



**A Review on *Golding*: Looking Back on 30 Years of *Golding*
Review in the Criminal Context**

March 30, 2020

6:00 p.m. – 8:00 p.m.

CT Bar Association

New Britain, CT

CT Bar Institute, Inc.

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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**Connecticut Bar Association
Young Lawyers Section – Criminal Law Committee**

**A Review on *Golding*: Looking Back on 30 Years of *Golding* Review in the
Criminal Context**

Date: March 30, 2020

Time: 6:00PM – 8:00PM

Location: CBA Office – 30 Bank Street, New Britain, CT 06051

Description: Our panel convenes just prior to the 30th anniversary of the release of arguably one of the most seminal cases in Connecticut appellate jurisprudence, *State v. Golding*, 213 Conn. 233 (1989). Criminal defendants frequently rely on this method of reviewing previously unpreserved constitutional claims on appeal. Our panelists will discuss the evolution of *Golding* review over the past thirty years, including the recent modification of the rule in *In re Yasiel R.* in 2015. We will discuss views of the effectiveness of *Golding* review in raising unpreserved constitutional challenges in the criminal context, as well as its proper use and most effective ways to utilize *Golding* review. Topics include:

- Factual background on the criminal trial and appeal that resulted in *Golding* review
- Preservation of appealable issues at trial
- History & Evolution of *Golding* review, including the most-recent modification of the rule in *In re Yasiel R.* (2015)
- Tips & tricks for briefing and arguing for *Golding* review from a seasoned appellate practitioner
- Perspectives from the bench on effective ways to pursue *Golding* review of unpreserved, constitutional claims
- The future of *Golding* review

Co-chairs & Moderators:

Christopher DeMatteo, DeMatteo Legal Solutions, West Haven

Megan L. Wade, Sexton & Company, LLC, Hartford

Speakers:

Honorable Raheem L. Mullins, Associate Justice - Connecticut Supreme Court, Hartford

Attorney Joseph G. Bruckmann, Public Defender, Fairfield Judicial District

Attorney Richard Emanuel, Appellate Practitioner, Law Offices of Richard Emanuel, Guilford, CT

Agenda

- 5:30 – 6:00 PM Check-in/registration
- 6:00 – 6:15 PM Introduction to the event and panelists
- 6:15 – 6:40 PM Remarks by Attorney Joseph Bruckmann
- Discussion of underlying criminal trial and appeal resulting in *Golding* decision
 - Discussion of preservation of issues at trial
- 6:40 – 7:05 PM Remarks by Attorney Richard Emanuel
- Discussion of history/evolution of *Golding*
 - Appellate practice tips for briefing and arguing for *Golding* review
- 7:05 – 7:30 PM Remarks by Justice Raheem Mullins
- Discussion from a former appellate prosecutor regarding *Golding* review
 - Perspectives from the bench on *Golding* review and most effective ways to pursue review
 - Practice pointers for the bench on briefing and arguing for *Golding* review
- 7:30 – 8:00 PM Question and Answer Session with the panelists
- We will open this up to questions and answers among attendees and the panelists

Faculty Biographies

Associate Justice Raheem L. Mullins, Connecticut Supreme Court

Justice Raheem L. Mullins was nominated to the Supreme Court on October 4, 2017 by Governor Dannel P. Malloy, and was sworn in on November 1, 2017. He is the youngest person to be nominated to the Supreme Court. Prior to this appointment, Justice Mullins served as a judge of the Appellate Court and as a judge of the Superior Court.

Justice Mullins received his Bachelor of Arts degree in Sociology from Clark University in Worcester, Massachusetts in 2001 and his Juris Doctor from Northeastern University School of Law in 2004. Justice Mullins is admitted to the Bar of the United States Supreme Court as well as the Connecticut Bar.

Prior to his appointment to the bench, Justice Mullins was an Assistant State's Attorney for the Appellate Bureau, Division of Criminal Justice, in Rocky Hill, and an Assistant Attorney General in the Child Protection Division in Hartford. He worked as a law clerk for the Honorable Frederick L. Brown of the Massachusetts Appeals Court from 2004 to 2005.

Justice Mullins is a member of the Oliver Ellsworth Inn of Court and the George W. Crawford Black Bar Association. He serves as Chair to the Code of Evidence Oversight Committee, 2018 to present. He also served as a member of the Young Lawyers Section of the Connecticut Bar Association, the Board of Directors for the Fund for Greater Hartford and, in 2007, as an Executive Committee Member of the Government Division of the Connecticut Bar Association.

Joseph G. Bruckmann, Public Defender's Office

Joseph G. Bruckmann has been the Public Defender for the Fairfield Judicial District since 1999. Prior to that appointment, he was the Public Defender for the Stamford/Norwalk Judicial District for seven years. He is an honors graduate of Fairfield University and a graduate of the University of Connecticut School of Law.

In addition to co-authoring *Connecticut Criminal Caselaw Handbook: A Practitioner's Guide*, Joe was a member of the Connecticut Code of Evidence Drafting Committee, the Practice Book Criminal Rules Revision Committee and the Connecticut Juvenile Training School Advisory Board. He is presently a member of the Connecticut Code of Evidence Oversight Committee. In 2018 he became the first recipient of *The Annual Thomas J. Ullmann, Esq. Public Defender Memorial Award*.

Richard Emanuel, Law Offices of Richard Emanuel

Emanuel graduated from the University of Connecticut (B.A. 1967) and George Washington University Law School (J.D. 1970). During law school he worked part-time as a legislative aide in the Washington, D.C. office of a Connecticut Congressman. Returning to Connecticut, his first position as a new lawyer was manning a storefront office for neighborhood legal services in Bridgeport. There he worked on a federal civil rights lawsuit against the Bridgeport Police Department. Two years later he joined the Connecticut Public Defender's Office, and worked for five years in the trial court in New Haven, Connecticut.

In 1977 the Connecticut public defender system established an Office of Legal Services to handle criminal appeals. Emanuel was hired as its first staff attorney. Under his mentor Jerold H Barnett, a brilliant lawyer and later a Superior Court judge, Emanuel fell in love with the appeals process—it was a chance to put a trial “on trial” to see if it was fair. Emanuel practiced in the appellate office for fifteen years. Since 1998, he has maintained a private practice focused on appellate litigation.

Attorney Emanuel is a member of the Connecticut Bar Association, the New Haven County Bar Association, the Connecticut Criminal Defense Lawyers Association, and the National Association of Criminal Defense Lawyers. He is admitted to practice in the state and federal courts of Connecticut, the United States Courts of Appeals for the First and Second Circuits, and the United States Supreme Court.

Attorney Emanuel has helped train future appellate lawyers, serving as an adjunct faculty member and co-instructor in the appellate clinic at the University of Connecticut School of Law. He has also supervised the appellate clinic at Quinnipiac University School of Law which is sponsored by the public defender system. Attorney Emanuel has frequently participated as a speaker or panelist at seminars sponsored by the Connecticut Bar Association, the Connecticut Division of Public Defender Services, and the Connecticut Trial Lawyers Association. He is a co-author of the 1992 supplement to the *Connecticut Criminal Case Law Handbook*.

Attorney Emanuel is a former member of the Executive Committee of the Connecticut Criminal Defense Lawyers Association (CCDLA). In 1992 he was a co-winner of the David H. Neiditz Professional Writing Award for submitting the best-written appellate brief in a Connecticut case. In 1998 he received the Pro Bono Award from the *Connecticut Law Tribune* for his work on behalf of Lawrence J. Miller, who spent more than twelve years in prison before being exonerated. In 2002 Attorney Emanuel received the CCDLA’s Champion of Liberty award for his career achievements.

213 Conn. 233 (Conn. 1989), 13508, State v. Golding /**/ div.c1 {text-align: center} /**/

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213 Conn. 233 (Conn. 1989)

567 A.2d 823

STATE of Connecticut

v.

Monica GOLDING.

No. 13508.

Supreme Court of Connecticut.

December 19, 1989

Argued May 4 and Oct. 3, 1989.

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Joseph G. Bruckmann, Asst. Public Defender, with whom, on the brief, was Michael Lefebvre, Law Student Intern, for appellant (defendant).

Steven M. Sellers, Asst. State's Atty., and Mary H. Lesser, Deputy Asst. State's Atty., with whom, on the brief, were John M. Bailey, State's Atty., and Alan Reisner, Asst. State's Atty., for appellee (state).

Before PETERS, C.J., and ARTHUR H. HEALEY, CALLAHAN, GLASS,

[567 A.2d 825]

COVELLO, HULL and SANTANIELLO, JJ.

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CALLAHAN, Associate Justice.

The defendant was charged in a four count information with larceny in the second degree in violation of General Statutes § 53a-123(a)(4), ^[1] conspiracy to commit larceny in the second degree in violation of General Statutes §§ 53a-123 and 53a-48, general assistance fraud in violation of General Statutes § 17-282, ^[2] and conspiracy to commit general assistance

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fraud in violation of General Statutes §§ 17-282 and 53a-48. At the close of the state's case the trial court dismissed both counts of conspiracy. The defendant was thereafter convicted by a jury of larceny in the second degree and of general assistance fraud. The trial court sentenced the defendant to concurrent suspended sentences on both counts, placed her on probation on both counts and ordered as conditions of probation that the defendant make restitution of the sum of \$877.90 and perform two hundred hours of community service.

The defendant, thereafter, appealed on several grounds to the Appellate Court; that court upheld the trial court's judgment. *State v. Golding*, 14 Conn.App. 272, 541 A.2d 509 (1988). The defendant then requested certification to this court. We granted certification ^[3] limited to the questions of whether the Appellate Court had erred in refusing to reverse the defendant's conviction of general assistance fraud because of the lack of an instruction by the trial court concerning the amount involved in the fraud and whether the Appellate Court had erred by refusing to review the defendant's claim that under the federal and state constitutions the amount involved in the fraud was an essential element of the offense and was therefore required to be

charged by the trial court. ^[4] The claim

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of the lack of a jury instruction regarding the amount of the fraud was not raised at trial. The defendant therefore sought review in the Appellate Court and seeks **[567 A.2d 826]** review in this court under *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973). ^[5]

We initially heard arguments in this case in May, 1989. Thereafter, sua sponte, we requested further briefing and argument as to whether we should revise the standards set out in *State v. Evans*, supra, for appellate review of constitutional claims not distinctly raised at trial. We now reverse the Appellate Court on the merits and in this opinion adhere to *Evans*.

I

Prior to July 1, 1984, the maximum penalty for general assistance fraud was a fine of \$1000, imprisonment for one year, or both. General Statutes (Rev. to 1983) § 17-282. The penalty in the statute bore no relation to the amount fraudulently obtained. Effective July 1, 1984, however, the statute was amended by No. 84-471 of the 1984 Public Acts, to subject a person convicted of general assistance fraud to the penalties for larceny under General Statutes §§ 53a-122 through 53a-125b. Those statutes grade the degree of the crime and the consequent severity of the penalties according to the amount obtained as a result of the defendant's illegal conduct. Those grades range from larceny in the first degree, a class B felony carrying a maximum possible penalty of twenty years imprisonment and a \$10,000 fine, to larceny in the sixth degree, a class C misdemeanor

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carrying a maximum possible penalty of three months imprisonment and a fine of \$250. ^[6]

The trial court in its charge, however, failed to inform the jury that it must find proven, beyond a reasonable doubt, the amount the defendant obtained by fraud. See *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970). The trial court further did not request the jury to make a specific finding as to that amount. Under the circumstances revealed by the evidence, however, the jury could have determined that the defendant obtained varied amounts depending upon the conduct of the defendant the jury found proven to have been fraudulent. The first question to be addressed, therefore, is whether the amount obtained by the defendant is an essential element of the crime of general assistance fraud. ^[7]

The overwhelming weight of authority is that the value of property stolen or obtained by fraud is an essential element of the crime when the value is used to differentiate between a felony and a misdemeanor or to determine the severity of the offense and the consequent punishment for a convicted offender. *State v. Scielzo*, 190 Conn. 191, 199-200, 460 A.2d 951 (1983); *State v. Baker*, 182 Conn. 52, 62, 437 A.2d 843 (1980); *Negron v. State*, 306 So.2d 104, 108 (Fla.1974); *People v. Stark*, 59 Ill.App.3d 676, 681-82, 16 Ill.Dec. 719, 375 N.E.2d

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826 (1978); *State v. Dilworth*, 358 So.2d 1254, 1256 (La.1978); *State in Interest of Batiste*, 359 So.2d 1077, 1078 (La.App.1978); *People v. Johnson*, 133 Mich.App. 150, 153, 348 N.W.2d 716 (1984); *People v. Fuzi*, 46 Mich.App. 204, 209, 208 N.W.2d 47 (1973); *Sanders v. State*, 664 S.W.2d 705, 709 (Tex.Crim.App.1982); *Standley v. State*, 517 S.W.2d 538, 541

(Tex.Crim.App.1975); 50 Am.Jur.2d, Larceny § 159. We conclude therefore that under the present statutory scheme embodied in § 17-282 for determining the degree of [567 A.2d 827] the offense and the severity of the permissible punishment the amount obtained by general assistance fraud is an essential element of that crime. Because the amount the defendant obtained by fraud is an essential element of the crime under the applicable statutory scheme, the trial court was obligated to instruct the jury concerning it. *State v. Williamson*, 206 Conn. 685, 708, 539 A.2d 561 (1988); *State v. Harman*, 198 Conn. 124, 133-34, 502 A.2d 381 (1985); *State v. Mason*, 186 Conn. 574, 585, 442 A.2d 1335 (1982); *State v. Sumner*, 178 Conn. 163, 170, 422 A.2d 299 (1979). Failure to do so was constitutional error; *State v. Williamson*, supra; and requires reversal because the jury reached its decision without any instruction on, or consideration of, an essential element of the crime charged. *Screws v. United States*, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945); *State v. Harman*, supra, 198 Conn. at 134, 502 A.2d 381; *State v. Kurvin*, 186 Conn. 555, 561, 442 A.2d 1327 (1982); *State v. Sunday*, 187 Mont. 292, 299-300, 609 P.2d 1188 (1980).

II

Further, the 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. *State v. Hill*, 201 Conn. 505, 512-13, 523 A.2d 1252 (1986); *State v. Kurvin*, supra, 186 Conn. at 558, 442 A.2d 1327. We have for many years held that claims not raised

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in the trial court "can and will be considered" on appeal in two "exceptional circumstances." *State v. Evans*, supra, 165 Conn. at 70, 327 A.2d 576. One of those circumstances "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." [8] (Emphasis added.) Id.

The state urges us to revise the *Evans* standard of review for errors not preserved at trial because the words used by the standard though easily said lend themselves to inconsistent application. We have reviewed our own cases and those of the Appellate Court, and we agree with the state that they demonstrate disparate approaches to the *Evans* criteria. Upon reflection, we have decided neither to adopt a pure plain error standard for alleged constitutional violations, nor to attempt to reconcile past *Evans* decisions. Instead, we articulate 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.

Relying on the methodology of *State v. Whistnant*, 179 Conn. 576, 427 A.2d 414 (1980), we hold 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; [9] (2) the claim is of constitutional magnitude alleging the violation of a fundamental right;

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(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. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the

particular circumstances.

The defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the [567 A.2d 828] record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim. *State v. Anderson*, 209 Conn. 622, 632-33, 553 A.2d 589 (1989); *State v. Wilson*, 199 Conn. 417, 438, 513 A.2d 620 (1986); *State v. Thompson*, 197 Conn. 67, 76 n. 7, 495 A.2d 1054 (1985); *State v. Tyler-Barcomb*, 197 Conn. 666, 675-76, 500 A.2d 1324 (1985), cert. denied, 475 U.S. 1109, 106 S.Ct. 1518, 89 L.Ed.2d 916 (1986); *State v. Conroy*, 194 Conn. 623, 627 n. 5, 484 A.2d 448 (1984); *State v. Baker*, supra, 182 Conn. at 56-57, 437 A.2d 843; *State v. Evans*, supra, 165 Conn. at 70-71, 327 A.2d 576. ^[10]

The defendant also bears the responsibility of demonstrating that his claim is indeed a violation of a fundamental constitutional right. Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label. *State v. Vilalastra*, 207 Conn. 35, 46, 540 A.2d 42 (1988); *State v. Douglas*, 203 Conn. 445, 455,

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525 A.2d 101 (1987); *State v. Mullings*, 202 Conn. 1, 15, 519 A.2d 58 (1987); *State v. McIntosh*, 199 Conn. 155, 162, 506 A.2d 104 (1986); *State v. Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985); *State v. Gooch*, 186 Conn. 17, 18, 438 A.2d 867 (1982). For example, once identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed. *State v. Smith*, 209 Conn. 423, 425-26, 551 A.2d 742 (1988); *State v. Mullings*, supra, 202 Conn. at 15, 519 A.2d 58; *State v. Tyler-Barcomb*, supra, 197 Conn. at 674, 500 A.2d 1324; *State v. George*, 194 Conn. 361, 371-72, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985).

