BISHOP, J., with whom LAVINE, J., joins, concurring in part and dissenting in part. Although I concur with the majority's affirmation of this court's earlier opinion affirming the judgment of conviction; see *State* v. *Elson*, 116 Conn. App. 196, 975 A.2d 678 (2009); I write separately because I believe the sentencing claim of the defendant, Zachary Jay Elson, raises a troubling issue warranting resentencing. The state claims, and the majority agrees, 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 main brief. I agree with the majority that this court is bound by our Supreme Court's holdings regarding a party's obligation to affirmatively request extraordinary review and to do so in its main brief. Therefore, I concur with the majority opinion insofar as it overrules the analysis in *State* v. *Wright*, 114 Conn. App. 448, 455–64, 969 A.2d 827 (2009).[2] Unlike the majority, however, I would reach the issue by invoking our supervisory power over the administration of justice in resolving the present appeal.[3] And because I believe that the defendant's constitutional rights were violated, I would remand this case to the trial court for resentencing.

"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, 552 U.S. 868, 128 S. Ct. 164, 169 L. Ed. 2d 112 (2007).

In *State* v. *Revelo*, 256 Conn. 494, 504, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S. Ct. 639, 151 L. Ed.

2d 558 (2001), our Supreme Court held that supervisory review is sometimes necessary if disposing of a touchstone due process claim on procedural grounds would be construed as tacit approval of the alleged constitutional violation. In *Revelo*, the trial court announced a plea offer of eight years, then withdrew that offer when the defendant asserted his right to a judicial determination of his then pending motion to suppress. The court informed the defendant that if the motion was denied and he decided to plead guilty, he would be sentenced to nine years, which is what occurred. Id., 497–99. On appeal, the defendant claimed that his constitutional right to due process was violated because the court increased his sentence on the basis of his decision to seek adjudication of his motion to suppress. After this court declined to review the claim, our Supreme Court reversed, exercising its supervisory power for three reasons. First, it held that the significance of the due process claim transcended the particular case because it concerned the proper role of trial judges in plea bargaining. Id., 503. Second, the undisputed facts of the case bore out the defendant's claim of a constitutional violation. Id., 503–504. Third, the Appellate Court had indicated in dictum that the challenged practice was permissible, which needed to be refuted by the Supreme Court, "lest it be construed by our trial judges as approval of a practice that violates principles of due process." Id., 504.

The criteria enunciated in *Revelo* apply in the present case. Here, the defendant contends that the trial court impermissibly equated the exercise of his constitutional right to trial with the absence of remorse. Given the precedential impact of appellate decision making, our tacit acceptance of this practice likely could have the effect of fettering the right of a criminal defendant to require the state to prove guilt beyond a reasonable doubt lest that exercise later be viewed by a sentencing court as evidence that the defendant lacked remorse. Thus, I believe this claim transcends the circumstances of this case, "present[ing] one of the rare exceptions to the general rule of unreviewability." Id., 503. Accordingly, I believe that this is an appropriate case to invoke our supervisory power to address the defendant's claim.

Turning to the merits of the defendant's claim, the record in the case at hand reveals that, at sentencing, the 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."[4]

The defendant claims that these comments reveal that the court improperly considered at sentencing his decision to go to trial as evidence of his lack of remorse

and that his sentence was improperly elongated by this consideration.[5] 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 met the burden of persuasion enunciated by our Supreme Court in *State* v. *Kelly*, 256 Conn. 23, 770 A.2d 908 (2001), that the court's improper consideration did, in fact, elongate his sentence.[6]

I begin with the elementary principle that a defendant's right to trial is among the most cherished constitutional 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). 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, "courts 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).[7]

In the majority of jurisdictions, a criminal defendant may not receive a harsher sentence solely or even partially because he exercised his right to trial. "The rationale behind the principle is that the coercion or the inducement casts a chill over the exercise of guaranteed fundamental constitutional rights." *Fermo* v. *State*, 370 So. 2d 930, 932 (Miss. 1979). Many courts have a "per se" rule that it is impermissible to give this factor any weight at sentencing. For example, the Supreme Court of Iowa 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." (Emphasis added.) *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 that "[a]ny 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 consider-

ation 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 [s]tate to prove, at trial, the guilt of the [defendant] as charged." *Johnson* v. *State*, 274 Md. 536, 543, 336 A.2d 113 (1975); see also *State* v. *Hass*, 268 N.W.2d 456, 463–65 (N.D. 1978); *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).

