DUPONT, J., concurring in part. I concur in the majority opinion and agree that the judgment of the trial court should be affirmed. I write separately to express my disagreement with the majority's interpretation of the meaning of "affirmative request" as used by our Supreme Court in order to determine whether a defendant can obtain review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), of a claimed constitutional deprivation that was not preserved at trial, and with the majority's decision to overrule in part *State* v. *Wright*, 114 Conn. App. 448, 969 A.2d 827 (2009).[1]

This appeal was first argued in the 2008–2009 court year before a three judge panel of this court and was the subject of a published opinion, *State* v. *Elson*, 116 Conn. App. 196, 975 A.2d 678 (2009). This court granted en banc reargument and reconsideration of the original *Elson* decision. The same briefs of the parties used in the original case were used in this case on reconsideration. On appeal, the defendant, Zachary Jay Elson, claimed in his main brief that the court considered improper factors at the time of his sentencing, thereby depriving him of his right to due process of law afforded by the federal constitution. He provided an excerpt of the transcript of the sentencing with citation to the specific statements that he claimed demonstrated that the trial court considered his decision to stand trial as a factor in his sentencing, thereby impermissibly punishing him for exercising a constitutional right. The defendant raised and adequately briefed the constitutional claim in his main brief. In its brief, the state argued that the defendant's claim was not reviewable because he had failed to preserve it at trial and had failed to invoke any doctrine of extraordinary review of the claim on appeal. In its brief, the state, explicitly arguing in the alternative, also analyzed the defendant's constitutional claim on its merits. The defendant requested review of this claim pursuant to *Golding* in his reply brief. In my opinion, the question is whether the defendant had made in his main brief an "affirmative request for review" pursuant to *Golding* and its progeny in order to obtain such review based on *Golding* itself and subsequent Supreme Court cases.

The author of the original *Elson* decision declined to review the unpreserved claim because the defendant did not cite *Golding*, or assert that his claim was not preserved for appellate review or otherwise "affirmatively request" review pursuant to *Golding* in his main brief. *State* v. *Elson*, supra, 116 Conn. App. 239–40. In a concurring opinion, I determined that the unpreserved claim was reviewable under *Golding* but that the claim failed to satisfy the third prong of *Golding* because

the defendant failed to demonstrate that the alleged constitutional violation clearly existed and clearly deprived him of a fair trial. Id., 245 (*Dupont*, *J.*, concurring in part).[2]

Upon a rehearing and a reconsideration of the reviewability of the sentencing issue, the majority has concluded that because the defendant did not "affirmatively request" *Golding* review of the unpreserved claim, he was not entitled to such review. The majority defines such an affirmative request as "nothing less than an explicit assertion and analysis in a party's main brief that explains that, if the reviewing court deems a particular claim to be unpreserved, that claim nonetheless is reviewable on appeal because the record is adequate to review the claim and it is a claim of constitutional magnitude." See part I of the majority opinion. Our Supreme Court has not, in any case of which I am aware, defined precisely or amplified what it meant by the phrase "affirmative request" for appellate review of an unpreserved constitutional claim, as originally used in *State* v. *Ramos*, 261 Conn. 156, 171, 801 A.2d 788 (2002) ("[a] party is obligated . . . affirmatively to request review under [*Golding*]"). It is my hope that our Supreme Court will elucidate the phrase in order that this court and the Connecticut bar can know what may be needed, if anything, to implement that court's decision in *Golding*. Specifically, our Supreme Court has not yet decided whether the phrase is intended to expand or modify the original directions of *Golding*, namely, its first two prongs. I depart from the majority insofar as it interprets the "affirmative request" requirement as requiring anything more than satisfying the first two prongs of *Golding* itself. Accordingly, I would not overrule *State* v. *Wright*, supra, 114 Conn. App. 448.