Finally, if we are persuaded that the merits of the defendant's claim should be addressed, we will review it and arrive at a conclusion as to whether the alleged constitutional violation clearly exists and whether it clearly deprived the defendant of a fair trial. *State v. Torrence*, 196 Conn. 430, 435, 493 A.2d 865 (1985); *State v. Evans*, supra, 165 Conn. at 71-73, 327 A.2d 576. In the present case, for example, it was clear constitutional error for the trial court to fail to instruct the jury concerning an essential element of the crime with which the defendant was charged, and the defendant was therefore clearly deprived of a fair trial.

In many cases of an alleged constitutional violation, however, the state is able to demonstrate the harmlessness of such alleged violation beyond a reasonable doubt. See *United States v. Hasting*, 461 U.S. 499, 507-509, 103 S.Ct. 1974, 1979-1980, 76 L.Ed.2d 96 (1983), on remand, 739 F.2d 1269 (7th Cir.1984), cert. denied, 469 U.S. 1218, 105 S.Ct. 1199, 84 L.Ed.2d 343 (1985); *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, reh. denied, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967); *State v. Morrill*, 197 Conn. 507, 539, 498 A.2d 76 (1985); *State v. Castonguay*, 194 Conn. 416, 434-35, 481 A.2d 56 (1984); *Williams v. Salamone*, 192 Conn. 116, 120, 470 A.2d

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694 (1984); *State v. Washington*, 182 Conn. 419, 429, 438 A.2d 1144 (1980); *Aillon v. State*, 168 Conn. 541, 547-48, 363 A.2d 49 (1975). Under such circumstances, it would be a waste of judicial resources, and a pedantic exercise, to delve deeply into the constitutional merits of a claim that can appropriately be resolved in accordance with the relevant harmless error analysis. For example, in a case where, on the whole record, there is overwhelming evidence of guilt and a constitutional claim is raised under *Evans* concerning the admission of inconsequential tangible evidence that was allegedly illegally seized, there is no reason that we cannot assume the constitutional violation and first address the fair trial issue and, if the alleged violation is harmless beyond a reasonable doubt, not engage in an in-depth discussion of the substantive constitutional claim.

Such an approach would be in keeping with the spirit of what the United States **[567 A.2d 829]** Supreme Court said in *United States v. Hastings*, supra, 461 U.S. at 509, 103 S.Ct. at 1980: "Since [*Chapman v. California*, supra,] the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations, see, e.g., [*Brown v. United States*, 411 U.S. 223, 230-32, 93 S.Ct. 1565, 1569-70, 36 L.Ed.2d 208 (1973)]; *Harrington v. California*, 395 U.S. 250, [89 S.Ct. 1726, 23 L.Ed.2d 284] (1969); *Milton v. Wainwright*, 407 U.S. 371, [92 S.Ct. 2174, 33 L.Ed.2d 1] (1972). The goal ... is 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.' "

The decision of the Appellate Court is reversed and a new trial is ordered for the count of the information charging the defendant with general assistance fraud in violation of § 17-282 only. The defendant's conviction

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of larceny in the second degree in violation of § 53a-123(a)(4) and the sentence and conditions imposed thereon remain in effect.

In this opinion PETERS, C.J., and HEALEY, GLASS, HULL and SANTANIELLO, JJ., concurred.

COVELLO, J., concurred in the result.

Notes:

[1] General Statutes § 53a-123(a)(4) provides: "LARCENY IN THE SECOND DEGREE: CLASS C FELONY FELONY. (a) A person is guilty of larceny in the second degree when he commits larceny as defined in section 53a-119 and ... (4) the property is obtained by defrauding a public community, and the value of such property is two thousand dollars or less."

[2] "[General Statutes] Sec. 17-282. GENERAL ASSISTANCE FRAUD. PENALTY. FORFEITURE OF PRIVILEGES OF PARTICIPATION IN PROGRAM. TERMINATION UPON CONVICTION. READMISSION ON (a) No vendor of goods or services sold to or performed for any beneficiary of assistance under this part shall, with intent to defraud, present for payment any false claim for goods or services performed, or accept payment for goods or services performed, which exceeds the amounts due for goods or services performed.

"(b) Any person or vendor who defrauds or assists in defrauding any town as to the support of its

paupers, or deceives the selectmen thereof in obtaining support for any person not entitled to the same, or is found in violation of subsection (a) of this section, shall be subject to the penalties for larceny under sections 53a-122 to 53a-125b, inclusive, depending on the amount involved. In addition, any such person or vendor shall be subject to forfeiture of privileges of participation in the program provided under this part after a hearing held by the town according to procedures established by such town. Any person or vendor who is convicted of violating this section shall be terminated from participation in such program, effective upon conviction. No vendor so terminated shall be readmitted to such program for at least three years from the date of termination."

See footnote 6, *infra*.

[3] The questions certified read as follows: "Where, in a prosecution for general assistance fraud (Section 17-282) the jury was never instructed concerning a finding of 'the amount involved,' did the Appellate Court err in refusing to reverse the defendant's conviction on the ground of the lack of such an instruction and did it err in refusing to review the defendant's claim that under the United States and Connecticut constitutions 'the amount involved,' is necessarily an essential element of the offense since it determines whether the offense is a misdemeanor or a crime as serious as a class B felony?"

[4] The defendant claimed that the lack of a jury instruction concerning the amount obtained by fraud deprived her of her right to a jury trial on all the essential elements of the crime charged under the sixth and fourteenth amendments to the United States constitution and article first, § 8 of the Connecticut constitution. The right to a trial by jury is a "fundamental" right protected from state action by the due process clause of the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-49, 88 S.Ct. 1444, 1446-47, 20 L.Ed.2d 491, reh. denied, 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968).

[5] Certification was not granted on any questions concerning the defendant's conviction of larceny in the second degree in violation of General Statutes § 53a-123(a)(4).

[6] Although No. 84-471 of the 1984 Public Acts was not effective until July 1, 1984, and some of the defendant's fraudulent conduct occurred prior to that date, apparently the trial court and certainly the parties and the Appellate Court treated the defendant's sentence as having been imposed under the amended statute. See *State v. Allen*, 12 Conn.App. 403, 406, 530 A.2d 670, cert. denied, 205 Conn. 809, 532 A.2d 76 (1987).

[7] The Appellate Court applied its Thurman test for Evans review and under the second prerequisite of that test found that the amount obtained by fraud was not an essential element of the crime. It, therefore, concluded that the trial court's failure to charge the jury concerning it was not constitutional error reviewable under Evans. See *State v. Thurman*, 10 Conn.App. 302, 306-307, 523 A.2d 891, cert. denied, 204 Conn. 805, 528 A.2d 1152 (1987).

[8] The other exceptional circumstance is "where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal." *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). That circumstance is not at issue in this case.

[9] A review of our cases reveals that the words "adequately supports" in *State v. Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973), may be translated to read "is adequate to review." See, e.g., *State v. Mercer*, 208 Conn. 52, 57, 544 A.2d 611 (1988); *State v. Torrence*, 196 Conn. 430, 435,

493 A.2d 865 (1985).

[10] An adequate factual record is especially crucial when dealing with a claim that was not preserved at trial, since consideration is being sought for review of a claim for which we lack a trial court ruling.

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317 Conn. 773 (Conn. 2015)

120 A.3d 1188

IN RE YASIEL R. ET AL. [*]

SC 19372

Supreme Court of Connecticut

August 18, 2015

Argued February 11, 2015

[120 A.3d 1189] Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Windham, Juvenile Matters at Willimantic, and tried to the court, Hon. Francis J. Foley III, judge trial referee, who, exercising the powers of the Superior Court, rendered judgments terminating the respondents' parental rights, from which the respondent mother appealed to the Appellate Court, Gruendel and Beach, Js., with Norcott, J., concurring in part and concurring in the judgments, which affirmed the trial court's judgments, from which the respondent mother, on the granting of certification, appealed to this court.

Reversed; further proceedings.

SYLLABUS

The respondent mother appealed to the Appellate Court from the judgments of the trial court terminating her parental rights with respect to two her minor children. On appeal, the respondent raised, inter alia, an unpreserved claim that the trial court had violated her constitutional right to due process when it failed to canvass her about her decision to waive a full trial and not contest the exhibits presented to the trial court by the petitioner, the Commissioner of Children and Families. The Appellate Court determined, inter alia, that the respondent's due process claim failed under the third prong of *State v. Golding* (213 Conn. 233, 567 A.2d 823) because she failed to show that a constitutional violation clearly existed when she failed to cite any binding precedent indicating that a parent has a constitutional right to be personally canvassed at the trial stage of a termination proceeding. The Appellate Court therefore affirmed the trial court's judgments, and the respondent, on the granting of certification, appealed to this court. *Held* :

1. The Appellate Court improperly concluded that the absence of existing Connecticut precedent precluded consideration of the respondent's constitutional claim under the third prong of *Golding* ; this court clarified that the third prong of *Golding* does not require that there be existing Connecticut precedent already recognizing a constitutional right and concluded that a party satisfies that prong if he or she makes a showing sufficient to establish a constitutional violation and that requiring anything more would defeat the purpose of *Golding*, which is to permit a party to prevail on an unpreserved constitutional claim when, on appeal, that party can demonstrate a harmful constitutional deprivation.

2. Contrary to the respondent's claim, the due process clause of the fourteenth amendment does not require a trial court to canvass a parent in a termination proceeding who is represented by counsel when, as here, the parent does not testify or present witnesses and the respondent's

attorney does not object to exhibits or cross-examine witnesses; although the respondent's fundamental liberty interest as a parent was sufficient to warrant heightened procedural safeguards under the balancing test enunciated in *Mathews v. Eldridge* (424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18), requiring the trial court to canvass the respondent would not have substantially decreased the risk of erroneous deprivation.

3. This court, exercising its supervisory authority over the administration of justice, adopted a rule requiring trial courts, in all termination proceedings, to canvass respondent parents prior to the start of trial: this court concluded that the lack of a canvass in termination proceedings may give the appearance of unfairness insofar as it may indicate a lack of concern over a parent's rights and understanding of the consequences of the proceeding and that public confidence in the integrity of the judicial system would be enhanced by requiring a brief canvass of all parents immediately before termination proceedings so as to ensure that parents understand the trial process, their rights and the potential consequences of their actions.

James P. Sexton, assigned counsel, with whom was Michael S. Taylor, for the appellant (respondent).

Stephen G. Vitelli, assistant attorney general, with whom, on the brief, were George Jepsen, attorney general, and Benjamin Zivyon, assistant attorney general, for the appellee (petitioner).

Karen Oliver Damboise, for the minor children.

Christine Perra Rapillo, director of delinquency defense and child protection, filed a brief for the Office of the Chief Public Defender as amicus curiae.

Rogers, C. J., and Palmer, Zarella, Eveleigh, McDonald, Espinosa and Vertefeuille, Js. EVELEIGH, J. In this opinion ROGERS, C. J., and PALMER, McDONALD and VERTEFEUILLE, Js., concurred. ZARELLA, J., concurring in part and dissenting in part. ESPINOSA, J., concurring in part and dissenting in part.

OPINION

[120 A.3d 1190]

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EVELEIGH, J.

This certified appeal raises important issues concerning the review of unpreserved claims under *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), and our supervisory authority over the administration of justice in connection with the need to canvass a parent in a termination of parental rights proceeding. The present case arises from the trial court's judgments terminating the parental rights of the respondent mother, Ashley P., to her two minor children.^[1] On appeal, the Appellate Court concluded that, in order to prevail on an unpreserved claim under *Golding*, which requires that a party establish that an alleged constitutional violation "clearly exists," a party must point to binding Connecticut precedent. *In re Yasiel R.*, 151 Conn.App. 710, 721, 94 A.3d 1278 (2014). The respondent appeals, upon our grant of certification,^[2] claiming that: (1) the Appellate Court improperly construed the third prong of *Golding*; (2) because her right to due process was violated, she can prevail under *Golding*; and (3) even if her right to due process was not violated, this court should nonetheless reverse the Appellate Court's judgment

under our supervisory authority because the trial court failed to canvass her regarding her decision to waive her right to a trial and

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to not contest the allegations of the petitioner, the Commissioner of Children and Families.^[3] We conclude, contrary to **[120 A.3d 1191]** the Appellate Court, that the absence of existing Connecticut precedent does not preclude consideration of a claim under *Golding*, but we are not convinced that the trial court's failure to canvass the respondent constituted a denial of her right to due process under the fourteenth amendment to the United States constitution. We are, however, convinced that we are warranted in using our supervisory authority over the administration of justice to require that a trial court canvass a parent who does not consent to the termination prior to the start of a termination of parental rights trial, in order to ensure the overall fairness of the termination of parental rights process. See part III of this opinion. Accordingly, we reverse the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following relevant facts and procedural history. " The respondent's 'fourth child, Yasiel, was born to [the respondent] when she was twenty-two years old. The father . . . was fifteen years old when he impregnated [the respondent]. [The respondent] was subsequently arrested for statutory rape. [The father] moved in with [the respondent] while she was pregnant. After the child was born, [the respondent] reported that [the father] became increasingly violent. She said she did not want to remain in the relationship and wished to leave, but she became pregnant with Sky, her fifth child, in July, 2009, only four months after Yasiel was born.' The two children were removed from the respondent's care on September 21, 2011. The respondent was thereafter provided with supervised visitation and transportation.

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" Due to the respondent's various arrests and her mental health and substance abuse issues, the petitioner filed petitions to terminate [the respondent's] parental rights in November, 2012. According to the petitioner, the court, on December 11, 2012, advised the respondent of her trial rights, entered denials to the petitions on her behalf, and appointed her an attorney.^[4] A contested hearing then was scheduled for November 12, 2013. At that hearing, the respondent's counsel stated that 'although [the respondent is] not in agreement with the [termination of parental rights], she cannot bring herself to consent today. That being said, she's in agreement with the court taking the case on the papers. She's in agreement to the exhibits that . . . have been entered.' Her counsel then stated that the respondent 'wants the court to be aware that things have significantly changed for her over the last two years' and continued to explain those changes.^[5] At no time did the court canvass the respondent personally to question her decisions not to contest the petitioner's exhibits and to waive her right to a full trial. It stated only that 'I think I understand your position, and I will certainly consider that [you've made great progress] when I'm reviewing all the material'

" [The trial] court terminated the parental rights of the respondent [as to both Yasiel and Sky on November 13, 2013]. In so doing, the court held that the petitioner **[120 A.3d 1192]** had proved, by clear and convincing evidence, that (1)

the children were neglected or uncared for in a prior proceeding, (2) the respondent was provided specific steps to take to facilitate the return of the children, and (3) the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the children, such parent could assume a responsible position in the lives of the children. The court also held that, in considering all the statutory criteria set forth in General Statutes § 17a-112 (k), termination was in the best interests of the children." (Footnotes altered.) *In re Yasiel R.*, *supra*, 151 Conn.App. 712-14. On appeal to the Appellate Court, the respondent argued that the trial court violated her right to due process when it failed to canvass her about her decision to waive her right to a full trial and to not contest the exhibits presented to the court by the petitioner. *Id.*, 712. The Appellate Court affirmed the judgments of the trial court, concluding that the respondent failed to demonstrate that the failure to canvass her was plain error and that her constitutional claim failed under the third prong of *Golding*. *Id.*, 721-22. Specifically, with regard to review under *Golding*, the Appellate Court concluded that the respondent's claim failed because she failed to "cite to any precedent from Connecticut for the proposition that a parent has a constitutional right to be personally canvassed at the trial stage of a termination proceeding." *Id.*, 721. The respondent then filed a petition for certification to appeal which we granted. See footnote 2 of this opinion.

After oral argument in this court, we ordered the parties to submit supplemental briefs to answer the following questions: "If this court were to conclude that the respondent . . . cannot prevail on her claim that the due process clause of the fourteenth amendment . . . required the trial court to canvass her personally regarding her decision not to challenge the evidence

introduced by the petitioner . . . and not to adduce any evidence of her own, should this court nevertheless consider whether to require the canvass under our inherent supervisory authority over the administration of justice? If so, should this court exercise its supervisory authority to require such a canvass?" The parties submitted supplemental briefs answering these questions.

