.

"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. In *Wade*, the Court explained the process of expanding the counsel guarantee to these confrontations: When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves 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. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to critical stages of the proceedings. . . .

"The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to

the right itself." (Citation omitted; internal quotation marks omitted.)

In this case, the presentence credit matter did not involve any action on the part of counsel. Rather, it involved inaction on the part of counsel, with respect to two pending cases, in which the petitioner had been released on bail and on a promise to appear. Because neither the calculation of presentence confinement credit, pursuant to General Statutes § 18-98d, nor earlier preservation or enhancement of the credit constitutes a proceeding that *affects the accused's trial rights or his right to a defense* in any of his pending cases, neither is a critical stage matter that entitles the petitioner to habeas relief.[4] In light of the purposes of the sixth amendment right to counsel, it is clear that a failure of counsel to request an increase in bail on the petitioner's cases does not amount to ineffective assistance in a "trial-like [confrontation]"; (internal quotation marks omitted) *Rothgery* v. *Gillespie County*, supra, 128 S. Ct. 2591 n.16; or involve the petitioner's right to a fair trial. I am not aware of any authority—federal or state—that so holds. Certainly, none of the cases submitted by the petitioner, relied on by the habeas court or cited by the principal opinion, supports that proposition. The closest analogies that appear to illustrate the trial-related rationale involve proceedings under rule 35 (b) of the Federal Rules of Civil Procedure, as argued by the respondent. In *United States* v. *Palomo*, 80 F.3d 138, 142 (5th Cir. 1996), the court held that a rule 35 (b) proceeding is "not a trial-related proceeding and no Sixth Amendment right to counsel attaches at this stage." In *United States* v. *Nevarez-Diaz*, 648 F. Sup. 1226, 1230 (N.D. Ind. 1986), the District Court held similarly. In conclusion, if a matter does not implicate the right to counsel under the sixth amendment, regardless of when it is raised, there can be no deprivation of such right. See *Wainwright* v. *Torna*, 455 U.S. 586, 587–88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982).

II

Even assuming for purposes of argument that the petitioner was entitled to counsel under the sixth amendment during pretrial or trial to maximize the later calculation of the petitioner's presentence confinement credit, I disagree with the principal opinion that the habeas court correctly determined that the petitioner satisfied both the performance and prejudice prongs of the *Strickland* test for ineffective assistance of counsel.[5]

Although I agree with the habeas court that counsel's failure to seek increased bail promptly was an oversight on the part of the attorney, I do not believe that it rises to the level of a constitutional deficiency. Our case law is clear, moreover, that "[t]he right to counsel . . . is the right to effective assistance and not the right to perfect representation." (Internal quotation marks

omitted.) *Johnson* v. *Commissioner of Correction*, 36 Conn. App. 695, 701, 652 A.2d 1050, cert. denied, 233 Conn. 912, 659 A.2d 183 (1995). To satisfy the performance prong, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 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). As stated in *Strickland*, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland* v. *Washington*, supra, 466 U.S. 696.

On the basis of the foregoing, I conclude that the petitioner's trial counsel did not provide constitutionally deficient performance, nor has the petitioner shown that the result of the particular proceeding is unreliable. Because the petitioner has failed to satisfy the first prong of the *Strickland* test for ineffective assistance of counsel, I need not analyze whether counsel's performance unfairly prejudiced the petitioner. See *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 835–36, 950 A.2d 1220 (2008).

I respectfully submit that the principal opinion affirms the result and remedy ordered by the habeas court in the absence of a clear and consistent rationale for doing so. Because I believe that no basis exists for sustaining the habeas court's decision, regardless of how the original issue is construed, I would reverse the judgment of the habeas court.

For the foregoing reasons, I respectfully dissent.

[1] See *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires a petitioner to establish both that counsel's representation fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.

[2] I note that I disagree with the concurrence's characterization of the respondent's issue on appeal. I agree that the habeas court determined that the "trial counsel on all three then pending files should reasonably have sought an increase in bond with respect to each of the two files already pending so that, if convicted on any or both of those files, he would have received pretrial jail credit time as set forth in [General Statutes] § 18-98d." I believe, however, that the respondent has sufficiently challenged this determination by the habeas court on appeal. Specifically, the respondent claims in his statement of issues the following: "Whether the habeas court erred in ruling that the petitioner was denied his right to effective assistance of counsel when his attorney failed to request that his bond be raised after he was arrested and held in lieu of bond in another case." I agree with the concurrence that the respondent's argument as to why the petitioner was not entitled to claim ineffective assistance of counsel pursuant to the sixth amendment focused on the calculation of the presentence confinement credits. I believe that the respondent's argument does not limit our review of his underlying claim. Therefore, I review the respondent's claim, that is, whether the petitioner was entitled to claim ineffective assistance of counsel pursuant to the sixth amendment for counsel's failure to request an increase

in bond in two pending cases.

[3] I disagree with the principal opinion's reasoning that critical stage analysis is not required in this case. Specifically, the principal opinion states: "Cases that undertake a critical stage analysis . . . normally involve matters in which a defendant was denied access to counsel, did not have counsel present or was not himself present, at a critical stage of trial. . . . This case, however, deals not with a petitioner who was denied access to counsel, but rather with a petitioner whose counsel failed to provide him effective assistance after his right to counsel had attached and counsel was present. This court does not agree with the dissent that this claim presents a critical stage issue and declines to undertake any critical stage analysis." (Citations omitted.) When a defendant is denied access to counsel, the question for the court is whether the defendant is entitled to counsel pursuant to the sixth amendment of the United States constitution. The sixth amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. In *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the court stated that in previous cases it had "recognized that the right to counsel is the right to the effective assistance of counsel." (Internal quotation marks omitted.) Because an ineffective assistance of counsel claim stems from the petitioner's right to counsel, if a petitioner is not entitled to counsel pursuant to the sixth amendment, his claim for ineffective assistance of counsel must fail. Therefore, the critical stage analysis used to determine whether a petitioner is entitled to counsel pursuant to the sixth amendment is appropriate in determining whether a petitioner may make a claim for ineffective assistance of counsel. Furthermore, this court has recognized that ineffective assistance of counsel claims have to involve allegations of ineffectiveness that occurred during a critical stage of the proceedings. See *Ebron* v. *Commissioner of Correction*, 120 Conn. App. 560, 567, 992 A.2d 1200 (2010) ("[o]ur Supreme Court has recognized that pretrial negotiations implicating the decision of whether to plead guilty *is a critical stage, and, therefore, a defendant is entitled to adequate and effective assistance of counsel* at this juncture of the criminal proceedings" [emphasis added; internal quotation marks omitted]). Therefore, I believe that the question of when the sixth amendment right *attaches* is separate and distinct from the question of whether every matter that arises after the right to counsel attaches constitutes a *critical stage* requiring the effective assistance of counsel.

[4] I recognize that obtaining the maximum credit for presentence confinement is beneficial to the petitioner. The sixth amendment, however, guarantees only the "right . . . to have the assistance of counsel for his defense." U.S. Const., amend. VI. " '[D]efence' means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery* v. *Gillespie County*, supra, 128 S. Ct. 2594 (Alito, J., concurring); see also id., 2605 (Thomas, J., dissenting) ("[W]e have never suggested that the accused's right to the assistance of counsel 'for his defence' entails a right to use counsel as a sword to contest pretrial detention. To the contrary, we have flatly rejected that notion, reasoning that a defendant's liberty interests are protected by other constitutional guarantees."). Last, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial." *Strickland* v. *Washington*, supra, 466 U.S. 689.

[5] See footnote 1 of this dissent.