Golding followed the case of *State* v. *Evans*, 165 Conn. 61, 69, 327 A.2d 576 (1973). In *Evans*, our Supreme Court established review for unpreserved claims that constituted " 'exceptional circumstances' . . . ." Id., 70. The court recognized "two situations that may constitute 'exceptional circumstances' such that newly raised claims can and will be considered by [an appellate] court. The first is . . . where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal. . . . The second 'exceptional circumstance' may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." (Citation omitted.) Id.

These exceptional circumstances were intended to strike the proper balance between protecting the constitutional rights of defendants and the court's interest in reviewing only properly preserved claims, thus avoiding trial by ambuscade of the trial court. Claimed constitutional violations normally should be brought to the attention of the trial court, where they can be addressed

and remedied. See *State* v. *Canales*, 281 Conn. 572, 581, 916 A.2d 767 (2007). Over time, the second "exceptional circumstance" came to be relied on in so many cases that it ceased to be exceptional. The rule in *Evans* made it difficult for the court to address the reviewability issue without actually reviewing the claim on its merits, thus resulting in a variety of approaches.[3] This court, for example, attempted to disentangle the issue of reviewability from the merits of the claim by adopting a four part approach in *State* v. *Thurman*, 10 Conn. App. 302, 305–306, 523 A.2d 891, cert. denied, 204 Conn. 805, 528 A.2d 1152 (1987),[4] an approach that was cited favorably by our Supreme Court in *State* v. *Bailey*, 209 Conn. 322, 329 n.4, 551 A.2d 1206 (1988), and was employed by this court in numerous decisions.[5]

In 1989, our Supreme Court acknowledged that the methodologies used under the *Evans* standard were inconsistent and, in *Golding*, "articulate[d] guidelines designed to facilitate a less burdensome, more uniform application of the present *Evans* standard in future cases involving alleged constitutional violations that are raised for the first time on appeal." *State* v. *Golding*, supra, 213 Conn. 239.[6] The court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) Id., 239–40. Case law is clear that "[t]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the defendant may prevail." (Internal quotation marks omitted.) *State* v. *Whitford*, 260 Conn. 610, 621, 799 A.2d 1034 (2002).

In the present matter, the majority concludes that our Supreme Court later added a gloss to *Golding* that an appellant's entitlement to a *Golding* review must be requested affirmatively in the main brief. This gloss is traced to *State* v. *Waz*, 240 Conn. 365, 371 n.11, 692 A.2d 1217 (1997), in which the court admonished: "[D]efendants who seek consideration of unpreserved constitutional claims [on appeal] . . . bear the burden of establishing their entitlement to such review under the guidelines enumerated in *Golding*." In *Waz*, the court addressed the defendant's unpreserved constitutional claim, despite the defendant's failure to make an express reference to the guidelines specified in *Golding*. In *State* v. *Ramos*, supra, 261 Conn. 170–71, the court concluded that the defendant had not preserved his objection to a particular jury instruction. The court declined to review the claim, relying in part on *State*

v. *Waz*, supra, 371 n.11, stating: "[A] defendant may prevail on an unpreserved claim under *Golding* or the plain error doctrine. . . . A party is obligated, however, affirmatively to request review under these doctrines." (Citations omitted.) *State* v. *Ramos*, supra, 171. This was the first time our Supreme Court expressly associated an "affirmative request" requirement with a *Golding* review of unpreserved claims. Although the majority in the present case has cited numerous instances since *Ramos* in which our Supreme Court has reiterated that an appellant has a duty to "affirmatively request" *Golding* review, that court has not expressly defined what form such an "affirmative request" must take.[7]