I

We first consider whether the Appellate Court properly construed the third prong of *Golding* so as to require that there be directly applicable binding Connecticut precedent for a constitutional violation clearly to exist such that relief can be afforded to the respondent.

It is not disputed that the respondent did not preserve her constitutional claim before the trial court. Therefore, she seeks our review pursuant to *Golding*. In *State v. Golding*, *supra*, 213 Conn. 239-40, we held that an appellant "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 [respondent] 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. In the absence of any one of these conditions, the [respondent's] claim will fail." (Emphasis [120 A.3d 1193] omitted; footnote omitted.) The Appellate Court held that "[i]n [the present] case, the first two prongs of

Golding are satisfied.^[6]

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First, the record is adequate to review the respondent's claim. Second, 'a claim concerning the termination of a respondent's parental rights is of constitutional magnitude in that [t]he right to the integrity of the family is among the most fundamental rights guaranteed by the fourteenth amendment.'" (Footnote altered.) *In re Yasiel R.*, *supra*, 151 Conn.App. 721. The court concluded, however, that the respondent's claim faltered on the third prong of *Golding* because she failed to show that a constitutional violation clearly existed where, although the respondent pointed to cases from other jurisdictions in support of her due process claim, she failed to "cite to any precedent from Connecticut for the proposition that a parent has a constitutional right to be personally canvassed at the trial stage of a termination proceeding." *Id.*

On appeal to this court, the respondent claims that the text of the third prong of *Golding* does not support the Appellate Court's conclusion that the respondent was required to rely on "binding precedent to support [her] proposition." *Id.* Further, the respondent contends that the Appellate Court's conclusion represents a stark departure from this court's jurisprudence over the last twenty-five years. The petitioner, however, contends that the respondent's counsel mischaracterizes the Appellate Court's decision. The petitioner asserts that the Appellate Court did not find that the respondent had failed to satisfy the third prong of *Golding* merely because it believed binding precedent was required to do so, but rather it did so after finding no supporting precedent and properly performing the due process analysis required by *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). We agree with the respondent. Although not dispositive of our analysis, we wish to clarify that the third prong of *Golding* does not require that there be existing Connecticut precedent already recognizing a constitutional right. Instead, a
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party satisfies the third prong of *Golding* if he or she makes a showing sufficient to establish a constitutional violation. Requiring anything more would defeat the purpose of *Golding*, which, of course, is to permit a party to prevail on an unpreserved constitutional claim when, on appeal, the party can demonstrate a harmful constitutional deprivation. Construing *Golding* in this manner, we conclude that our use of the word "clearly" in describing the requirements under that prong of the test is unnecessary and misleading. See *State v. Golding*, *supra*, 213 Conn. 239-40. Accordingly, we conclude that the third prong of *Golding* should read: "the alleged constitutional violation . . . exists and . . . deprived the [respondent] of a fair trial." *Id.*, 240.

Indeed, our holding regarding the third prong of *Golding* is consistent with our prior case law, in which we have previously employed *Golding* to decide constitutional questions of first impression. See, e.g., *State v. Montanez*, 277 Conn. 735, 751, 894 A.2d 928 (2006) (utilizing *Golding* to decide for first time that "principal's use of self-defense properly may be considered in the prosecution of his accessory"); *State v. Joyner*, 225 Conn. 450, 457, 625 A.2d 791 (1993) **[120 A.3d 1194]** (reviewing unpreserved claim under *Golding* "because it raises an important and *unresolved* question of state constitutional law" [emphasis added]). Therefore, to the extent that the Appellate Court required that the respondent reference prior Connecticut precedent to be successful under the third prong of *Golding*, we disagree.

II

Having determined that the Appellate Court improperly construed the third prong of *Golding*, we must next consider whether the due process clause of the fourteenth amendment to the United States constitution requires that a trial court canvass a parent about his or her decision not to contest the exhibits presented

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against him or her in a parental termination proceeding and to waive his or her right to present a case at trial.

The right of a parent to raise his or her children has been recognized as a basic constitutional right. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Accordingly, a parent has a right to due process under the fourteenth amendment to the United States constitution^[7] when a state seeks to terminate the relationship between parent and child. See *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

In determining what procedural safeguards are required by the federal due process clause when the state seeks to terminate the parent-child relationship, the United States Supreme Court has utilized the balancing test set forth in *Mathews v. Eldridge, supra*, 424 U.S. 335. To determine whether due process requires a canvass in this context, *Mathews* directs us to consider and weigh three factors: " [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail." *Id.*

We first consider the importance of the private interest that is jeopardized by the termination proceeding. The petitioner does not dispute that the respondent's interest in retaining her parental rights as to her children

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is constitutionally protected. Indeed, this court has recognized that " [t]he rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and [r]ights far more precious . . . than property rights." (Internal quotation marks omitted.) *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 284, 455 A.2d 1313 (1983). " Unquestionably, these important rights are severely threatened by the state's initiation of termination proceedings. Such proceedings may result not only in the modification or limitation of parental rights, but may irrevocably sever the relationship between parent and child. . . . This deprivation is unique and complete. . . . Consequently, under the first prong of the [*Mathews*] test, the private interest of a parent in a termination proceeding is considerable." (Citations omitted.) *In re Alexander V.*, 223 Conn. 557, 561, 613 A.2d 780 (1992).

[120 A.3d 1195] We agree with the respondent that the fundamental liberty interest of a parent that is placed in jeopardy by a trial to terminate that parent's parental rights, standing alone, has been sufficient to warrant heightened procedural safeguards.

The respondent contends that the second *Mathews* factor militates in her favor. She argues that the twin perils of conducting a termination trial in summary fashion and the risk of

inadvertently foreclosing a parent from receiving a full trial on the merits must both be considered. There is a need, she suggests, to subject social workers, who author the social studies that courts rely on, to cross-examination. There is also a need to cross-examine expert witnesses. The respondent also points to the fact that in a summary proceeding, without the court first canvassing the parent, there is the potential that crucial rights will be inadvertently waived. These rights can only be waived, she claims, if they are made knowingly, intelligently and voluntarily. The petitioner, however, claims that the second factor of *Mathews* weighs heavily in favor of herself. The petitioner

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asserts that the respondent's intention to forgo testimonial evidence and the trial court's failure to canvass her regarding that decision did not erroneously deprive her of any right. In support of her position, the petitioner contends that, despite the fact that the respondent's brief is an apparent wholesale attack on her trial attorney's strategy, the respondent is not claiming that she received ineffective assistance of counsel. In addition, the petitioner asserts that it would be impracticable to canvass the respondent on every issue because the trial court would be required to ask whether the respondent agrees with every objection or every exhibit that is admitted without any objection. Finally, the petitioner claims that the respondent's due process rights were protected because she was present and represented by an attorney and she was fully able to participate in the proceedings if she had so desired.

The second factor set forth in *Mathews* requires that we examine the extent to which current procedures create a risk of an erroneous deprivation of parental rights and also that we weigh the likelihood that a canvass would reduce that risk. We begin by noting that there currently is no statute or court rule requiring a trial court in a termination proceeding to conduct a canvass prior to the initiation of the trial. However, "[t]he essence of due process is the requirement that a person in jeopardy of a serious loss [be given] notice of the case against him and [an] opportunity to meet it." (Internal quotation marks omitted.) *State v. Lopez*, 235 Conn. 487, 493, 668 A.2d 360 (1995). As one of our sister states has stated: "Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation

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is required by the [c]onstitution or statutes; and a hearing before an impartial decisionmaker." (Internal quotation marks omitted.) *In re Interest of Mainor T.*, 267 Neb. 232, 247-48, 674 N.W.2d 442 (2004).

We agree with the petitioner that the added procedural safeguard requiring that a trial court canvass a parent prior to a termination of parental rights trial does not substantially decrease any risk of erroneous deprivation of her right to family integrity. When the respondent is represented by counsel, the current procedures in place adequately protect the respondent from any claimed constitutional deficiencies.

[120 A.3d 1196] We note that the respondent was previously advised of her rights approximately

one year before the start of trial and she was represented by an attorney throughout the proceedings. It has frequently been recognized, albeit in other contexts, that " we strongly presume that counsel's professional assistance was reasonable, and the [respondent] has the burden to overcome the presumption that [her] attorney was employing sound trial strategy. . . . We evaluate the conduct from trial counsel's perspective at the time. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Bova v. Commissioner of Correction*, 95 Conn.App. 129, 137-38, 894 A.2d 1067, cert. denied, 278 Conn. 920, 901 A.2d 43 (2006); see also footnote 5 of this opinion. On appeal, the respondent's claims relate to failures of her attorney during the trial on the termination of parental rights. A canvass of the respondent would, however, do nothing to enhance the performance of her attorney during the trial. The respondent certainly had adequate notice of the proceedings and was present with her counsel at the time of the trial. She had the opportunity to participate in a contested hearing, present evidence on her own behalf,

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testify on her own behalf, and object to any exhibits and cross-examine witnesses, but she declined to do so. In the present case, the respondent does not claim that she attempted to participate and was prevented from doing so by her attorney or that she asked her attorney to participate and he refused. Therefore, we conclude that the second *Mathews* factor weighs heavily in favor of the petitioner.^[8]

The third factor in the *Mathews* balancing test concerns the government's interest in the proceeding and the fiscal and administrative burdens attendant to increasing procedural requirements. The respondent contends that the state has two interests that are implicated by requiring trial courts to canvass parents in termination of parental rights trials. The first is its " fiscal and administrative interest in lessening the cost involved in termination proceedings" ; the second is its

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parens patriae interest " in the accurate and speedy resolution of termination litigation in order to promote the welfare of the affected child." *In re Alexander V.*, *supra*, [120 A.3d 1197] 223 Conn. 565. The respondent claims that the fiscal and administrative costs of a short canvass would be minimal. Further, she argues, a canvass would ensure the accuracy of the termination proceeding.

The petitioner asserts that the state's primary interest in terminating parental rights is to free the child for adoption or to free the child of uncertainty. The petitioner also asserts that it has an interest in expediting cases involving abused and neglected children, and the speedy resolution of trials involving the termination of parental rights in order to protect the welfare of the affected children. The petitioner further claims that the respondent's proposed canvass would necessitate the trial court to extensively educate the parent on multiple substantive and procedural legal principles in order to ensure this " 'waiver'" of objections to exhibits was knowingly and voluntarily made. As such, the petitioner contends that the cost and delay are significant with little if any potential benefit to the respondent.

While we agree with the respondent that the cost of a short canvass would be minimal, if any, we also acknowledge that a lengthy canvass could potentially affect the accurate and speedy resolution of the termination proceeding. Therefore, in view of the fact that the respondent was represented throughout the course of this proceeding, we view the third *Mathews* factor as neutral to both sides and fully dependent on the length of a proposed canvass, which we do not perceive as being constitutionally required.

Having considered the three factors set forth in *Mathews*, we conclude that due process does not require that a trial court canvass a respondent who is represented by counsel when the respondent does not

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testify or present witnesses and the respondent's attorney does not object to exhibits or cross-examine witnesses. Although it is evident that the parent has an important interest to be protected, the strength of the second *Mathews* factor outweighs our conclusions regarding the first and third factors. We therefore conclude that the respondent has failed to sustain her burden of proof as to the third prong of *Golding* and we reject her claim on that basis.

III

Having concluded that the respondent's right to due process was not violated, we next consider whether we should nonetheless exercise our supervisory authority to require a canvass prior to a termination of parental rights trial.

The respondent urges us to use our supervisory power to require a canvass in a situation, such as the present case, where there is no testimony offered by the respondent, no objection to exhibits and no cross-examination of witnesses. The respondent claims that using our supervisory power to require a canvass in such situations is consistent with the ruling in *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 155-61, 84 A.3d 840 (2014), where this court recently articulated the circumstances under which it is appropriate for the court to exercise its supervisory authority. The respondent further claims that because the present case involves safeguards for securing a fundamental right, we should use our supervisory authority to guide the trial courts in the administration of justice.

In response, the petitioner asserts that using our supervisory authority to require a canvass would inject a trial court into the relationship between counsel and the parent by requiring courts to canvass a respondent, directly, about her counsel's [120 A.3d 1198] trial strategy. The petitioner

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further contends that the very reasons that constitutional due process does not require a canvass in this situation also counsels against the adoption of a rule that would entail the same sort of intrusion. The petitioner also suggests that it would be very difficult to craft a rule applicable to all situations. Here, in particular, the petitioner argues that the record is not clear that the respondent's counsel totally abandoned the case. She points to the fact that counsel argued to the court, based upon one of the exhibits, that the respondent "has had clean drug screens over the course of the last two years." The petitioner further expresses a concern that a canvass could be required every time counsel agreed to the admission of a piece of evidence, perhaps contrary to trial counsel's strategic choice to do so. Also, the petitioner contends that such a rule is not

prudent at this time since the Rules Committee of the Superior Court and other attorneys experienced in the area have not had the opportunity to voice their opinion on the matter. We disagree with these contentions and, rather, agree with the respondent that, in the interest of the fair administration of justice, it is appropriate that we exercise our supervisory authority to require that a trial court canvass the respondent parent before the start of any trial on the termination of parental rights.

It is well settled that "[a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State v. Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176

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(2010); see also *State v. Rose*, 305 Conn. 594, 607, 46 A.3d 146 (2012).

We recognize that this court's "supervisory authority is not a form of free-floating justice, untethered to legal principle." (Internal quotation marks omitted.) *State v. Pouncey*, 241 Conn. 802, 813, 699 A.2d 901 (1997). Rather, the rule invoking our use of supervisory power is "one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide lower courts in the administration of justice in all aspects of the [adjudicatory] process." (Internal quotation marks omitted.) *State v. Elson*, 311 Conn. 726, 768, 91 A.3d 862 (2014). Indeed, "the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court's] supervisory powers." (Internal quotation marks omitted.) *State v. Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014).

We recently reemphasized the fact that three criteria must be met before we will consider invoking our supervisory authority. *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, *supra*, 311 Conn. 155-61. First, the record must be adequate for review. *Id.*, 155. Second, all parties must be afforded an opportunity to be heard on the issue. *Id.*, 156. Third, an unpreserved issue will not be considered where its review would prejudice a party. *Id.* If these three threshold considerations are satisfied, the reviewing court next considers whether one of the following three circumstances exists: (1) the parties do not object; (2) the party that would benefit from the application of this court's supervisory powers **[120 A.3d 1199]** cannot prevail; or (3) a claim of exceptional circumstances is presented that justifies deviation from the general rule that unpreserved claims will not be reviewed. *Id.*, 158-61.

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It is clear that the three threshold requirements have been satisfied in the present case. Just as the record was adequate to consider the respondent's due process claim, it is also adequate to consider whether this court should adopt a rule requiring a canvass in trials for termination of parental rights pursuant to its supervisory power. Specifically, the issues regarding whether the

respondent chose to waive her right to offer her own testimony or that of other witnesses on her behalf, challenge any evidence, or cross-examine witnesses is evident from the transcript of the trial. Further, the second predicate requirement is satisfied because the parties have been afforded the opportunity to brief the issue. Finally, the petitioner will not be prejudiced if this court were to rely on its supervisory power to adopt the suggested canvass rule. If such canvasses are required, there would have been nothing that the petitioner could have done to prevent such a canvass, even if she had known about the rule at the time that trial counsel agreed on the summary proceeding. This proposed canvass rule does not present a situation where the parties are prejudiced because, had they been aware of a new rule, they would have presented additional evidence or prepared their case in a different manner. Thus, the three predicate requirements are met for the invocation of the rule.

