BISHOP, J., concurring in part and dissenting in part. I agree with the majority's well reasoned analysis and its disposition of the claims of the defendant, Zachary Jay Elson, regarding the judgment of conviction. I write separately, however, because I believe the defendant's sentencing claim raises a troubling issue warranting resentencing. With respect to the state's claim that this issue has not been adequately preserved for review, I write separately from Judge Dupont because I reach the issue by following a different analytical path.

The state claims that we should not review the defendant's sentencing claim because the issue was unpreserved[1] and he did not seek review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), in his initial brief. I agree with Judge Dupont that the failure of a party to cite to *Golding* need not invariably prevent review of a claim that is otherwise properly briefed.[2] I also agree with Judge Harper, however, that this court is bound by our Supreme Court's holdings regarding a party's obligation affirmatively to request extraordinary review and to do so in its initial brief.[3] I would reach the issue by invoking our supervisory power over the administration of justice in resolving the present appeal.

"Appellate courts possess an inherent supervisory authority over the administration of justice. . . . The standards that [are] set under this supervisory authority are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law . . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . [O]ur supervisory authority [however] is not a form of free-floating justice, untethered to legal principle. . . . [T]he integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . [O]ur supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . ." (Internal quotation marks omitted.) *State* v. *Mukhtaar*, 253 Conn. 280, 290 n.11, 750 A.2d 1059 (2000); see also Practice Book §§ 60-1 and 60-2. Additionally, "[i]n certain instances, dictated by the interests of justice, we may, sua sponte, exercise our inherent supervisory power to review an unpreserved claim that has not been raised appropriately under the *Golding* or plain error doctrines." (Internal quotation marks omitted.) *State* v. *Jones*, 281 Conn. 613, 618 n.5, 916 A.2d 17, cert. denied, U.S. , 128 S. Ct. 164, 169 L. Ed. 2d 112 (2007).[4] I believe that the present case warrants the exercise of those powers.[5]

I begin with the elementary principle that a defendant's right to trial is among the most cherished consti-

tutional rights. As noted by the United States Supreme Court: "Although some are prone to overlook it, an accused's right to trial by a jury of his fellow citizens when charged with a serious criminal offense is unquestionably one of his most valuable and well-established safeguards in this country." *Green* v. *United States*, 356 U.S. 165, 215, 78 S. Ct. 632, 2 L. Ed. 2d 672 (1958) (Black, J., dissenting). Accordingly, it is impermissible to penalize a defendant for standing trial instead of pleading guilty. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978) ("[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). Because this right is a fundamental one, we must be particularly vigilant in circumstances in which the right may be in peril. One such circumstance may arise at sentencing. One court has commented: "[C]ourts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice." *United States* v. *Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948, 93 S. Ct. 1924, 36 L. Ed. 2d 409 (1973).[6] Many courts have held that it is impermissible for the court to give any weight, at sentencing, to the fact that a defendant may have exercised his right to trial. For example, the Iowa Supreme Court has concluded that "the fact a defendant has exercised the fundamental and constitutional right of requiring the state to prove at trial his guilt as charged and his right as an accused to raise defenses thereto is to be given no weight by the trial court in determining the sentence to be imposed after the defendant's guilt has been established." *State* v. *Nichols*, 247 N.W.2d 249, 255 (Iowa 1976). Similarly, the Court of Appeals of Maryland, in reviewing a claim that the court may have given impermissible consideration to a defendant's exercise of his right to trial, stated: "Any doubt in this regard must be resolved in favor of the defendant. Accordingly, our part in the administration of justice requires that we find that a consideration of [the defendant's] failure to plead guilty was impermissible because a price may not be exacted nor a penalty imposed for exercising the fundamental and constitutional right of requiring the State to prove, at trial, the guilt of the petitioner as charged." *Johnson* v. *State*, 274 Md. 536, 543, 336 A.2d 113 (1975); see also *People* v. *Mosko*, 190 Mich. App. 204, 211, 475 N.W.2d 866 (1991), aff'd, 441 Mich. 496, 495 N.W.2d 534 (1992).