Our Supreme Court has come close, however, to equating an affirmative request with compliance with the first two prongs of *Golding*. In *State* v. *Bowman*, 289 Conn. 809, 815, 960 A.2d 1027 (2008), the court stated: "[I]f a defendant fails to preserve a claim for appellate review, we will not review the claim unless the defendant is entitled to review under the plain error doctrine or the rule set forth in *State* v. *Golding*, [supra, 213 Conn. 239–40]." (Internal quotation marks omitted.) Immediately after these words, the court quotes *Ramos* as follows: "A party is obligated . . . affirmatively to request review under these doctrines. *State* v. *Ramos*, supra, 171 . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bowman*, supra, 815. It would appear that the word "doctrines" relates to the plain error doctrine *or* the rule set forth in *Golding*. Furthermore, after stating that a party is obligated affirmatively to request review, the court, citing *Waz*, explains that "defendants who seek consideration of unpreserved constitutional claims [on appeal] . . . bear the burden of establishing their entitlement to such review under the guidelines enumerated in *Golding* . . . ." (Internal quotation marks omitted.) Id. The plain meaning of these words appears to equate "affirmatively" with establishing a right to review under the guidelines of *Golding*. Furthermore, if "affirmative" is equated with a specific reference to *Golding* or an explicit plea for review pursuant to *Golding*, I believe that the philosophy underlying the case would be compromised.

Regardless of the meaning of the phrase "affirmative request," Connecticut case law has remained essentially unchanged. The rationale underlying both *Evans* and *Golding* remains that fundamental constitutional rights are of such importance that appellate courts should review claims of alleged constitutional violations even when a defendant fails to take an exception to the alleged violation at the trial court level. Much like requests for review pursuant to *Evans*, requests for *Golding* review of unpreserved claims of constitutional magnitude have proliferated like kudzu[8] in our appellate system. Because of the ubiquitous presence of *Golding* review in our jurisprudence, it would be difficult for

the state or the reviewing court to fail to perceive that such a review of an unpreserved constitutional issue is sought. If the defendant has provided an adequate record for review and has demonstrated through adequate briefing in his main brief that his unpreserved claim alleges a claim of constitutional magnitude, that is, the violation of a constitutional right, it is my belief that the defendant has alerted opposing counsel and the reviewing court sufficiently to be equated with and tantamount to a request for *Golding* review.

This is the approach employed in *State* v. *Wright*, supra, 114 Conn. App. 448. In that case, the defendant claimed a constitutional violation in his main brief and provided an adequate record for review. Id., 456. The state in its brief argued that the claim was unreviewable because it was not preserved at trial and the defendant did not request review pursuant to *Golding*. Id. The state in its brief argued in the alternative that if the court found the claim to be reviewable, the claim failed on its merits. Id., 456–57. *Wright* is indistinguishable from *Elson* in these respects. As noted in *Wright*: "This court's ability to *review* a claim, and the defendant's ability to *prevail* on his claim, are two entirely different concepts. . . . As the Supreme Court stated in *Golding*, the defendant bears the responsibility for providing a record that is adequate for review of his claim and demonstrating that his claim is indeed a violation of a fundamental constitutional right, thereby satisfying the first and second prongs. . . . Should the defendant do so, [an appellate court] will [then] review [the claim] and arrive at a conclusion as to whether . . . the third and fourth prongs [are satisfied]." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 458. This court held in *Wright*: "[It is not] mandatory for a defendant to cite *Golding* to obtain review of an unpreserved claim of a constitutional deprivation at trial, [but] we do require that a defendant present a record that is adequate for review and affirmatively [demonstrate] that his claim is indeed a violation of a fundamental constitutional right." (Internal quotation marks omitted.) Id., 463.

Nothing in the approach in *Wright* is contrary to established Supreme Court precedent. The approach is wholly consistent with *State* v. *Waz*, supra, 240 Conn. 371 n.11, as it properly places on appellants who seek consideration of their unpreserved claims of constitutional magnitude the burden "of establishing their entitlement to such review under the guidelines enumerated in *Golding*." In addition, this approach promotes judicial economy, as it provides a lessened need for future habeas corpus petitions and other cases, both civil and criminal, that allege ineffective assistance of appellate counsel for failure to obtain appellate review of an unpreserved constitutional claim because counsel failed to "affirmatively request" *Golding* review, when counsel did provide an adequate record for review and

adequately briefed an unpreserved claim of constitutional magnitude.