We next consider whether there are exceptional circumstances that would justify review of this unpreserved claim. In this regard, we note that delineating the circumstances in which a trial court is obligated to canvass a parent personally regarding her right to contest the petitioner's allegations against her at trial, as well as determining what the scope that such a canvass must be, are the type of " exceptional circumstances" in which this court has previously invoked its supervisory authority. For instance, in *State v. Connor*, 292 Conn. 483, 518-19, 973 A.2d 627 (2009), this court employed its

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supervisory authority to require a trial court to canvass defendants who have been found competent to stand trial to assess whether they also were competent to conduct the trial proceedings without counsel. Further, in *State v. Gore*, 288 Conn. 770, 778, 955 A.2d 1 (2008), we invoked our supervisory power to require, in the absence of a written waiver, a canvass of the defendant briefly to ensure that his or her personal waiver of a jury trial is made knowingly, intelligently, and voluntarily. Also, in *Duperry v. Solnit*, 261 Conn. 309, 329, 803 A.2d 287 (2002), we exercised our supervisory authority to require that in all future cases in which a defendant pleads not guilty by reason of mental disease or defect, the trial court must canvass the defendant to ensure that his plea is made voluntarily and with a full understanding of the consequences. We exercised our supervisory authority in the aforementioned cases to ensure " 'the fair and just administration of [justice]'" ; *State v. Connor, supra*, 518-19 n.23; " 'to guide the [trial] courts'" ; *State v. Gore, supra*, 787; and " in light of concerns of fundamental fairness" *Duperry v. Solnit, supra*, 326-27. In all three of these cases, the canvass rules were deemed not to be constitutionally compelled. Like the rights in *Connor*, *Gore*, and *Duperry*, the respondent in the present case was faced with the loss of core fundamental rights--her fundamental parental rights and right to family integrity--that were placed in jeopardy through the use of an adjudicatory procedure [120 A.3d 1200] that failed to ensure that she understood the significant risks of proceeding as she did. Also, like *Gore*, which involved the waiver of the jury trial, and like *Duperry*, which involved the entry of a plea, the result in the present case was that the trial was not an adversary proceeding. Although the petitioner points to the fact that counsel for the respondent commented on certain language in an exhibit, those comments of counsel did not serve as evidence or convert this summary proceeding into an adversarial one.

It is significant that Connecticut requires its trial courts to canvass, inter alia, parents pleading nolo contendere in a neglect or termination proceeding; Practice Book § 35a-1; criminal defendants waiving their right to a jury trial; see *State v. Gore, supra*, 288 Conn. 786-87; criminal defendants who have been found competent to stand trial but wish to represent themselves at that trial; see *State v. Connor, supra*, 292 Conn. 518-19; and criminal defendants regarding their plea of not guilty by reason of mental defect where the state does not challenge that claim; see *Duperry v. Solnit, supra*, 261 Conn. 329; all circumstances that lead to the loss of significant personal rights. We conclude, therefore, that this case involves exceptional circumstances requiring that we employ our supervisory power.

" In utilizing our supervisory powers, we [have] emphasized that [a]n important function of this court is to ensure public confidence in the integrity of the judicial system. This confidence is enhanced through the enactment of rules that safeguard the fairness of our system of justice." (Internal quotation marks omitted.) *State v. Elson, supra*, 311 Conn. 773. Furthermore, "[w]e are aware of no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum" *State v. Rose, supra*, 305 Conn. 607. "[T]his court ordinarily [invokes its] supervisory powers to enunciate a rule that is not constitutionally required but that [it thinks] is preferable as a matter of policy." (Emphasis omitted; internal quotation marks omitted.) *Id.*, 608.

In the present case we have concluded that the respondent, who was represented by counsel, was not constitutionally entitled to a canvass regarding her trial counsel's strategy and the decision not to contest evidence presented by the petitioner. Nevertheless, we recognize that the lack of a canvass of all parents in a parental rights termination trial may give the appearance

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of unfairness insofar as it may indicate a lack of concern over a parent's rights and understanding of the consequences of the proceeding. Therefore, we conclude that public confidence in the integrity of the judicial system would be enhanced by a rule requiring a brief canvass of all parents immediately before a parental rights termination trial so as to ensure that the parents understand the trial process, their rights during the trial and the potential consequences.

We also note that the canvass that we require differs from that the respondent claims is constitutionally mandated. The canvass we require today will be given to all parents involved in a termination trial, not just those whose attorneys choose not to contest evidence. Indeed, we require that the canvass be performed at the very start of the termination trial, before a decision as to whether to challenge evidence has been communicated to the court. In so doing, the canvass we require does not single out those parents whose attorneys have made a tactical decision not to contest the evidence presented. As a result, the **[120 A.3d 1201]** canvass we require does not interfere with the attorney-client relationship but serves to inform and protect *all* parents.

Indeed, the provision of our rules of practice which requires a trial court to canvass a parent pleading nolo contendere in a neglect or termination proceeding is instructive here. See Practice Book § 35a-1 (b). The existence of such a requirement demonstrates that the judges of the

Superior Court thought it was important that "[t]he judicial authority shall determine whether a noncustodial parent or guardian standing silent understands the consequences of standing silent." Practice Book § 35a-1 (b). Similarly, by exercising our supervisory authority in the present case, we are promoting public confidence in the process by ensuring that all parents involved in parental termination proceedings fully understand their right to participate and the consequences

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of the proceeding. We conclude, therefore, that it is proper to exercise our supervisory power in the present case and require that, in all termination proceedings, the trial court must canvass the respondent prior to the start of the trial. The canvass need not be lengthy as long as the court is convinced that the respondent fully understands his or her rights. In the canvass, the respondent should be advised of: (1) the nature of the termination of parental rights proceeding and the legal effect thereof if a judgment is entered terminating parental rights; (2) the respondent's right to defend against the accusations; (3) the respondent's right to confront and cross-examine witnesses; (4) the respondent's right to object to the admission of exhibits; (5) the respondent's right to present evidence opposing the allegations; (6) the respondent's right to representation by counsel; (7) the respondent's right to testify on his or her own behalf; and (8) if the respondent does not intend to testify, he or she should also be advised that if requested by the petitioner, or the court is so inclined, the court may take an adverse inference from his or her failure to testify, and explain the significance of that inference. Finally, the respondent should be advised that if he or she does not present any witnesses on his or her behalf, object to exhibits, or cross-examine witnesses, the court will decide the matter based upon the evidence presented during trial. The court should then inquire whether the respondent understands his or her rights and whether there are any questions. This canvass will ensure that the respondent is fully aware of his or her rights at the commencement of the trial. It will neither materially delay the termination proceeding nor unduly burden the state.

We reject the petitioner's argument that this canvass will involve the court in counsel's trial strategy because the canvass merely constitutes an advisement to the respondent of his or her rights regarding the trial. In

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fact, as explained previously in this opinion, trial courts frequently canvass parties in other circumstances, such as when a parent pleads nolo contendere in a neglect or termination proceeding, a criminal defendant waives his or her right to a jury trial, a criminal defendant wishes to represent himself or herself, or when a criminal defendant pleads not guilty by reason of mental defect. Therefore, the claim that a canvass unduly interferes with trial strategy is unavailing. We recognize that there may be rare instances wherein counsel may not actively participate in the trial because the petitioner has no or insufficient evidence to support the grounds claimed. Further, there may be substantial reasons why counsel does not wish to call his or her client to testify. We do not agree, however, that the advisement which we impose today will interfere with trial strategy, nor do we contemplate a situation where a respondent will be able **[120 A.3d 1202]** to interrupt the trial if his or her counsel does not object to a certain exhibit or piece of testimony. Further, although we appreciate the petitioner's concern that the Rules Committee of the Superior Court

and other parties experienced in termination proceedings were not consulted before implementing this rule, we are mindful that proceedings before the Rules Committee of the Superior Court take time. Because the parental rights involved in such a canvass are so important in ensuring the fairness of the process, we do not believe it would be prudent to require that the public wait for the adoption of a new rule of practice. We conclude, therefore, that imposing the canvass rule announced today is an appropriate exercise of our supervisory authority.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgments of the trial court and to remand the case to the trial court for further proceedings consistent with this opinion.

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

CONCUR BY: ZARELLA (In Part); ESPINOSA (In Part)

DISSENT

ZARELLA, J., concurring in part and dissenting in part.

In the present case, the majority correctly determines that the trial court did not violate the constitutional rights of the respondent, Ashley P., when it allowed her to forgo a trial without canvassing her to ensure that she understood the rights that she forfeited in doing so. Nevertheless, the majority invokes this court's supervisory authority in order to reverse the judgments of the trial court. In my view, this use of the court's supervisory authority is entirely unwarranted. Moreover, I write separately to emphasize that this court *never* should exercise its supervisory authority to reverse a judgment in the absence of independent grounds for reversal. Although I recognize that this court previously has exercised its supervisory authority in this manner, and that I have joined in some of those decisions; see, e.g., *State v. Connor*, 292 Conn. 483, 505-506, 973 A.2d 627 (2009); I no longer believe that it should. Procedural rules announced under the court's supervisory authority should be given only prospective effect and not be used to reverse judgments in individual cases. Accordingly, I respectfully dissent in part.

I begin by briefly outlining the principles that previously have guided this court in its use of supervisory authority. " It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the

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criminal process . . . and on the civil side, as well. Thus, this court has exercised its supervisory authority over a wide variety of matters We ordinarily invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy." (Citations omitted; internal quotation marks omitted.) *Kervick v. Silver Hill Hospital*, 309 Conn. 688, 710, 72 A.3d 1044 (2013).

" Supervisory authority is an extraordinary remedy that should be used sparingly

Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, **[120 A.3d 1203]** untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. [Rather] [t]hey are an *extraordinary* remedy Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [in which] these traditional protections are inadequate to ensure the fair and just administration of the courts. . . . Overall, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers. . . . Thus, we are more likely to invoke our supervisory powers when there is a pervasive and significant problem . . . or when the conduct or violation at issue is offensive to the sound administration of justice" (Citations omitted; emphasis in original; internal quotation marks omitted.) *State v. Edwards*, 314 Conn. 465, 498-99, 102 A.3d 52 (2014).

" [W]e recently [have] explained that the cases in which this court has invoked its supervisory authority can be divided into two different categories. In the first category are cases [in which] we have utilized our supervisory power[s] to articulate a procedural rule as

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a matter of policy, either as holding or dictum, but without reversing [judgments] or portions thereof. In the second category are cases [in which] we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal. Although we recently have noted that [o]ur cases have not always been clear as to the reason for this distinction . . . a review of the cases in both categories demonstrates that, in contrast to the second category, the first category consists of cases [in which] there was no perceived or actual injustice apparent on the record, but the facts of the case lent themselves to the articulation of prophylactic procedural rules that might well avert such problems in the future." (Citation omitted; internal quotation marks omitted.) *State v. Carrion*, 313 Conn. 823, 850, 100 A.3d 361 (2014); see also *State v. Elson*, 311 Conn. 726, 768-70 n.30, 91 A.3d 862 (2014) (listing cases in both categories).

In my view, it is the second category of cases, in which we have used our supervisory authority to reverse judgments, that is problematic. The fundamental problem with this practice is that it undermines the rule of law. To understand how, we must examine more closely how we have used our supervisory authority to reverse judgments in individual cases.

The question of whether we should use our supervisory authority to reverse judgments in individual cases is really a question of whether we should retroactively apply the new rules we announce under our supervisory authority to the facts of the cases in which they are announced. In the past, we have not been consistent in how we have applied such new rules. In some cases, we have announced rules under the court's supervisory authority only prospectively. See, e.g., *State v. Medrano*, 308 Conn. 604, 631, 65 A.3d 503 (2013) (directing trial

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courts to refrain from giving certain jury instruction and upholding judgment even though trial court had given such instruction); *State v. Ouellette*, 295 Conn. 173, 191-92, 989 A.2d 1048 (2010)

(directing trial courts to inquire into nature of plea agreements and upholding judgment even though trial court had failed to so inquire); *State v. Griffin*, 253 Conn. 195, 209-10, 749 A.2d 1192 (2000) (directing trial courts to refrain from using certain instructional language and affirming judgment even though trial court had used such language). Yet, in other cases, **[120 A.3d 1204]** we have applied such rules retroactively to the facts of the case in which the rule is announced. In those cases, we sometimes have affirmed the judgment of the trial court on the ground that the court had unknowingly complied with the new rule; see, e.g., *State v. Coleman*, 242 Conn. 523, 534-35, 700 A.2d 14 (1997) (requiring trial courts to articulate reasons for imposing longer sentence after trial than state and defendant previously had agreed on pursuant to vacated guilty plea and upholding defendant's sentence because trial court sufficiently had articulated such reasons); and sometimes have reversed the judgment on the ground that the trial court had failed to comply with the new rule, even though the rule was not in effect at the time of trial. See, e.g., *State v. Elson*, *supra*, 311 Conn. 764, 784-85 (cautioning trial courts against commenting negatively on, at sentencing, defendant's decision to exercise his right to trial and remanding case for new sentencing because trial court had done so); *State v. Rose*, 305 Conn. 594, 605-606, 46 A.3d 146 (2012) (adopting per se rule of reversibility when defendant is compelled to stand trial in identifiable prison clothing and upholding Appellate Court's reversal of trial court's judgment because defendant had stood trial in such clothing); *State v. Santiago*, 245 Conn. 301, 332, 340, 715 A.2d 1 (1998) (requiring trial courts to conduct more extensive inquiry in order to investigate allegations of

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racial or ethnic bias on part of juror and reversing judgment because trial court had failed to conduct such inquiry).^[1] Thus, there has been no rhyme or reason as to when the court has applied a new rule prospectively or retroactively.

Scholars suggest that the decision to apply a new rule retroactively in the context of an individual case involves countervailing interests. See L. Fuller, *The Morality of Law* (1964) p. 57; see also J. Fisch, "Retroactivity and Legal Change: An Equilibrium Approach," 110 *Harv. L.Rev.* 1055, 1084-87 (1997). On the one hand, retroactively applying a new rule destroys the parties' reliance interests by subjecting them to a rule of which they had no prior notice. See, e.g., *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring) ("[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal"); see also L. Fuller, *supra*, p. 57 (" [i]f [the] overruling is made retrospective, then the [party relying on the decision being overruled] loses out though he relied on a legal decision that was clearly in his favor"). On the other hand, if the new rule is not applied retroactively, and the party who sought the new rule does not receive the benefit of its effect, that party's incentive to suggest the promulgation of a new rule to enhance the administration of the judicial system is undermined. See L. Fuller, *supra*, p. 57; J. Fisch, *supra*, 1085-86. This concern, it seems to me, pales in comparison to the fairness and due process concerns that are raised when a party is subjected to a rule of which it had

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no prior notice. Nevertheless, the impact of imposing retroactive rules also should be examined from the perspective of not only individual cases, but the judicial system as a whole.

[120 A.3d 1205] When viewed from the perspective of the entire judicial system, it is clear to me that we should not give retroactive effect to new rules announced under our supervisory authority because doing so subverts the rule of law. At its essence, the rule of law "conveys an ideal of governmental power and discretion being exercised and constrained within a framework of rules." J. Waldron, "Stare Decisis and the Rule of Law: A Layered Approach," 111 Mich. L.Rev. 1, 2 (2012). "The rule of law requires people in positions of authority to exercise their power under the authority, and within a constraining framework, of public norms (laws) rather than on the basis of their own preferences or ideology" *Id.*, 3; cf. R. Kozel, "Precedent and Reliance," 62 Emory L.J. 1459, 1464 (2013) (rule of law ensures that "bedrock principles are founded in the law rather than in the proclivities of individuals" [internal quotation marks omitted]). The judiciary's adherence to the rule of law is a defining characteristic of any healthy democracy, as it provides individuals with "clarity, certainty, predictability, [and] trustworthiness" as to the rules that govern their lives. J. Finnis, *Natural Law and Natural Rights* (1980) p. 272.

We undermine the rule of law when we promulgate a new rule under the court's supervisory authority and then reverse a trial court's judgment on the ground that the trial court had failed to comply with that new rule, which did not exist at the time of trial. As I previously discussed, this court has observed that "the integrity of the judicial system serves as a unifying principle" to guide our use of supervisory authority; (internal quotation marks omitted) *State v. Edwards, supra*, 314 Conn. 498; and that we use our supervisory authority to

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reverse a judgment only when it "is necessary to ensure that justice is achieved in [a] particular case." *State v. Carrion, supra*, 313 Conn. 852. When, however, the only principles constraining our use of supervisory authority are concepts such as "integrity" and "justice," we are not really constrained at all. See *Kaiser Aluminum & Chemical Corp. v. Bonjorno, supra*, 494 U.S. 857 (Scalia, J., concurring) ("Manifest injustice, I fear, is just a surrogate for policy preferences. . . . [When discussing the standard of manifest injustice] one is not really talking about justice at all, but about mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result." [Internal quotation marks omitted.]). Indeed, we openly acknowledge the fact that the rules that we craft pursuant to the court's supervisory authority are simply rules that "we think [are] preferable as a matter of policy." (Internal quotation marks omitted.) *Kervick v. Silver Hill Hospital, supra*, 309 Conn. 710. Thus, when we retroactively apply such rules to reverse judgments, we decide cases not on the basis of controlling legal principles, but on the court's policy preferences.