The record in the case at hand reveals that at sentencing, the trial court stated: "We've all heard the defendant's apology. I don't know how sincere it is, but it is certainly unfortunate that it comes so late in the process. If the defendant had been truly apologetic, he wouldn't have put the victim through the trial. To a large extent it seems to me that the defendant's apology represents thinking of himself rather than the victim."

The defendant claims that these comments reveal that the court improperly considered at sentencing his decision to go to trial and that his sentence improperly was elongated by this consideration.[7] The defendant points out, as well, that the court considered the decision by the defendant to go to trial as evidence that he lacked remorse for his criminal conduct. In response, the state argues that the court did not improperly consider the defendant's election to go to trial as a sentencing factor and that even if the court did so, the defendant has not meet the burden of persuasion enunciated by our Supreme Court in *State* v. *Kelly*, 256 Conn. 23, 770 A.2d 908 (2001). Simply put, the state contends that the defendant has not proven that the court elongated his sentence because he chose to go to trial.[8]

As noted by Judge Dupont, our Supreme Court, in *Kelly*, adopted a "totality of the circumstances" test. Id., 82.[9] Judge Dupont surveyed the circumstances of the sentencing at issue and concluded that the defendant did not prove that his sentence was elongated because he exercised his right to trial. Respectfully, I believe there are significant differences between the circumstances the court faced in *Kelly* and those we confront here. In *Kelly*, the record reflected that the sentencing court commented that it took into consideration "whether or not there was a plea or a complete trial . . . ." (Internal quotation marks omitted.) Id., 80. On review, our Supreme Court found that the subject comment did not, by itself, demonstrate that the court elongated the defendant's sentence because he elected to go to trial. Id., 83.

In the present case, the court not only took into consideration that the defendant exercised his right to trial, but the court equated that choice with the absence of remorse. Although the teaching of *Kelly* is that we must assess all of the circumstances, no part of *Kelly* requires us to give equal weight to the factors considered by the court. Thus, as in this case, I believe that if it is apparent that the court impermissibly considered, as a factor, the defendant's exercise of a fundamental right as proof of lack of remorse, that factor alone sufficiently taints the sentencing process to warrant resentencing.

Clearly, a court may take a defendant's remorse or lack of it into consideration in imposing sentence. Our Supreme Court has stated: "Among the factors that may be considered by a court at a sentencing hearing are the defendant's demeanor and his lack of veracity and remorse as observed by the court during the course of the trial on the merits. See, e.g., *United States* v. *Grayson*, 438 U.S. 41, 47–48, 50–52, 98 S. Ct. 2610, 57 L. Ed. 2d 582 (1978); *United States* v. *Rosenberg*, 806 F.2d 1169 (3d Cir. 1986), cert. denied, 481 U.S. 1070, 107 S. Ct. 2465, 95 L. Ed. 2d 873 (1987); *United States* v. *Roland*, 748 F.2d 1321, 1327 (2d Cir. 1984); *McClain* v.

United States, 676 F.2d 915, 919 (2d Cir.), cert. denied, 459 U.S. 879, 103 S. Ct. 174, 74 L. Ed. 2d 143 (1982) . . . ." (Citation omitted.) *State* v. *Anderson*, 212 Conn. 31, 47–48, 561 A.2d 897 (1989).

Here, rather than assessing the sincerity of the defendant's remorse by reference to his demeanor as a witness or other behaviors, the court discounted his expression of remorse at sentencing on the basis of its timing, commenting that if he had been truly apologetic, the defendant would not have put the victim through a trial.[10] In doing so, I believe that the court impermissibly conflated the question of remorse with the exercise of a fundamental constitutional right. In arriving at this conclusion, I do not suggest that it is always impermissible for a court to consider, as a sentencing factor, the impact on a victim of being required to testify at trial, but, here, the court went beyond that consideration to conclude that the defendant's exercise of a fundamental constitutional right, itself, demonstrated a lack of remorse.[11] In making this determination, I believe, the court impermissibly tainted the sentencing process, thereby entitling the defendant to be sentenced anew.