In place of a "per se" test, our Supreme Court, in *Kelly*, adopted a more flexible "totality of circumstances" test. *State* v. *Kelly*, supra, 256 Conn. 83. Under this test, the mere inference that the exercise of the right to trial will not trigger a remand; rather, the totality of the circumstances must demonstrate that the exercise of the right actually elongated the sentence.[8] In *Kelly*, for example, 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 comments under scrutiny did not, by themselves, demonstrate that the court elongated the defendant's sentence because he elected to go to trial. Rather, the Supreme Court opined, the trial court's comments served only as a reminder to the defendant that the court could have shown leniency if the defendant had acknowledged guilt before the trial, but, instead, the defendant had forgone that opportunity in electing to go to trial. Id., 83–84.

I believe there are significant differences between the circumstances the court faced in *Kelly* and those we confront. In the present case, the court did not simply note that the defendant had forgone an opportunity for leniency. Rather, the court equated the defendant's exercise of the right to trial 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.[9]

Clearly, a court may take a defendant's remorse or lack of it into consideration in imposing sentence. Indeed, it is the importance of remorse as a sentencing factor that heightens the risk that equating the exercise of a right to trial to a lack of remorse that may negatively affect a defendant's willingness to exercise this fundamental right. 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). A trial court not only may mitigate the sentence of a truly remorseful defendant but also may aggravate the sentence to deter a remorseless defendant from reoffending. See, e.g., *State* v. *Eric M.*, 271 Conn. 641, 653–54, 858 A.2d 767 (2004) ("From the statements . . . the trial court reasonably could have drawn the inferences that the defendant was guilty, remorseless and dangerous, and that he had little prospect for rehabilitation. . . . [T]hese conclusions properly may bear on sentencing." [Citation omitted.]). Given the significance of remorse as a sentencing factor, there is a heightened risk that the court's view of the defendant's decision to put the state to its proof was detrimental to the defendant at sentencing.[10]

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, he would not have put the victim through a trial. 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 dealing with the sentencing claim. I would remand the matter for resentencing. In all other respects, I concur.

[1] I am constrained to agree with the majority that the issue is unpreserved. I believe, however, that it would have been extraordinarily difficult and of no practical value under these particular circumstances for counsel to have interrupted the court during its sentencing comments in order to effect any change in the sentence imposed because the court's comments revealed that it had already formulated its view tying together the defendant's absence

of remorse with his exercise of the fundamental right to a trial.

[2] 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 fully respond 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, cert. denied, 291 Conn. 912, 969 A.2d 176 (2009). In each of those cases, however, as in the present case, the defendant briefed the constitutional issue in his main 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.

I note, as does Judge Dupont, that the *Golding* opinion, itself, does not impose a procedural requirement that an appellant specifically request *Golding*-type review on appeal, but rather that any unpreserved constitutional claim, to be reviewable, must meet the requirements elucidated in *Golding*. However, as the majority has noted, our Supreme Court later added a gloss to *Golding* that an appellant's entitlement to *Golding* review must be argued in the main brief. Thus, although I find Judge Dupont's approach to the review of unpreserved constitutional claims completely sensible, I am bound to conclude, as does the majority, that we must follow the Supreme Court's gloss on *Golding*, which added procedural requirements for reviewability unstated in *Golding* itself.

It is noteworthy, in this regard, that in *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 951 A.2d 520 (2008), 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] I believe that we should exercise our supervisory authority to review only the defendant's claim that the court improperly equated his exercise of his right to trial to his sense of remorse. I agree with the majority that the defendant's claim that the court impermissibly considered at sentencing the knife that was a full trial exhibit does not warrant extraordinary review.

[4] 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 further traumatized her by causing her and her loved ones to relive the events of the defendant's criminal behavior.

[5] 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 cannot say with any accuracy whether the substantial sentence received by the defendant is outside the norm.

[6] Except in the most blatant 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, 13 (2d Cir.), cert. denied, 472 U.S. 1031, 105 S. Ct. 3511, 87 L. Ed. 2d 640 (1985), 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.) And in *Johnson* v. *State*, 679 So. 2d 831, 832 (Fla. App. 1996), the panel voted two to one for resentencing where the trial court stated during sentencing, "I will be very candid, what I see is an absolutely indefensible case by someone who has a felony record that stretches off into the distance, who had an indefensible case and put us through going through a whole trial, I guess so he could talk about it. When there was an offer on the table he decided to turn down. Now it's time to pay the piper." (Internal quotation marks omitted.)