Constantly exercising the court's supervisory authority in this manner compromises the legitimacy of this court. See *State v. Carrion, supra*, 313 Conn. 854 (*Zarella, J.*, concurring) ("invoking this authority too easily and too often can undermine the very integrity of the judicial system that this authority is designed to protect"). As the final arbiter of legal disputes in this state, there is nothing to restrain the court in its use of supervisory authority but the court itself. As long as this court allows itself to reverse judgments in individual cases under its supervisory authority,

litigants cannot be sure whether we will decide such cases on the basis of our constitution, statutes, and precedent, on the one hand, or our own policy preferences, on the other.

[120 A.3d 1206] Such uncertainty erodes the predictability and public confidence

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that adherence to the rule of law fosters. *State v. Elson, supra*, 311 Conn. 771 (expansive use of supervisory authority may lead to "arbitrary, result oriented, and undisciplined jurisprudence").

Moreover, by invoking the court's supervisory authority to reverse judgments in individual cases, we contradict our continual assertion that our supervisory authority does not serve as "a last bastion of hope for every untenable appeal." (Internal quotation marks omitted.) *State v. Edwards, supra*, 314 Conn. 498. That is exactly what we have turned our supervisory authority into by using it, as we do in the present case, to reverse judgments in the absence of legal grounds for reversal. As long as we continue to exercise our supervisory authority in this manner, claimants will justifiably seek to prevail under the court's supervisory authority, regardless of whether their legal claims are meritorious.

In my view, these considerations significantly outweigh the aforementioned policy considerations that support the retroactive application of new rules. As I previously discussed, the interests of the party that would benefit from having the new rule applied retroactively always will be offset by the interest of the opposing party who had no notice of the new rule. Most importantly, whatever the cost to individual litigants of not applying a rule retroactively, it would be vastly outweighed by the benefits of adhering to the rule of law. With respect to our ability to supervise the judicial system, prospectively applying new rules articulated under our supervisory authority will not diminish the number of opportunities we have to do so. In the vast majority of cases, including the present case, requests to exercise our supervisory authority are accompanied by legal claims. See, e.g., *State v. Connor, supra*, 292 Conn. 506 (exercising supervisory authority after rejecting defendant's constitutional claims). Thus, when this court is presented with an unsuccessful legal or constitutional

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claim, we nevertheless will be able to recognize the need for and to implement a procedural fix by promulgating a prospective rule. Limiting our use of supervisory authority to creating only prospective rules therefore will not constrain our ability to appropriately oversee and administer the system of justice.^[2] Accordingly, we no longer should invoke the court's supervisory authority to reverse judgments in the absence of independent grounds for reversal, as this practice risks "entrenching the rule of men rather than the rule of law." J. Waldron, *supra*, 111 Mich. L.Rev. 7.

To be sure, I do not suggest that the court never should exercise its supervisory authority. The court can properly continue to announce prophylactic procedural rules in order to ensure the sound administration of the judicial system. Such an exercise of supervisory authority does not diminish the rule of law because it does not require the court to change the outcome of an individual case on the basis of judge made rules that are essentially creatures of policy rather than the law. We properly may articulate new rules pursuant to our supervisory authority regardless of whether we are reversing a judgment on the basis of independent legal grounds raised on appeal, as long as we apply the new rule prospectively and not to the facts of the case in which it is

announced. Applying **[120 A.3d 1207]** new rules prospectively " ensure[s] public confidence in the integrity of the judicial system" ; (internal quotation marks omitted) *State v. Elson, supra*, 311 Conn. 773; without contravening the rule of law.

Finally, I note that an alternative to limiting our use of supervisory authority to announce only prospective

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rules would be to self-impose additional limitations on the use of our supervisory authority to reverse judgments. I have no confidence, however, that this more moderate proposal would be effective. Justices of this court, including myself, have, for decades, authored dissenting and concurring opinions counseling against the excessive use of supervisory authority. See, e.g., *State v. Carrion, supra*, 313 Conn. 854 (*Zarella, J.*, concurring); *State v. Rose, supra*, 305 Conn. 629-33 (*Zarella, J.*, dissenting); *State v. Santiago, supra*, 245 Conn. 341, 351 (*Callahan, C. J.*, concurring in part and dissenting in part); *State v. Coleman, supra*, 242 Conn. 549-50 (*Norcott, J.*, concurring). As Justice Espinosa details in her concurring and dissenting opinion, those calls for restraint have gone unheeded, as the court has only exercised its supervisory authority with increasing frequency.^[3] This makes it highly **[120 A.3d 1208]** doubtful that additional

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self-imposed conditions on the use of supervisory authority would lead this court to resist the use of its supervisory authority to reverse judgments in individual cases.

In sum, I disagree with the majority that the facts of the present case warrant the use of our supervisory authority to require trial courts, in parental rights termination proceedings, to canvass parents who elect to forgo a contested trial. Furthermore, I disagree with the majority's retroactive application of that new canvass requirement in the present case and its use of its supervisory authority to reverse the judgments of the trial court on the ground that the trial court had failed to conduct such a canvass, which was not required at the time of the termination proceedings. Finally, I emphasize that, in future cases, the court should give only prospective effect to new rules articulated pursuant to its supervisory authority and not use its supervisory authority to reverse judgments in individual cases. If we are to uphold the ideal of the rule of law, we must decide cases on the basis of existing legal principles, not on the basis of our own policy judgments regarding the administration of the judicial system.

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Accordingly, I respectfully concur in part and dissent in part.

ESPINOSA, J., concurring in part and dissenting in part.

I agree with parts I and II of the majority opinion. Specifically, I agree with the majority that the Appellate Court incorrectly construed the third prong of *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), to require an appellant to produce binding precedent directly on point in order to establish that " the alleged constitutional violation clearly exists and clearly deprived the [respondent] of a fair trial" in order to prevail under *Golding*. I also agree with the majority that the respondent mother, Ashley P. (respondent), has not demonstrated that her right to due process was violated by the trial court's failure to personally canvass her regarding her decision to allow

the court to decide whether to grant the petition^[1] of the petitioner, the Commissioner of Children and Families, to terminate the parental rights of the respondent on the basis of the documentary evidence submitted by the petitioner, without the presentation of testimony.

I write separately, however, to express my disagreement with the majority's determination, in part III of its opinion, to invoke this court's supervisory authority to reverse the judgment of the Appellate Court in the present case in accordance with the new rule announced in its decision, which requires the trial court to personally canvass a parent who is represented by counsel before accepting a waiver of the right to a full trial and a decision not to contest the exhibits offered
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by the Department of Children and Families (department) in support of a petition to terminate parental rights. Today's decision exemplifies the routine manner in which this court invokes its supervisory authority of late. Certainly, the issue at stake is an important one--ensuring that a parent's waiver of the right to trial and to contest the department's evidence in a termination proceeding is knowing, intelligent and voluntary. The majority has not persuasively **[120 A.3d 1209]** explained, however, why representation by counsel is not sufficient to ensure that a parent's waiver comports with the requirements of due process. The majority, therefore, has not demonstrated how its rule is required for the administration of justice. Nor has the majority offered any explanation as to why it believes this case presents the type of extraordinary circumstance that justifies the invocation of this court's supervisory authority in order to reverse the judgment of the Appellate Court. My review of the record reveals that there was no question that the respondent, who was represented by counsel and who previously had her rights terminated with respect to three of her other children, was quite familiar with the consequences of the termination of her parental rights. There is no indication in the record that counsel was experiencing any difficulty communicating with the respondent or that the respondent had taken issue with the strategic decisions of counsel at any point during these protracted proceedings. Nor has the respondent alleged that her counsel's performance was deficient. Indeed, the record provides support for the conclusion that the respondent's counsel was justified in resting on the papers, given the overwhelming, negative testimony about the respondent that would have been presented had this case gone to trial. By invoking its supervisory authority, therefore, the majority second-guesses the strategy choices of counsel and forces the children who are the subject of the petition to suffer additional, needless

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delay before being placed permanently. Accordingly, I respectfully dissent with respect to part III of the majority opinion.

I have said it before--this court exercises its supervisory authority " too broadly, too readily and too often." *Lapointe v. Commissioner of Correction*, 316 Conn. 225, 457, 112 A.3d 1 (2015) (*Espinosa, J.*, dissenting). In light of recent decisions expanding the scope of that authority; see *id.*, 268-72; *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 144-66, 84 A.3d 840 (2014); as well as the court's increasingly routine reliance on what is supposed to be an extraordinary power, I believe that it is time to take stock and consider the ramifications of the court's existing jurisprudence on the scope of that authority. Because that

power is now entrenched in our jurisprudence, I do not believe that it is possible to abandon it, but it is time that we take seriously the oft recited mantra that this court's supervisory power should be exercised rarely. See, e.g., *State v. Edwards*, 314 Conn. 465, 498, 102 A.3d 52 (2014); *State v. Hines*, 243 Conn. 796, 815, 709 A.2d 522 (1998).

Three decades--that is the extent of this court's history of reliance on its inherent supervisory authority. Thirty years, out of the almost 230 year history of this court's published opinions. I believe that it is fair to say that the supervisory authority of this court is a relatively new power. In light of its brief history, it is perhaps not surprising that we have not yet considered the ramifications of how we have used the power thus far. This court's recent decisions, however, make it very clear that the time has come to have that discussion. See, e.g., *Lapointe v. Commissioner of Correction*, *supra*, 316 Conn. 268-72; *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, *supra*, 311 Conn. 144-66. In order to better understand the nature of our supervisory power and the need to

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exercise it with " great caution" ; *State v. Santiago*, 245 Conn. 301, 343, 715 A.2d 1 (1998) (*Callahan, C. J.*, concurring and dissenting); I begin by reviewing the origins of our reliance on it, trace the path of that power to its present day form, and, finally, explain why the **[120 A.3d 1210]** present case is not an appropriate one for the exercise of that authority.

Preliminarily, I offer the following observation. Unrestrained exercise of this court's supervisory authority is dangerous because it erodes the predictability that is essential to the rule of law. The best perspective from which to understand the danger is from the vantage point of the litigants who appear before this court. Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes, later a justice of the United States Supreme Court, expressed it aptly: " When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts." O. Holmes, " The Path of the Law," 10 Harv. L.Rev. 457 (1897).

Justice Holmes' remarks clarify that predictability is not an abstract value, revered in a vacuum by the proponents of judicial restraint. It is a value that has

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pragmatic worth, because predictability ensures that the law *works* for those who need it. The parties who argue before this court through their attorneys are entitled to rely on the predictability of the rule of law. They come before the court with the expectation that the existing precedents will determine the resolution of the appeal, and they make their decisions and prepare their cases on the basis of that expectation. When this court decides appeals more and more frequently on the

basis of supervisory authority, however, we add a level of mystery to the law that defeats expectation. No one wants to pay an attorney to speculate as to whether this court will decide to invoke its supervisory authority. And no attorney wants to be placed in the position of trying to guess whether his or her appeal will be the next instance in which the court exercises that authority rather than resting the decision on the merits. Reserving our supervisory authority for the very rare instances when it is appropriate, by exercising self-restraint, and adhering consistently to guidelines for its exercise will protect the predictability that is essential to the rule of law.

I

HISTORY OF THIS COURT'S EXERCISE OF SUPERVISORY AUTHORITY

A

Origin of the Authority

The origin of this court's supervisory authority tells the entire story--our power is self-conferred, unanchored, and, unless we ourselves restrain it, unlimited. This court first invoked its inherent supervisory authority in 1983, in *State v. Ubaldi*, 190 Conn. 559, 569-75, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S.Ct. 280, 78 L.Ed.2d 259 (1983), in which the court reversed the defendant's conviction on the basis of prosecutorial

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impropriety. The defendant in *Ubaldi* had been convicted of various counts of larceny in connection with the conversion of tax funds that he had collected on behalf of the city of Waterbury.

[120 A.3d 1211] *Id.*, 560. During cross-examination of the defendant, the prosecutor asked whether a certain person, Nick Jamele, to whom the defendant apparently had disbursed city funds, was the defendant's "bookie" *Id.*, 561. The court sustained the defendant's objection to the question and instructed the jury to disregard it. *Id.*, 561-62 n.2. The state subsequently attempted to call Jamele as a witness. *Id.*, 564. During the state's proffer to the court outside the presence of the jury, however, Jamele successfully invoked his fifth amendment privilege against self-incrimination. *Id.* Notwithstanding both Jamele's unavailability as a witness and the trial court's earlier ruling that had barred the state from implying an unsavory connection between the defendant and Jamele, the prosecutor commented during closing argument on the defendant's failure to call Jamele as a witness, thus reviving the court prohibited suggestion that the defendant had paid off gambling debts to Jamele with city funds. *Id.*

This court characterized the prosecutor's conduct as deliberate, and undertaken in "total disregard" of the intent of the trial court's rulings, which was to protect the defendant "against consideration by the jury of irrelevant and prejudicial matters." *Id.*, 567. The court's ability to deter such conduct, the court explained, is essential to "the integrity of the judicial system." *Id.*, 572. Accordingly, the court rejected the state's claim that it should prevail on appeal because the defendant had not been deprived of a fair trial by the improper remarks, and announced that "[a]n appellate court has a certain inherent supervisory authority over the administration of justice . . . in the trial courts below that permits action to deter prosecutorial misconduct which

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is unduly offensive to the maintenance of a sound judicial process." (Citation omitted; internal

quotation marks omitted.) *Id.*, 570. Because of the flagrant nature of the impropriety, the court reasoned, a mere rebuke without the concrete sanction of reversal would not deter counsel from repeating the offense. " Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking." (Internal quotation marks omitted.) *Id.*, 571. Thus, because the conduct at issue would not constitutionally mandate a new trial, the court viewed its reliance on its supervisory authority as *necessary* under the extraordinary circumstances of the case. *Id.*, 571-72.

Significantly, the court in *Ubaldi* established several prerequisites that justified the use of its new power. As I have already indicated, the court viewed its resort to the power to be driven by necessity. The court understood the case to implicate an important issue, nothing less than the integrity of the judicial system itself. *Id.*, 568. In addition, the court emphasized that the case presented extraordinary circumstances that justified the invocation of its supervisory authority. The prosecutor's behavior was extreme--the court stressed the flagrant and deliberate nature of the impropriety; *id.*, 571; which " undermine[d] the authority of the trial court's ruling" *Id.*, 574. And the circumstances of the case were *sui generis*, prompting the court to observe that it had never been presented with " a situation precisely like the one before us." *Id.*, 566. The court also recognized that its new authority " must not be undertaken without balancing other interests which may be involved." *Id.*, 572. For [120 A.3d 1212] instance, " [t]he trauma which the victim of a heinous crime might undergo by being forced to relive a harrowing experience or the practical problems to be encountered in retrying a case several

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years after the event require a cautious approach." *Id.* Because, however, there were no " highly significant competing social interests [to] outweigh the important judicial consideration of restraining serious prosecutorial misconduct," the court deemed it an appropriate circumstance in which to exercise its supervisory authority. *Id.*, 573.

The court made clear, therefore, that it viewed its new supervisory authority as a power only to be used in limited, exceptional circumstances, invoked only when its exercise is necessary and the interests involved are of the utmost importance, and when an evaluation of the interests involved reveals that the balance weighs in favor of invoking the authority. Applied properly, these considerations should yield the result that our supervisory power is reserved for the *rare* instance in which this court's reliance on it is appropriate. [2]

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The court looked to federal authority to justify its claim to this new power. Given the " inherent" nature of the supervisory power, one would expect the federal decisions on which the court in *Ubaldi* relied to stem from some incipient authority-constitutional provisions, a very early decision of the United States Supreme Court, colonial law, or perhaps even English common law. Such expectations are doomed to disappoint. " Inherent" supervisory authority is a twentieth century concept. A. Barrett, " The Supervisory Power of the Supreme Court," 106 Colum. L.Rev. 324, 387 (2006). Like the court in *Ubaldi*, when the United States Supreme Court first invoked its supervisory power in *McNabb v. United States*, 318 U.S. 332, 340, 63 S.Ct. 608, 87 L.Ed. 819

(1943), the court did so in response to governmental misconduct. Specifically, the facts of *McNabb* suggested that the petitioners had been held without bail and questioned for two days by law enforcement officials, without having been brought before a United States commissioner or a judge. *Id.*, 334-38. In analyzing the petitioners' claim that the foregoing facts warranted reversal of their convictions, the court eschewed any discussion of **[120 A.3d 1213]** constitutional issues, deeming such discussion "unnecessary." *Id.*, 340. Instead, the court announced that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.* The court claimed in *McNabb* that it had been exercising this authority all along, on the basis that "this [c]ourt has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *Id.*, 341.