Our Supreme Court has not yet expressly defined an "affirmative request" as anything other than satisfying the first two prongs of *Golding*.[9] For these reasons, I do not believe that this court should overrule in part *State* v. *Wright*, supra, 114 Conn. App. 448, or should decline to review an unpreserved constitutional claim because of a lack of an "affirmative request" for review. I do, however, concur in the result reached by the majority opinion for the reasons stated in *State* v. *Elson*, supra, 116 Conn. App. 240–46 (*Dupont*, *J.*, concurring in part).

[1] "[A] court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it . . . ." (Internal quotation marks omitted.) *State* v. *Bowman*, 289 Conn. 809, 817, 960 A.2d 1027 (2008). Neither party in *Wright* petitioned our Supreme Court for review. I believe that *Wright* is logically and legally robust and does not contravene any Supreme Court or Appellate Court decision. See W. Horton & K. Bartschi, "2009 Appellate Review," 84 Conn. B.J. 1, 13 (2010) (noting that "[i]n *State* v. *Wright*, [supra, 114 Conn. App. 448], the court held that the defendant need not cite *Golding* by name to invoke *Golding* review" but not commenting on soundness of that holding).

[2] The third member of the original panel would have reached the issue by invoking our supervisory power over the administration of justice and would grant remand of this case to the trial court for resentencing. See *State* v. *Elson*, supra, 116 Conn. App. 246 (*Bishop*, *J.*, concurring in part and dissenting in part). My conclusion that the defendant failed to demonstrate that the alleged constitutional violation clearly deprived him of a fair trial should not be construed as my approval of the comments made by the judge at sentencing.

[3] See S. Sellers, "*State* v. *Golding*: A Standardless Standard?," 65 Conn. B.J. 245, 246–51 (1991).

[4] "We must ask a series of questions when an *Evans* claim is made and answer each in the affirmative before continuing to the succeeding question. . . . The first two questions relate to whether a defendant's claim is reviewable, and the last two relate to the substance of the actual review. . . .

"First, does the defendant raise an issue which, by its terms, implicates a fundamental constitutional right? . . . Second, is the defendant's constitutional claim adequately supported by the record? . . . Third, was there, in fact, based on the record, a deprivation of a constitutional right of a criminal defendant? . . . Fourth, did the deprivation deny the defendant a fair trial, thereby requiring that his conviction be set aside?" (Citations omitted; internal quotation marks omitted.) *State* v. *Thurman*, supra, 10 Conn. App. 306–307.

[5] See, e.g., *State* v. *Robinson*, 14 Conn. App. 40, 539 A.2d 606, cert. denied, 488 U.S. 899, 109 S. Ct. 244, 102 L. Ed. 2d 233 (1988); *State* v. *Flynn*, 14 Conn. App. 10, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988); *State* v. *Arroyo*, 13 Conn. App. 687, 539 A.2d 581, cert. denied, 208 Conn. 805, 545 A.2d 1103 (1988); *State* v. *Vega*, 13 Conn. App. 438, 537 A.2d 505 (1988); *State* v. *Peterson*, 13 Conn. App. 76, 534 A.2d 1237 (1987); *State* v. *Griffin*, 12 Conn. App. 221, 530 A.2d 210 (1987); *State* v. *Day*, 12 Conn. App. 129, 529 A.2d 1333 (1987); *State* v. *Diorio*, 12 Conn. App. 74, 529 A.2d 1320, cert. denied, 205 Conn. 813, 532 A.2d 587 (1987), cert. denied, 484 U.S. 1065, 108 S. Ct. 1025, 98 L. Ed. 2d 990 (1988); *State* v. *Foshay*, 12 Conn. App. 1, 530 A.2d 611, cert. denied, 205 Conn. 813, 532 A.2d 587 (1987); *State* v. *McKenna*, 11 Conn. App. 122, 525 A.2d 1374, cert. denied, 205 Conn. 806, 531 A.2d 939 (1987); *State* v. *Huff*, 10 Conn. App. 330, 523 A.2d 906, cert. denied, 203 Conn. 809, 525 A.2d 523 (1987).