[7] 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 judicial branch reveals that in the 2004–2005 fiscal year, the Superior Court disposed of 3323 part A 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. In 2006–2007, there were 3382 criminal dispositions, 137 (4.1 percent) by trial and, in 2007–2008, 2843 criminal dispositions, 146 (5.1 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 at sentencing the rare exercise of the right of the defendant to require the state to prove its case at trial.

[8] In *Kelly*, the focus was on whether the court lengthened a defendant's sentence as punishment for exercising the right to trial. Other cases, however, focus on whether the court impermissibly took the defendant's exercise into consideration at sentencing. Because the issue was framed in *Kelly* as a claim that the court actually elongated the defendant's sentence as a consequence of his having exercised his right to trial, the Supreme Court on review responded in like manner. In fairness, I believe it would be nearly impossible to prove, except in the most blatant of circumstances, that a court actually elongated a sentence because the defendant put the state to its proof. On the other hand, the trial record may often be adequate to demonstrate whether the court improperly considered a defendant's election as a factor at sentencing. Because I view the defendant's claims herein as more the latter than the former, I do not believe we are bound by the outcome determination approach fashioned by *Kelly* in response to the particular claim made in that case.

[9] See, e.g., *State* v. *Ambriez*, 2004-Ohio-5230, Docket No. L-03-1051 (Ohio App., September 24, 2004) (where trial court stated that " 'there's no genuine remorse, because we had to proceed to trial; and obviously with your statement there's no genuine remorse, all of which makes recidivism more likely, thus would tip the scales on the side of [a] prison term,' " Court of Appeals found that "the inference that [the] appellant's sentence was augmented because he chose to stand trial is unavoidable").

[10] To guard against this risk, the United States Sentencing Guidelines Manual (2010) (Sentencing Manual) for federal courts has drawn a bright line between the exercise of rights and lack of remorse. The section titled "Acceptance of Responsibility" allows a downward adjustment for remorse. U.S.S.G. § 3E1.1. Although this downward adjustment is not available to defendants who denied their guilt at trial, and thereby did not accept responsibility; id., commentary (2); the Sentencing Manual emphatically states that the trial judge may *not* make an inverse upward adjustment: "This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than . . . perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. . . ." U.S.S.G. § 3C1.1, commentary (2).

[11] I am not insensitive to the trauma realized by victims who must often relive the experiences of criminal acts inflicted upon 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. See, e.g., *State* v. *Farnham*, 479 A.2d 887, 892 (Me. 1984) ("[The] defendant and others on his behalf were perfectly justified in seeking leniency on the basis of his claimed repentance and remorse; but at the same time the sentencing justice could fully evaluate the sincerity of those claims only by considering [the] defendant's whole course of conduct. . . . Although [the] defendant had an absolute right to a trial . . . he cannot escape the fact that his exercise of those rights are probative of his attitude towards the victim and society.") *State* v. *Tiernan*, 645 A.2d 482, 487 (R.I. 1994) ("[i]n the face of [the] defendant's plea for leniency, the trial justice's consideration of [the] defendant's false testimony and the impact of the trial upon the victim was proper as these factors related to his prospects for rehabilitation"). 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. Obviously, any chilling effect may be reduced if the trial court articulates the difference between denying leniency and increasing punishment. See, e.g., *State* v. *Farnham*, supra, 479 A.2d 890 (sentence upheld in Maine where trial court considered impact of trial on victim but clarified, "I do not punish people for having trials" [internal quotation marks omitted]). Some even more

cautious appellate courts require an affirmative statement from the trial court to this effect. See, e.g., *State* v. *Fritz*, 178 Ohio App. 3d 65, 70, 896 N.E.2d 778 (2008) ("If an inference of sentencing impropriety exists . . . an appellate court must determine whether the record contains an unequivocal statement as to whether the decision to go to trial was not considered in fashioning the sentence. . . . Absent such an unequivocal statement, the sentence will be reversed and the matter remanded for resentencing." [Internal quotation marks omitted.]); *State* v. *Fitzgibbon*, 114 Or. App. 581, 587, 836 P.2d 154 (1992) ("[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" [internal quotation marks omitted]). Still, the Court of Appeals of South Carolina recognizes that such disclaimers can be disingenuous. See *State* v. *Brouwer*, 346 S.C. 375, 388, 550 S.E.2d 915 (App. 2001) ("[a]lthough the court herein also stated it had never, and never would, 'punish someone for exercising their right to a jury trial,' we believe the mere disavowal of wrongful intent cannot remove the taint inherent in the court's commentary, especially since the record fails to reflect an otherwise appropriate basis for [the defendant's] disparate sentence").