None of the authorities cited by *McNabb*, however, purported to invoke the court's supervisory authority, nor did they provide support, either for the proposition that the court has the authority to engage in rule making

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by way of adjudication, or, as happened in *McNabb*, to apply a new rule to the case at hand. Instead, the cases cited in *McNabb* merely applied established legal principles to the facts of the particular case in order to determine the proper evidentiary rule. See, e.g., *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469, 6 L.Ed. 693 (1827) (The court rejected the defendant's claim that the witness' testimony regarding certain admissions made by the defendant's agent was inadmissible, on the basis that "[i]n general the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act."); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 199, 5 L.Ed. 64 (1820) (rejecting proposition that only admissible testimony as to character of ships plundered by pirates was limited to documentary papers, and citing to various legal principles in support of conclusion, including fact that laws requiring such papers to be on vessels are not for purposes of criminal prosecution, but, rather, purposes of finance and commerce); see also S. Beale, "Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts," 84 Colum. L.Rev. 1433, 1435 (1984) (" *McNabb* represented a substantial departure from the role played by the [United States] Supreme Court during the first 140 years of its existence. The [c]ourt's assertion of supervisory authority rested on the assumptions that the federal courts would follow federal procedure and that the [c]ourt was the appropriate body to exercise overall responsibility for developing and supervising the implementation of this procedure, particularly in criminal cases. Prior to 1930 neither of these assumptions was valid.").^[3]

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Nor did the court in *McNabb* offer any constitutional or statutory authority to justify its claim to supervisory authority.^[4] The power, therefore, is untethered to any external authority. The trail of its common-law roots ends with *McNabb*, and it is **[120 A.3d 1214]** not derived from any legislative or constitutional grant of power, but rather is a power that the court conferred upon itself.

In *Ubaldi*, therefore, this court moored itself to a ship that had no anchor. Our supervisory

authority is inherent only in the sense that it is a power that we ourselves created by stating that we have it. Its strength and authenticity stem only from the confidence with which we assert that we are entitled to use it. This recognition is critical toward understanding why we must exercise that power with great caution. I previously have observed that when this court exercises its supervisory authority, " our use of it is virtually unreviewable" *Lapointe v. Commissioner of Correction, supra*, 316 Conn. 455-56 (*Espinosa, J.*, dissenting). The origin of our authority, which reveals that the power is a self-proclaimed one, explains why our use of the power is virtually unreviewable and can only be limited by this court. Only by doing so can we protect the predictability of the rule of law. We often have stated that our supervisory authority is not " a form of free-floating justice, untethered to legal principle" (Internal quotation marks omitted.) *State v. Elson*, 311 Conn. 726, 768, 91 A.3d 862 (2014), quoting *State v. Pouncey*, 241 Conn. 802, 813, 699 A.2d 901

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(1997). That statement is only true as long as we hold ourselves to it. And we have not been doing that.

B

Evolution of the Doctrine

A review of the history of this court's reliance on its supervisory authority since *Ubaldi* reveals a gradual and steady increase in reliance on the authority for the first twenty-five years, then a sharp spike in the past five years, both in the frequency with which the court invokes the power and the breadth of its application. As an overview, since and including *Ubaldi*, this court has invoked its supervisory authority approximately forty-four times.^[5] In the [120 A.3d 1215] 1980s, the court relied on its

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supervisory authority only four times.^[6] Between 1990 and 1999, the court used its supervisory power fourteen times; ^[7] between 2000 and 2009, the court invoked its power twelve times.^[8] Astonishingly, in the past five years, the court already has relied on its supervisory

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authority, including the exercise by the majority in the present case, fourteen times, and we are not quite halfway through the decade.^[9]

[120 A.3d 1216] To put that number in perspective, approximately one third of this court's decisions invoking supervisory authority have been issued within the past five years.

Although the drastically increased frequency of this court's reliance on supervisory authority suggests that there may be a problem, the numbers alone are not conclusive. For instance, it could be possible that within the past five years there simply have been many more extraordinary circumstances that have justified a more frequent invocation of our supervisory power. On the other hand, perhaps the court's decisions initially adhered to the limitations set forth in *Ubaldi*, and then gradually abandoned those limits. Although it may be argued that the latter is somewhat closer to the truth, it does not give a complete picture of the problem, which is a complex one. This court's supervisory decisions have never treated the limitations set forth in

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Ubaldi as binding in any sense of the word—from the beginning, we have sometimes adhered to those limits, but in the majority of cases, we have not given any indication that we have even *considered* them prior to invoking our authority.

Two principles might explain both the inconsistency in this court's consideration of the limits on its supervisory authority, as well as the substantial, recent increase in the exercise of that authority. First, and most fundamentally, despite the oft repeated refrain that this court's supervisory power is not a form of " free-floating justice" ; *State v. Santiago, supra*, 245 Conn. 333; it is the inherent nature of a self-conferred power that it lacks limits unless those are self-imposed. Second, after the court announced the existence of its supervisory authority in 1983, the court seems simply to have assumed its validity and has not given significant consideration to establishing and adhering to any parameters for its exercise. With the passing of time, absent any consistent adherence to self-imposed limitations on the power, the court has become less and less capable of disciplining itself to view its supervisory authority as extraordinary. The court has become habituated to its use, and now treats its supervisory power as a panacea for any difficult problem confronting it.

It is neither possible, nor helpful, to discuss all forty-four decisions in illustrating the course that our law on supervisory authority has taken over the past thirty years. I restrict my discussion to some of the earlier decisions, general remarks regarding trends in the intervening years, and a closer look at a few recent decisions. I also have limited my discussion to the two types of exercise of supervisory authority that are at issue in the present case: applying a newly announced rule to reverse the judgment that is the subject of the appeal; and announcing a new rule with prospective application. See *State v. Elson, supra*, 311 Conn. 768-71

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n.30 (collecting cases).^[10] I first **[120 A.3d 1217]** consider the evolution of our supervisory power in cases in which we have applied a new rule to the pending appeal, then turn to decisions that have announced a new rule that is to be applied prospectively. I conclude that both lines of cases demonstrate a lack of focus on the importance of self-restraint in invoking our supervisory powers.

After *Ubaldi*, the court did not rely on its supervisory authority to reverse the judgment at issue in an appeal for twelve years. Viewed in context, *State v. Jones*, 234 Conn. 324, 662 A.2d 1199 (1995), represented a modest exercise of the court's supervisory authority, and appears to have been mindful of the guidelines that the court established in *Ubaldi*. The court resolved the appeal on the merits, applying the laws of severance and joinder, together with principles of statutory construction, to hold that, when a defendant is charged with capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (3), he is entitled to be tried in a bifurcated proceeding. *Id.*, 343-44. The standard of review of the trial court's denial of the defendant's motion to bifurcate was whether the trial court abused its discretion and the court was loath to reverse the judgment on the merits. *Id.*, 343. The court explained: " We do not demand or necessarily expect our trial courts to create new roads of practice and procedure never before traveled in our jurisdiction." *Id.*, 346. Accordingly, the court relied on its supervisory authority

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to reverse the judgment. *Id.*, 346-47. A reasonable way to read *Jones* is that the court viewed the

exercise of supervisory authority as necessary because the alternative would have been absurd-to hold that the trial court abused its discretion by failing to adhere to a rule that had not yet been articulated by this court. In addition to finding necessity, the court also relied on extraordinary circumstances presented in *Jones*, citing to the " high risk of prejudice to the defendant on the present record" *Id.*, 346. The court also considered the countervailing interests, concluding that the high risk of prejudice, at least in *Jones*, outweighed the state's interest in judicial economy. *Id.*

The court's very next exercise of its supervisory authority in which it applied a new rule to a pending appeal, however, evidenced none of the restraint shown in *Jones*. In *State v. Coleman*, 242 Conn. 523, 700 A.2d 14 (1997), not only did the court fail to offer any explanation as to why it was appropriate to resolve the case on its supervisory authority, the court expressly stated that it did not need to resolve the state constitutional issue raised by the defendant because the issue could be resolved by invoking the court's supervisory authority. *Id.*, 534. *Coleman*, accordingly, presented a radical departure from the principles espoused in *Ubaldi* and adhered to carefully in *Jones* -without even indicating any awareness that the court was departing from anything at all. What makes the majority's exercise of the court's supervisory power even more astonishing is that the concurrence in *Coleman* expressly stated that the court's supervisory authority should be reserved " for addressing serious concerns that affect the integrity of the defendant's trial in particular and the perceived fairness of the [120 A.3d 1218] judicial system as a whole." *Id.*, 550 (*Norcott, J.*, concurring).

Subsequent decisions applying new rules to pending appeals pursuant to our supervisory authority have

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seemed to follow *Coleman* more than *Ubaldi* and *Jones*. One example is *State v. Santiago, supra*, 245 Conn. 331-32, in which the court concluded that the trial court did not abuse its discretion in finding that allegations of a juror's racial bias lacked credibility, following a preliminary inquiry into the allegations as required by *State v. Brown*, 235 Conn. 502, 530-31, 668 A.2d 1288 (1995). Notwithstanding that conclusion, the court relied on its supervisory authority to reverse the judgment of the trial court, and to announce a rule requiring that, when there have been allegations that a juror has made racial epithets, the trial court must conduct a more extensive inquiry than required by *State v. Brown, supra*, 530-31. *State v. Santiago, supra*, 340.

Although the court properly placed great emphasis on the importance of the issue implicated by the appeal, the court did not claim, and indeed it could not, that extraordinary circumstances justified reversal. The trial court expressly had found that the witness who had alleged the misconduct was biased-prior to making her allegations, she had sent the court a letter indicating that she regretted her vote to convict the defendant and questioned his guilt, and also opined that, even if he was guilty, his act of killing a drug dealer had saved many from " the heartbreak of drug abuse" *Id.*, 324 n.14. There were also serious inconsistencies in her allegations, and when questioned by the trial court during the *Brown* inquiry, she was not able to offer any explanation for those inconsistencies. *Id.*, 326-27 n.16. By apparently second-guessing the trial court's credibility finding, the majority in *Santiago* seemingly usurped the properly exercised discretion of the court

and substituted its own judgment. The concurring and dissenting opinion accurately characterized the court's exercise of supervisory authority in the case to be irreconcilable with the " long settled distinction between the unique roles of appellate and trial courts." *Id.*, 342

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(*Callahan, C. J.*, concurring in part and dissenting in part).

Another, more recent example follows the *Coleman* model quite closely. In *State v. Polanco*, 308 Conn. 242, 248, 61 A.3d 1084 (2013), the court stated that it did not need to reach the constitutional claim because the appeal could be resolved by invoking the court's supervisory authority. What is particularly troubling about the exercise of supervisory authority in *Polanco* is the suggestion by the court that it was not resolving the claim on the constitutional issue raised by the defendant because doing so would have been difficult. Specifically, in justifying its reliance on its supervisory authority, the court stated: " We find *Rutledge* [*v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996)] to be less than a model of clarity as to what extent its holding was constitutionally based rather than jurisprudentially based or a matter of statutory construction." *State v. Polanco, supra*, 256. A fair reading of *Polanco* is that the court exercised its supervisory authority in order to avoid deciding a tricky issue.

The last case that I discuss in this part is *State v. Elson, supra*, 311 Conn. 726. I recognize that I participated in the panel in *Elson*, and I joined the unanimous decision. I have reconsidered, and now believe that the court improperly exercised its supervisory authority in that case to reverse the judgment of the Appellate [120 A.3d 1219] Court with respect to the defendant's sentencing. In doing so, this court substituted its judgment for the properly exercised discretion of the trial court. *Elson* involved the trial court's remarks, during the defendant's sentencing hearing, that: " 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

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thinking of himself rather than the victim." (Emphasis omitted; internal quotation marks omitted.) *Id.*, 733. The court in *Elson* concluded that the defendant had failed to demonstrate that, viewed in the totality of the circumstances, the trial judge's remark demonstrated that the judge had augmented the defendant's sentence in retaliation for the exercise of his right to trial. *Id.*, 762. The record demonstrated that the trial court considered many factors in sentencing the defendant, including the severity of the assault that gave rise to the defendant's conviction, the probation report's recommendation of a lengthy term of incarceration, the defendant's lack of truthfulness, and the fact that the attack was part of a pattern of behavior that justified the court's conclusion that the defendant was a dangerous person from whom the victim and society deserved protection. *Id.*, 761-62.

Despite acknowledging all of this, and also concluding that the trial court considered the defendant's expression of remorse relevant only to whether the defendant was entitled to leniency; *id.*, 762; the court in *Elson* issued a prophylactic rule precluding trial courts from commenting negatively on the defendant's election to proceed to trial during sentencing; *id.*, 777; and

remanded the case for a new sentencing hearing, concluding that the trial court's remarks " created an appearance of impropriety" *Id.*, 784. Certainly, if one ignored the context of the remarks, and evaluated them in isolation, the remarks might have that effect. But we have specifically rejected a test that would evaluate a trial court's sentencing remarks in isolation, instead adopting the totality of the circumstances test. *State v. Kelly*, 256 Conn. 23, 82-83, 770 A.2d 908 (2001). Viewed in the totality of the circumstances, therefore, the remarks do not create the appearance of impropriety at all. One is left with the impression that the court in *Elson* was motivated to use its supervisory authority to accomplish what the law precluded, merely because

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the trial court's awkwardly worded comment, if viewed in isolation, could be misconstrued to mean that the court was penalizing the defendant for exercising his right to a jury trial. It is difficult to see how the theoretical possibility that a trial judge's sentencing remarks, if construed in a manner that is expressly prohibited by our law, could give rise to the conclusion that the court violated a defendant's rights, justifies the invocation of this court's supervisory authority.

The progression in our decisions that have exercised the court's supervisory authority to apply a newly announced rule to the case on appeal is therefore clear. The court has consistently and steadily moved toward more extreme exercises of the power, and has abandoned the guidelines enunciated in *Ubaldi*. As I will explain in part II of this concurring and dissenting opinion, the present case fits this pattern precisely.

Our decisions that have announced new rules prospectively follow a somewhat similar pattern. The court first relied on its supervisory power to impose a new rule on [120 A.3d 1220] the trial courts in *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989), a case in which the defendant claimed that the state had excluded a potential juror on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The court restricted its exercise of supervisory authority to announcing the new rule prospectively, resolving the merits of the appeal on constitutional principles. Specifically, the court affirmed the defendant's conviction on the basis of its conclusion that he had failed to establish that the state's use of a peremptory challenge was racially motivated. *State v. Holloway, supra*, 644-45. After resolving the merits, however, the court stated that it was appropriate to use its supervisory authority to announce a new rule for future cases because the issue of purposeful racial

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discrimination " is a matter of utmost seriousness, not only for the integrity of a particular trial but also for *the perceived fairness of the judicial system as a whole.*" (Emphasis added; internal quotation marks omitted.) *Id.*, 645. Put another way, the court stated, the invocation of its authority was justified because " this issue is of such vital importance to our real and perceived adherence to the rule of law" *Id.* Going forward, the court stated, when a defendant claimed pursuant to *Batson v. Kentucky, supra*, 476 U.S. 79, that the state's exercise of a peremptory challenge to exclude a potential juror was based on purposeful racial discrimination, the state would be obligated to provide a race neutral explanation for the challenge without the requirement that the defendant make the prima facie showing required pursuant to *Batson*. *State v. Holloway, supra*,

645-46 and 646 n.4.

The decision in *Holloway* did not rest the court's exercise of supervisory authority on any exceptional circumstances presented in the case. Nor could the court have done so, given the different use it made of its authority in *Holloway*. That is, because the court deemed its authority appropriately limited to announcing a prospective rule, it could not justify the exercise of supervisory authority on the exceptional circumstances of the case--if the circumstances were that exceptional, the court would have relied on its authority to reverse the judgment. Nor did the court offer any explanation as to why the rule that it announced in *Holloway* was necessary in order to ensure the perceived fairness of the judicial system, or why it was necessary to announce the rule by way of adjudication rather than allowing the proposed rule to go to the Rules Committee of the Superior Court, a process that would have ensured transparency and allowed the participation of stakeholders and the public.