If a defendant's election for a trial can be considered, itself, as evidence of the absence of remorse, a significant sentencing factor, it does not take a leap of logic to conclude that such a determination by a sentencing court will have a chilling effect on a defendant's exercise of this most fundamental constitutional right. In a constitutional system, that result cannot be tolerated. Accordingly, I respectfully dissent from that portion of the majority opinion concerning the sentencing claim. I would remand the matter for resentencing. In all other respects, I concur.

[1] Under the particular circumstances, I believe it would have been extraordinarily difficult for counsel to have attempted to preserve this issue in the trial court. Once the court, at sentencing, revealed that it had taken the defendant's exercise of his right to trial into consideration and had equated this exercise with a lack of remorse, the proverbial bell had rung. The court's comments revealed that it had already formulated its view tying together the defendant's absence of remorse with his exercise of a fundamental right. At that juncture, it is unlikely there was a reasonable avenue available to counsel to undo the court's conclusion. Additionally, for counsel to have interrupted the court's sentencing comments to object to its reference to the defendant's exercise of his right to trial and its tie-in to the factor of remorse would have run the risk of incurring the court's displeasure at the moment of sentencing. The law does not require a party to undertake a patently fruitless act.

[2] It is noteworthy that in *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 68–69, 951 A.2d 520 (2008) (*Palmer*, *J.*, concurring), two justices concurred in the result while writing that they would have reviewed the defendant's unpreserved constitutional claim because the state was aware of the issue and had briefed and argued it, and the defendant made all of the same arguments he would have made if he had used the talismanic term *Golding* in his brief.

[3] Although our Supreme Court has made it clear that *Golding* may not be invoked for the first time in a reply brief, the rationale behind those rulings is to prevent unfair surprise and to give the state the opportunity to respond fully to the defendant's claims. See *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997); *State* v. *Rosario*, 113 Conn. App. 79, 93, 966 A.2d 249 (2009). In each of those cases, however, as in the present case, the defendant briefed the constitutional issue in his initial brief, and the

state, properly and thoroughly, briefed both the reviewability issue and the merits of the constitutional issue, fairly putting the rationale for this line of cases into question.

[4] It is noteworthy that in *State* v. *Jones*, supra, 281 Conn. 613, our Supreme Court decided to review an unpreserved claim on the ground that "the record . . . is adequate for our review and because the defendant's claim involves a constitutional right that we have characterized, in terms of importance to an accused, as equivalent to the *right to trial itself* . . . ." (Citation omitted; emphasis added.) Id., 618 n.5.

[5] Additionally, I note that our Supreme Court has expanded the range of unpreserved constitutional claims that it is willing to review without the need to seek *Golding* review. For example, the court now holds that an unpreserved claim of prosecutorial impropriety is reviewable without regard to *Golding*. See *State* v. *Stevenson*, 269 Conn. 563, 572–73, 849 A.2d 626 (2004). Similarly, a claim of evidentiary insufficiency is reviewable without regard to a *Golding* analysis on the rationale that a conviction based on insufficient evidence is, itself, unconstitutional. See *State* v. *Roy*, 233 Conn. 211, 658 A.2d 566 (1995); *State* v. *Cyrta*, 107 Conn. App. 656, 659, 946 A.2d 288, cert. denied, 288 Conn. 912, 954 A.2d 185 (2008). In *Cyrta*, this court opined: "[T]he defendant's claim of evidentiary insufficiency is reviewable even if it may not have been properly preserved at trial. Unpreserved sufficiency claims are reviewable on appeal because such claims implicate a defendant's federal constitutional right not to be convicted of a crime upon insufficient proof. . . . Our Supreme Court has stated that *Jackson* v. *Virginia*, [443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)], compels the conclusion that any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, supra, 213 Conn. 239–40]. . . . Thus . . . there is no practical reason for engaging in a *Golding* analysis of a claim based on the sufficiency of the evidence . . . ." (Internal quotation marks omitted.) *State* v. *Cyrta*, supra, 659–60. The court in *Cyrta* concluded that it would review the defendant's challenge to the sufficiency of the evidence as it would any properly preserved claim. Id., 660.