[6] In *State* v. *Golding*, supra, 213 Conn. 233, our Supreme Court reversed a decision by this court. Our court had concluded that the defendant's claim was not reviewable under *Evans* because it failed to satisfy the second question of *Thurman*, as it was not "truly of constitutional proportions, but [was] simply characterized by her as such." *State* v. *Golding*, 14 Conn. App. 272, 279, 541 A.2d 509 (1988), rev'd, 213 Conn. 233, 567 A.2d 823 (1989). The issue was whether the amount obtained by fraud was an essential element of the crime charged, and the Supreme Court concluded that it

was. *State* v. *Golding*, supra, 213 Conn. 238. The court stated: "[T]he Appellate Court erred by refusing to review the defendant's claim since she proffered a constitutional claim and the record was clearly adequate to review that claim." Id. Our Supreme Court thus admonished this court that review of an unpreserved constitutional deprivation should be granted if a defendant has made a constitutional claim and presented a record adequate for such a review.

[7] See *In re Jan Carlos D.*, 297 Conn. 16, 20 n.10, 997 A.2d 471 (2010) (declining to review respondent's unpreserved claim of constitutional due process violation because *Golding* review not requested); *In re Melody L.*, 290 Conn. 131, 167, 962 A.2d 81 (2009) (declining to review unpreserved constitutional claim for trial by jury in termination of parental rights case when appellant "merely asserts in one sentence that her claim is subject to *Golding* review without providing any analysis of the four prongs"); *State* v. *McKenzie-Adams*, 281 Conn. 486, 533 n.23, 915 A.2d 822 (declining to review unpreserved constitutional claim when defendant failed to brief entitlement to *Golding* review in main brief), cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007); *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 532, 876 A.2d 1178 (2005) (declining to review unpreserved claim of constitutional due process violation when "the petitioner makes only a passing reference to *Golding* for the first time in his reply brief and fails to brief his entitlement to *Golding* review").

But see *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 68–69, 951 A.2d 520 (2008) (*Palmer*, *J.*, concurring), in which two justices would have reviewed the defendant's unpreserved constitutional claim under *Golding* because the state had briefed and argued the issue and the defendant made all of the same arguments he would have made had he cited *Golding* in his main brief. See also *State* v. *Alvarez*, 216 Conn. 301, 315–16, 579 A.2d 515 (1990) (court presumed defendant sought *Evans-Golding* review); *State* v. *Moye*, 214 Conn. 89, 97–98, 570 A.2d 209 (1990) (same).

Two recent cases, *State* v. *Tomas D.*, 296 Conn. 476, 496 n.28, 995 A.2d 583 (2010), and *State* v. *Chambers*, 296 Conn. 397, 410–11, 994 A.2d 1248 (2010), leave the phrase "affirmative request for review" undefined.

[8] Kudzu (pueraria montana) is generally defined as a rapid growing vine, native to Japan and China, with dense foliage consisting of woody, hairy stems and large, compound leaves. Once established, kudzu plants grow rapidly, extending as much as sixty feet per season at a rate of about one foot per day. It is considered an invasive vine present in the southern and eastern portions of the United States. See United States Dept. of Agriculture, Forest Service, "Weed of the Week," October 12, 2004, available at http://na.fs.fed.us/fhp/invasive plants/weeds/kudzu.pdf (last visited November 16, 2010).

[9] The saga of *Golding* begins with *Evans* and is interspersed with many other decisions since *Golding* over the past twenty years, but the saga has not yet ended, and cannot end until our Supreme Court provides additional guidance.