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The court's entire focus in *Holloway* was on the importance of the interest involved--the prevention of purposeful racial discrimination in seating a jury for a criminal trial--to the integrity of the judicial system. In fact, without expressly stating so, *Holloway* established slightly different parameters for the court's exercise of supervisory authority to announce a rule prospectively. That is, the relevant inquiry when the court determines whether to announce a new rule is whether the issue is of vital importance to the perception that the judicial system is fair. It makes sense to apply a different standard when determining whether to announce a rule prospectively--inquiries regarding exceptional circumstances presented in the case at issue are not particularly helpful in determining whether to apply a new rule going forward. A focus on the nature of the issue implicated by the proposed rule, and **[120 A.3d 1221]** its importance to the integrity of the judicial system, is more appropriate. A fair question to ask, however, is whether that broad guideline is sufficient to assist the court in exercising any restraint in using its supervisory power to announce new rules. Every criminal trial involves issues that are central to the perceived fairness of the judicial system--does this mean that the court is free to announce a new rule restricting the discretion of trial judges in criminal trials whenever the court believes that it would be a "good idea" to do so?

The court's next exercise of its supervisory authority provides a helpful additional guiding principle for the invocation of the court's supervisory power. In *State v. Patterson*, 230 Conn. 385, 645 A.2d 535 (1994), the court first resolved the merits of the appeal under the applicable constitutional and legal principles. The court concluded that the defendant had waived his claim that the trial judge had improperly been absent during voir dire. *Id.*, 396-97. The court then stated that it would exercise its supervisory authority to require trial judges

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"to remain on the bench throughout the voir dire of a criminal trial." *Id.*, 397. The court began its explanation as to why supervisory authority was appropriate in the case by emphasizing generally the high stakes at issue in a criminal trial. *Id.*, 398. The court also explained the centrality of its new rule to safeguarding the interests implicated by the important issue: "The uninterrupted supervision of the proceedings by the judicial authority, mindful of everything that transpires in the

courtroom, is an important part of the appearance that justice is being done in a criminal case." *Id.* Finally, although, like *Holloway*, the court engaged in no discussion of the necessity of resorting to the court's supervisory authority, it did weigh the various interests involved, and ultimately determined that the balance favored the exercise of the authority. *Id.*, 400.

Patterson provides helpful guidance for the appropriate exercise of our supervisory authority to announce a new rule prospectively. In subsequent decisions, if the court had followed *Patterson* as a model, it would have limited its invocation of supervisory authority to announce a prophylactic rule to those instances when the proposed rule was central to safeguarding the interests implicated by an issue of vital importance to the perceived fairness of the judicial system, after considering any countervailing interests and concluding that the balance weighed in favor of exercising the court's authority.

Because this court's decisions routinely announce rules prospectively pursuant to our supervisory authority with little or no explanation as to why reliance on the power is appropriate, there is no evidence that the court has followed the principles adhered to in *Patterson*, or that it was aware of any need to apply principles consistently when invoking its supervisory power to announce a new rule. For example, within one month after the decision in *Patterson* was issued, the court's decision in *Bennett v. Automobile Ins. Co. of Hartford*,

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230 Conn. 795, 646 A.2d 806 (1994), did not discuss any limits on the exercise of the power. In *Bennett*, in the context of an uninsured motorist claim appeal that challenged the trial court's order of remittitur, this court relied on its supervisory authority to announce a prospective rule requiring insurers to "raise issues of policy limitation, even when undisputed, by special defense." *Id.*, 806. The opinion offered no justification whatsoever for the reliance on the authority, merely stating vaguely that it exercised its authority "[i]n view of the issues raised by this appeal" *Id.*

[120 A.3d 1222] The court's subsequent decisions announcing new rules that apply prospectively have taken a path that is largely rudderless, so lacking in direction that it is difficult to characterize them with any conciseness. In some cases, the court has adhered to the principle that our power to announce prospective rules should be reserved for issues that are of vital importance to the perceived fairness of the judicial system. See, e.g., *State v. Brown, supra*, 235 Conn. 525-28 (requiring trial courts to conduct preliminary inquiry into facially credible allegations of juror misconduct in criminal case, and justifying invocation of supervisory power on importance of right to trial by jury in criminal case and responsibility of trial judge to ensure that criminal defendant receives fair trial).^[11] In other instances, the court

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appears to have relied on the "disturbing" facts of the particular case to announce the prophylactic rule. See, e.g., *State v. Ouellette*, 295 Conn. 173, 189-92, 989 A.2d 1048 (2010) (relying on "disturbing" discrepancies between state's representations at trial regarding deal offered to state's witness and state's conduct during witness' sentencing hearing, to invoke supervisory authority to require sentencing courts to inquire regarding nature of plea agreements when state attests to cooperation, and representations made about agreements during trials at which witness testified).

Many decisions have offered no explanation as to why it is appropriate to rely on the court's

supervisory authority. See, e.g., *Saleh v. Ribeiro Trucking, LLC*, 303 Conn. 276, 283, 32 A.3d 318 (2011) (relying on supervisory authority to require trial judges to expressly set forth in memorandum of decision " clear, definite and satisfactory" reasons to justify remittitur [internal quotation marks omitted]). Other decisions have vaguely alluded to broad principles, without providing a more specific explanation as to why it was appropriate to invoke our supervisory power in the given context. See, e.g., *Duperry v. Solnit*, 261 Conn. 309, 326, 329, 803 A.2d 287 (2002) (requiring trial court to canvass defendant, when defendant has entered plea of not guilty by reason of mental disease or defect and state agrees with defendant's claim, explaining that invocation of supervisory power is " appropriate, in light of concerns of fundamental fairness").

[120 A.3d 1223] Among the decisions that have announced new rules, those that have announced prospective changes to jury instructions appear to form a particular subset, in which the court routinely and consistently has required little to no justification for the exercise of supervisory authority. See, e.g., *State v. Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002) (directing trial courts " to refrain from instructing jurors that one who uses a deadly

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weapon on the vital part of another will be deemed to have intended the probable result of that act and that from such a circumstance the intent to kill properly may be inferred" [internal quotation marks omitted]); *State v. Griffin*, 253 Conn. 195, 205, 209-10, 749 A.2d 1192 (2000) (barring use of charge providing that, " [i]f two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you must adopt the one of innocence"). Although one certainly can imagine reasons why a lower barrier may be appropriate in this context, the court has never offered any indication that it has intentionally adhered to a different standard when announcing rules governing jury instructions.

Only recently, in *State v. Carrion*, 313 Conn. 823, 100 A.3d 361 (2014), the court expressly articulated a new standard for the invocation of our supervisory authority to announce new rules. According to the decision in *Carrion*, the only requirement is that the court deem such exercise of its authority to be " appropriate" or, in other words, dictated by " prudence and good sense" *Id.*, 852. The court specifically rejected the suggestion that supervisory authority may be used to announce a new rule only when its use is rendered " necessary." *Id.*, 851. Additionally, the court stated that in this context, " there is no need for this court to justify the use of extraordinary measures prior to exercising its supervisory authority." *Id.*, 852. As support, the court looked primarily to decisions in which we have announced prospective changes to jury instructions. *Id.*, 852-53. As I already have explained, however, those decisions are not representative of the entirety of this court's decisions announcing new rules prospectively. The standard announced in *Carrion*, if followed by the court, would further threaten the predictability that is essential to the rule of law, because it sets the bar too low. When we first invoked our supervisory authority

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in *Ubaldi*, we made it clear that the power should be used in the rare instance. If we rely on mere prudence and good sense as the trigger, we have abandoned the guidelines that we set for ourselves thirty years ago.

The history of the court's exercise of supervisory authority, both in announcing new rules to

be applied prospectively and in announcing new rules to be applied to the pending appeal, demonstrates that the court has not engaged in any meaningful consideration of what the appropriate guidelines governing our exercise of that power should be. The result is the current explosion of decisions by this court invoking the exercise of its supervisory authority, without any consensus as to appropriate guidelines for restraint. The history of this court's decisions that invoked its supervisory authority supports the conclusion that this court should be guided in its exercise of that authority by *State v. Patterson, supra*, 230 Conn. 397-400, and *State v. Ubaldi, supra*, 190 Conn. 572-73. That is, the court should announce new rules with prospective application only when the proposed rule is central to safeguarding the interests implicated by an issue of vital importance to the perceived fairness of the judicial system, after considering any countervailing interests and concluding that the balance weighed in favor of exercising the court's authority. *State v. Patterson, supra*, 397-400. As for the application of new rules to pending appeals, the court should apply a newly announced rule to the pending appeal only when its exercise is necessary because traditional protections are inadequate, when the interests involved are of the utmost importance to the perceived fairness of the judicial system as a whole, **[120 A.3d 1224]** when retroactive application of the rule is justified by exceptional circumstances presented in the pending case, and an evaluation of the interests involved reveals that the balance weighs in favor of invoking the authority. *State v. Ubaldi, supra*, 572-73.

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II

APPLICATION TO THE PRESENT CASE

Applying the standard established in *State v. Ubaldi, supra*, 190 Conn. 572-73, to the present case leads to the conclusion that this court should decline to exercise its supervisory authority. Although the interests involved are of the utmost importance, there are no exceptional circumstances in the present case, and traditional protections were adequate to safeguard the respondent's rights. Additionally, the countervailing interests involved in the present case are powerful--the interest that the children have in a permanent placement without any additional delay counsels against invocation of the court's supervisory authority. Accordingly, the exercise of that authority in the present case is inappropriate.

It is significant that in the present case the majority's unequivocal conclusion, that the respondent's right to due process was not violated by the trial court's failure to personally canvass her before taking the case on the papers, is grounded on a logical, objective constitutional analysis. The majority properly weighs the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and concludes that due process does not require the trial court to conduct a personal canvass prior to accepting a parent's waiver of the right to present evidence and testimony in opposition to a termination petition, and to object to the admission of exhibits in support of the termination petition. The United States Supreme Court crafted the three-pronged *Mathews* test in light of its recognition that " due process is flexible and calls for such procedural protections as the particular situation demands." (Internal quotation marks omitted.) *Id.*, 334. Accordingly, the court's test was formulated to allow courts to consider the particular circumstances presented in

a case in determining the process that is constitutionally due under those circumstances. The rule is designed to adapt to individual circumstances. The three *Mathews* factors are: " First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, 335.

The record in the present case reveals that the majority properly evaluated the three *Mathews* factors in reaching its conclusion that the respondent received all of the process that was constitutionally due to her. The process afforded to the respondent in the present case ensured that, when she waived her right to proceed to trial and to contest the exhibits presented by the petitioner, she did so knowingly, intelligently and voluntarily. In fact, that decision is perfectly consistent with the strategy employed throughout the extensive and lengthy course of proceedings provided to the respondent. Additionally, beside the lack of any allegation that her counsel was ineffective, there is no indication in the record that at any point in time the respondent experienced any difficulty [120 A.3d 1225] communicating with counsel or expressed any dissatisfaction with her representation.

The majority accurately describes the importance of the private interest at issue in the present case. This court has recognized that parents have a fundamental right to rear their children. *Roth v. Weston*, 259 Conn. 202, 213, 789 A.2d 431 (2002). The United States Supreme Court has stated that " [a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding

one." *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). That court has emphasized that even when familial " relationships are strained," the importance of the parents' fundamental right to raise their children is not diminished: " If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the [s]tate moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).

Although I agree with the majority that the second *Mathews* factor, which requires the court to consider " the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" ; *Mathews v. Eldridge*, *supra*, 424 U.S. 335; favors the petitioner, I observe that the majority only generally identifies the current procedural protections in place. Because I believe that the extensive nature of the existing procedural protections available to a parent during the termination process is relevant to the question of whether it is necessary in the present case to exercise our supervisory authority, I discuss those existing protections in greater detail than does the majority.

As happens in the vast majority of termination cases, the route that the present case followed prior to the termination of the respondent's parental rights was not a quick one. Along the

way, the respondent participated in numerous proceedings designed to achieve a balance between the respondent's fundamental right to parent her children and society's duty to protect the best interests of children. It is significant that the two years during which the respondent was involved in the proceedings

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to determine whether she would retain her right to parent her two children did not mark the first time that she traveled this route. In 2007, with her consent, her parental rights with respect to her older three children already had been terminated. Those children subsequently were adopted by the their maternal great-grandmother.

The record reflects that on September 21, 2011, the petitioner invoked a ninety-six hour hold on behalf of the children, Yasiel R. and Sky R., and removed them from the respondent's care, on the basis of a petition of neglect. See General Statutes § 17a-101g (e) and (f). Immediately upon the removal of the children from the respondent's custody, the procedures designed to protect her rights were triggered. On the day that the children were removed, Rosiris Espejo, the social worker for the department who was assigned to the case, provided the respondent with a copy of the petitioner's ninety-six hour hold. Espejo attempted to discuss other relative resources with whom the children could be placed, but the respondent refused to speak to her.

On September 23, 2011, the respondent was served with copies of the notice of temporary custody and order to appear,

[120 A.3d 1226] the petitioner's motion seeking an ex parte order of temporary custody pursuant to § 17a-101g (e) and (f) (ninety-six hour hold), Espejo's supporting affidavit, the neglect petition and the summary of facts substantiating the neglect petition, and specific steps. The notice of temporary custody and order to appear informed the respondent of the basis for the children's removal, and notified her of the date of the preliminary hearing on the neglect petition and motion for temporary custody. The notice also informed the respondent that she would have the opportunity to present her position to the court, that she had the right to

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remain silent, and the right to counsel, which would be appointed for her if she could not afford an attorney.

The neglect petition represented that the children were neglected on the basis that they were " being denied proper care and attention, physically, educationally, emotionally or morally," and that they were being " permitted to live under conditions, circumstances or associations injurious to their well-being." The petition informed the respondent that a hearing would be held on the petition, and it provided a date, time and place of the hearing. It also informed the respondent that if she failed to appear, the court could find the children neglected, uncared-for or abused. The preliminary specific steps provided to the respondent in order for her to regain custody of the children required her to keep all appointments set by or with the department, to successfully complete a parenting program, to accept in-home services referred by the department and to cooperate with the service providers, to submit to a substance abuse evaluation and follow recommended treatment, to submit to random drug testing, to refrain from using illegal drugs or abusing alcohol or medicine, to cooperate with court-ordered evaluations or testing, to sign

releases allowing the department to communicate with service providers and with the children's attorney or guardian ad litem, to obtain or maintain adequate housing and a legal income, to notify the department of changes in the make-up of the household, to not become involved with the criminal justice system, and to take care of the children's physical, educational, medical or emotional needs. The specific steps provided for the respondent to have supervised visitation with the children.

On September 27, 2011, the court held a hearing to determine whether to order temporary custody to the petitioner. At that hearing, the court appointed counsel for the respondent. The court found that the respondent

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had been served with notice of the petition of neglect, and had been advised of her rights. The court canvassed the respondent, who agreed to sustain the order committing the children to the temporary custody of the petitioner, and indicated that she wished to participate in the Recovery Specialist Voluntary Program, a program for parents for whom substance abuse is identified as one of the factors in the removal of their children. The court issued an order granting temporary custody to the petitioner and allowing the respondent supervised visitation.

The hearing on the petition for neglect took place on February 8, 2012, at which time the respondent, who was represented by counsel, entered a plea of nolo contendere. In her plea, the respondent alleged that the neglect petition had been read to her and that she had been advised of her rights, including her rights to a trial, to an attorney, and to disagree with any claims in the petition. She further stated that she voluntarily exercised her right not to contest the claims in the petition, and elected to exercise her right to remain silent without any admission of responsibility under the petition as to its allegation that the children had been permitted by **[120 A.3d 1227]** the respondent to live under conditions, circumstances or associations injurious to their well-being. The court accepted the respondent's plea and the children were adjudicated neglected and committed to the custody and care of the petitioner. At that time, the court provided specific steps to the respondent that were substantially similar to the initial specific steps that had been provided to her on September 23, 2011. An additional specific step provided to the respondent was that she was required to take part in individual counseling with Generations Behavioral Health. The court also ordered the petitioner to file a motion for review of a permanency plan.

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On June 6, 2012, the petitioner filed a motion to review the permanency plan, which had a stated goal of the termination of the parental rights of both the respondent and the father, and the adoption of the children. The respondent did not file an objection to the motion,^[12] and did not oppose it at the hearing on the motion on September 5, 2012. At that hearing, the court approved the permanency plan goal of termination of parental rights and adoption.

On November 21, 2012, the petitioner filed this petition for termination of the respondent's parental rights, and, on May 23, 2013, filed another motion to review the permanency plan, which was again approved by the court. The respondent filed an objection to the permanency plan on June 19, 2013, claiming that she was complying with the specific steps ordered by the court, and

arguing that termination of her parental rights was not in the best interests of the children. She subsequently withdrew her objection, and moved for an individual psychological evaluation, which request was approved by the court.