[6] This admonition has particular applicability to a system that is almost completely reliant on the plea bargaining process for the disposition of criminal cases. The biennial report of the Connecticut judicial branch reveals that in the 2004-2005 fiscal year, the Superior Court disposed of 3323 criminal cases, only 173 (5.2 percent) by trial, and in the 2005-2006 fiscal year, there were 3049 criminal dispositions, 165 (5.4 percent) by trial. Where disposition by trial is relatively rare, it is even more important to public confidence in our judicial system, if not to due process itself, that the court not take into consideration the rare exercise of the right of a defendant to require the state to prove its case at trial.

[7] The defendant was convicted of assault in the first degree and unlawful restraint in the first degree. He was found not guilty of attempt to commit assault in the first degree. He was also charged, in a part B information, with the commission of these crimes while out on bond for unrelated charges. He was sentenced on the assault conviction to a period of incarceration of twenty-five years, suspended after twenty years. On the unlawful restraint conviction he received a concurrent five year sentence. The total effective sentence of twenty-five years suspended after twenty years incarceration represented an enhancement of five years due to the part B conviction. Because Connecticut does not have sentencing guidelines and, to my knowledge, the judicial branch does not maintain comparative sentencing statistics, one can not say with any accuracy whether the substantial sentence received by the defendant is outside the norm.

[8] Except in the most outrageous case, I do not think that a defendant could ever demonstrate that the court actually lengthened a sentence because he or she elected a trial. Although decisional law is not uniform in this regard, some courts have taken the view that where the record is equivocal as to whether the sentencing court considered a defendant's decision to go to trial, the matter should be remanded for resentencing. For example, in *United States* v. *Hutchings*, 757 F.2d 11 (2d Cir.), cert. denied, 472 U.S. 1031, 105 S. Ct. 3511, 87 L. Ed. 2d 640 (1985), in which resentencing was ordered where the court commented, after trial, that the trial had been a "total waste of public funds and resources . . . there was no defense in this case. This man was clearly and unquestionably guilty, and there should have been no trial." (Internal quotation marks omitted.) Id., 13.

The Oregon Court of Appeals has taken a further step to dampen the potential for a sentencing court to impermissibly consider a defendant's

exercise of his right to trial. In *State* v. *Fitzgibbon*, 114 Or. App. 581, 836 P.2d 154 (1992), the court opined: "[T]he record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. Id., 587. There, because the record did not affirmatively show that the trial court sentenced the defendant solely on the facts and not as a punishment for pleading not guilty, the matter was remanded for resentencing.

[9] In *Kelly* and in some of the cases cited herein, the focus was on whether the court lengthened a defendant's sentence as punishment for exercising the right to trial. Other cases focus on whether the court impermissibly took the defendant's exercise of that right into consideration at sentencing. Although these terms are often used interchangeably, I believe they represent a distinction with a difference. It would be nearly impossible to prove, except in the most blatant of circumstances, that a court actually elongated a sentence for this reason. On the other hand, the trial record may often be adequate to demonstrate whether the court improperly considered the election. This particular distinction does not appear to have been a focus of the court in *Kelly*.

[10] It is noteworthy that immediately preceding the defendant's allocution, the victim made an impassioned and moving statement to the court in which she discussed how the trial had caused her and her loved ones to relive the events of the defendant's criminal behavior.

[11] To the contrary, see *People* v. *Janke*, 720 P.2d 613, 616 (Colo. App. 1986), citing with approval an earlier Colorado Appellate Court opinion holding that "any consideration of the trauma to the victims caused by their having to testify would be error in light of defendant's fundamental right to require the prosecution to prove every element of the case." *People* v. *Wilson*, 43 Colo. App. 68, 71, 599 P.2d 970 (1979). I am not insensitive to the trauma realized by victims who must often relive the experiences of criminal acts inflicted on them. To give consideration to a defendant who pleads guilty and thus saves the victim from having to testify is a hallmark of our plea bargaining system. But the coin is not exactly two-sided. In a just system, elongation of a sentence from the norm cannot be the flip side of leniency from the norm. Ensuring the integrity of such a system is no simple task.