The hearing on the petitioner's motion for termination of parental rights was set for November 12, 2013. The original summons that was sent to the respondent for the hearing on the termination of parental rights explained the effect of a termination decree: " The termination decree will be the complete end of the legal relationship between the child . . . and the person(s) whose parental rights have been terminated so that the child . . . is free for adoption The parent will have no legal right or responsibility to care for the child . . . or make any decisions on behalf of the child . . . to obtain the child's . . . birth certificate or any state or federal benefit. The parent will have no legal responsibility

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to support or to pay for the child's . . . expenses after the effective date of the termination. The child . . . will be legally free for adoption after the termination and the parent will have no right to notice of the adoption proceedings nor any right to participate in the proceedings."

The extensive process provided to the respondent demonstrates that she was notified of her rights at every opportunity, and given every protection under the law. Given the repeated notice provided to the respondent of the effect of a judgment of termination, the respondent's active participation in the proceedings, and the fact that she was represented by counsel, I agree with the majority that the record does not demonstrate that the existing procedures create a risk of an erroneous deprivation of parental rights. Additionally, because the record demonstrates that the respondent was repeatedly advised of her rights, it would be unreasonable to conclude that a personal canvass by the trial court likely would have reduced the **[120 A.3d 1228]** risk of erroneous deprivation of her rights. The second factor of the *Mathews* test is determinative in the present case--the respondent received the process that she was due.^[13] See *Mathews v. Eldridge, supra*, 424 U.S. 335.

Applying the guidelines that this court established in *State v. Ubaldi, supra*, 190 Conn. 572-73, I conclude that the only factor supporting the exercise of our supervisory authority is that the issue involved is an important one. None of the remaining factors, however, support the invocation of the court's supervisory authority. Under these facts, it is not surprising that the majority fails to rest its decision to exercise its supervisory authority to reverse the Appellate Court's

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judgment on any extraordinary circumstances presented in the case--there are none. There is no indication that the respondent was deprived of her rights, or that the termination of her parental rights involved any fundamental unfairness. There is also no indication that it is in any way necessary to resort to the court's supervisory authority. In fact, the record suggests precisely the opposite. Traditional remedies provided the respondent with adequate protection. It is also quite telling that the majority fails to give any consideration to the countervailing interests in the present case, which are particularly compelling and counsel against reversing the judgment. The interest of the children in being permanently placed without additional delay clearly outweighs the majority's theoretical concerns regarding fairness to the respondent. Viewed under the guidelines

that this court first set forth in *Ubaldi*, this appeal presents a particularly inappropriate circumstance in which to exercise the court's authority to reverse the judgment.

Finally, even if the majority had restricted its supervisory authority to an announcement of a new prospective rule, that exercise of authority would still be improper under the circumstances of this case. As I explained earlier in this concurring and dissenting opinion, the court should exercise its supervisory authority to announce a new rule only when the proposed rule is central to safeguarding the interests implicated by an issue of vital importance to the perceived fairness of the judicial system, after considering any countervailing interests and concluding that the balance weighed in favor of exercising the court's authority. See *State v. Patterson, supra*, 230 Conn. 385. Although the issue is important, there is no indication that the majority's proposed rule is central to safeguarding the interests implicated by the issue or that the exercise is appropriate when weighed against countervailing interests.

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Specifically, there has been no showing that parents who are represented by counsel in termination proceedings are likely to unknowingly, unintelligently or involuntarily waive their right to trial or their right to contest exhibits offered by the department in favor of termination. As the present case demonstrates, the proceedings available to parents are designed to protect their right to retain custody of their children and to inform them of the services and proceedings available to them to enable them to do so. Without some indication in the record of conflict, lack of communication or dissatisfaction with the representation provided by counsel to parents in termination proceedings, there is [120 A.3d 1229] simply no need for a personal canvass. The issue of whether to require a canvass properly should have been left to the Rules Committee of the Superior Court. The majority's rule, therefore, is unnecessary, and improperly substitutes its judgment for the discretion of trial judges.

Although I concur with and join parts I and II of the majority opinion, for the foregoing reasons, I respectfully dissent from part III of that opinion.

Notes:

[*] In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

[1] We note that the trial court also terminated the parental rights of the respondent father. He did not, however, appeal from those judgments. See *In re Yasiel R.*, 151 Conn.App. 710, 712 n.1, 94 A.3d 1278 (2014). For the sake of simplicity, we hereinafter refer to the respondent mother as the respondent.

[2] We granted certification as to the following two issues: (1) " Did the Appellate Court properly construe the third prong of *State v. Golding*, [supra, 213 Conn. 239-40], to require that there be binding precedent that is directly on point for a constitutional violation clearly to exist such that relief can be afforded to the [respondent]?" ; and (2) " Does the due process clause of the fourteenth amendment to the United States constitution require that a trial court canvass a parent

personally about his or her decision not to contest the exhibits presented to the court against him or her in a parental termination proceeding?" *In re Yasiel R.*, 314 Conn. 907, 99 A.3d 1169 (2014).

[3] As we explain later in this opinion, although the issue regarding the exercise of our supervisory authority was not certified for appeal, after oral argument, the court requested that the parties submit supplemental briefing on this question.

[4] " The petitioner does not cite to the record or append any relevant transcript to her appellate brief to support the aforementioned statement. The respondent does not, however, dispute that this [advisement] occurred." *In re Yasiel R.*, *supra*, 151 Conn.App. 713 n.3.

[5] " According to the [trial] court's November 13, 2012 memorandum of decision, the respondent had a history of mental health issues, addiction problems, educational deficits, and a dysfunctional family origin. Her counsel thus wanted to emphasize that the respondent had stabilized her life by securing employment and housing." *In re Yasiel R.*, *supra*, 151 Conn.App. 713 n.4.

[6] " The 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. . . . *State v. Lavigne*, 307 Conn. 592, 599, 57 A.3d 332 (2012)." (Internal quotation marks omitted.) *In re Yasiel R.*, *supra*, 151 Conn.App. 721 n.7.

[7] Section 1 of the fourteenth amendment to the United States constitution provides in relevant part: " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without the process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[8] The cases from other jurisdictions cited by the respondent in support of her position are easily distinguishable from the case at bar. See *Thompson v. Clark County Division of Family & Children*, 791 N.E.2d 792 (Ind.App.) (reversing judgment terminating parental rights where trial court had performed truncated hearing in which summaries of testimony were offered in lieu of testimony), transfer denied, 804 N.E.2d 755 (Ind. 2003); *State ex rel. Children, Youth & Families Dept. v. Stella P.*, 1999-NMCA-100, 127 N.M. 699, 986 P.2d 495 (1999) (reversing judgment terminating parental rights where respondent mother did not attend her termination of parental rights trial and her attorney and guardian ad litem both neglected to inform court that respondent mother objected to termination of her parental rights); *In re Etter*, 134 Ohio App.3d 484, 731 N.E.2d 694 (1998) (reversing judgment terminating parental rights where mother's attorney and guardian ad litem admitted to permanent custody petition and trial court did not personally canvass mother concerning this admission in violation of Ohio law); *State ex rel. Dept. of Human Services v. Sumpster*, 201 Or.App. 79, 83, 116 P.3d 942 (2005) (reversing judgment terminating mother's parental rights where trial court entered stipulated judgment " 'voluntarily'" terminating mother's parental rights, but did not canvass mother or her guardian ad litem at subsequent hearing); *In re Termination of Parental Rights to Idella W.*, 2005 WI App. 266, 288 Wis.2d 504, 708 N.W.2d 698 (2005) (vacating order terminating parental rights where father was federal prisoner in witness protection program and was not brought by federal authorities to court for his termination trial and only participated by telephone).

[1] Further complicating this history of our inconsistent application of new rules crafted under our supervisory authority is the fact that the prospective effect of such new rules is not always clear. See *State v. Smith*, 275 Conn. 205, 242, 881 A.2d 160 (2005) (declining to reverse judgment when trial court had failed to heed this court's prior direction, pursuant to its supervisory authority, to discontinue use of certain jury instruction).

[2] Furthermore, the Rules Committee of the Superior Court entertains improvements to our rules of practice on an ongoing basis. Proposed improvements can be and are submitted to the Rules Committee by judges, lawyers, bar associations, members of the legislature, and members of the public, as well as other associations.

[3] Justice Espinosa offers two possible explanations for this increase: (1) a self-conferred power such as our supervisory authority " lacks limits unless [they] are self-imposed" ; and (2) " after the court announced the existence of its supervisory authority in [*State v. Ubaldi*, 190 Conn. 559, 575, 462 A.2d 1001, cert. denied, 464 U.S. 916, 104 S.Ct. 280, 78 L.Ed.2d 259 (1983)], the court seems simply to have assumed its validity and has not given significant consideration to establishing and adhering to any parameters for its exercise." I agree with those explanations but would add a third possible explanation--the court in *Ubaldi*, which first established limitations on the use of the court's supervisory authority, failed to comply with its own limitations. See *State v. Ubaldi, supra*, 572-73. Thus, *Ubaldi*, sub silencio, fostered a low bar for future use of this court's supervisory authority.

In *Ubaldi*, the defendant, Charles F. Ubaldi, claimed that the trial court improperly had denied his motions for a mistrial after the assistant state's attorney (prosecutor) engaged in deliberate prosecutorial misconduct. See *id.*, 561. The state claimed that, even if the prosecutor had engaged in misconduct, Ubaldi was required to prove that such misconduct was harmful in order to receive a new trial. See *id.*, 565. The court rejected this argument and ordered a new trial pursuant to its supervisory authority; *id.*, 575; without determining whether the trial court had abused its discretion or whether Ubaldi had been deprived of a fair trial. See *id.*, 564-75. As Justice Espinosa explains in her concurring and dissenting opinion, the court in *Ubaldi* apparently established that supervisory authority should be " invoked only when its exercise is necessary and the interests involved are of the utmost importance, and when an evaluation of the interests involved reveals that the balance weighs in favor of invoking the authority."

The circumstances in *Ubaldi*, however, failed to meet this standard. It unquestionably was not *necessary* to reverse Ubaldi's conviction through the use of the court's supervisory authority in order to undo the harm wrought by the prosecutor's deliberate misconduct because, as the court in *Ubaldi* acknowledged, other states deter such misconduct " through contempt sanctions, disciplinary boards or other means." *State v. Ubaldi, supra*, 190 Conn. 571. Additionally, in weighing the countervailing interests to reversing Ubaldi's conviction, the court failed to account for the inherent cost to the state and the judiciary in requiring them to use resources to retry a case in which the guilt of the defendant was not in doubt. Cf. *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion) (noting cost of retrying cases after retroactive application of new rule). Because this court was unable to adhere to the limitations on the use of its supervisory authority in the very case in which those limitations were announced, it

should come as no surprise that those limitations subsequently have rung hollow.

[1] Although the Commissioner of Children and Families filed separate petitions and certain other supporting documents discussed herein on behalf of each of the two children who are the subject of this appeal, Yasiel R. and Sky R., and, in some instances, certain affidavits were made and studies conducted in the name of both children, for purposes of clarity, we refer to these documents in the singular.

[2] It is instructive to observe what the court in *Ubaldi* did *not* rely on to justify its newly recognized power. That is, the court did not rely on Practice Book § 60-2, formerly Practice Book (1978-97) § 4183, to justify its claim to possess "inherent supervisory power." See Practice Book § 60-2 ("[t]he supervision and control of the proceedings on appeal shall be in the court having appellate jurisdiction"). By not looking to the authority of the court to supervise the appellate process to justify the power it invoked in *Ubaldi*, the court drew a distinction between the two types of authority--the authority to supervise the proceedings before this court on appeal pursuant to the rules of practice, and the authority to supervise the proceedings at the lower courts, pursuant to *Ubaldi*. The derivation of our supervisory power in *Ubaldi*, therefore, is distinct in origin from the court's authority pursuant to the rules of practice.

I observe that our decisions have not always been clear, when invoking this court's supervisory authority, whether that authority is grounded in the rules of practice, or derived from this court's decision in *Ubaldi*, and instead have conflated the two types of authority. See, e.g., *In re Jonathan M.*, 255 Conn. 208, 236, 764 A.2d 739 (2001) (declining request that court exercise supervisory authority to remand case for further evidentiary hearings and to retain jurisdiction of appeal, which request implicated court's authority under Practice Book § 60-2; rather than citing to rules of practice, court cited as authority *State v. Andrews*, 248 Conn. 1, 20, 726 A.2d 104 [1999], which involved denial of request to exercise of supervisory authority to reverse conviction on basis of prosecutorial improprieties).

[3] As a possible explanation for the court's evolution in its understanding of its role, Beale offers the observation that *McNabb* was decided three years after legislation authorized the Supreme Court to promulgate rules of criminal procedure and two years after the court decided *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-16, 61 S.Ct. 422, 85 L.Ed. 479 (1941), which upheld the validity of rules 35 and 37 of the recently promulgated Federal Rules of Civil Procedure. A. Beale, *supra*, 84 Colum. L.Rev. 1433, 1444-45 and 1445 nn.74 and 75.

[4] For an excellent discussion of the lack of statutory and constitutional underpinnings for the "inherent supervisory authority" of the Supreme Court, see A. Barrett, *supra*, 106 Colum. L.Rev. 324, 344-52. Barrett reviews several theories of constitutional sources of supervisory authority, and explains why each is inconsistent with the historical context at the time that the constitution was ratified.

[5] Providing a definitive number of decisions in which we have invoked our supervisory power is complicated by several factors. Sometimes, for example, the majority decision has not expressly invoked the court's supervisory power, but a dissenting opinion nonetheless claims that the majority relied on it. See, e.g., *State v. Couture*, 194 Conn. 530, 568, 482 A.2d 300 (1984) (*Healey, J.*, dissenting), cert. denied, 469 U.S. 1192, 105 S.Ct. 967, 83 L.Ed.2d 971 (1985). In

other instances, a subsequent decision characterizes an earlier holding as having implicitly rested on the court's supervisory authority. See, e.g., *State v. Elson*, *supra*, 311 Conn. 771 n.31 (characterizing decision in *State v. Cohane*, 193 Conn. 474, 499-500, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 [1984], as exercise of supervisory authority, despite fact that *Cohane* purported to discuss supervisory authority only in dicta); *Tanzman v. Meurer*, 309 Conn. 105, 116, 70 A.3d 13 (2013) (characterizing decision in *Krafick v. Krafick*, 234 Conn. 783, 804, 663 A.2d 365 [1995], as invocation of court's supervisory authority). Additionally, as I explain in footnote 2 of this concurring and dissenting opinion, this court increasingly has conflated its supervisory authority over the appellate process pursuant to Practice Book § 60-2 with the supervisory authority over the lower courts that it announced in *Ubaldi* I have not included, in my summary of this court's invocation of its supervisory authority, the decisions in which the court invoked its supervisory authority over the appellate proceedings. I observe, however, that the line between the two types of authority is not always clear. For example, it could be argued that exercises of supervisory authority pursuant to *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, *supra*, 311 Conn. 123, pertain to this court's supervision over the appellate proceedings, and, therefore, could be characterized as an exercise of authority pursuant to § 60-2. My view, however, is that, although reviewing issues pursuant to *Blumberg Associates Worldwide, Inc.*, pertains to this court's supervision of the appellate proceedings, the exercise of authority goes beyond that which is contemplated by the rules of practice, and, therefore, I treat those decisions as an exercise of this court's supervisory authority announced in *State v. Ubaldi*, *supra*, 190 Conn. 570.

See *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989); *State v. Smith*, 207 Conn. 152, 162, 540 A.2d 679 (1988); *State v. Chung*, 202 Conn. 39, 44, 519 A.2d 1175 (1987); *State v. Ubaldi*, *supra*, 190 Conn. 570. See *State v. Delvalle*, 250 Conn. 466, 475-76, 736 A.2d 125 (1999); *State v. Schiappa*, 248 Conn. 132, 168, 728 A.2d 466 (1998), cert. denied, 528 U.S. 862, 120 S.Ct. 152, 145 L.Ed.2d 129 (1999); *Ireland v. Ireland*, 246 Conn. 413, 420-21, 717 A.2d 676 (1998); *State v. Santiago*, *supra*, 245 Conn. 301; *State v. Coleman*, 242 Conn. 523, 534, 700 A.2d 14 (1997); *State v. Gould*, 241 Conn. 1, 9, 695 A.2d 1022 (1997); *State v. Taylor*, 239 Conn. 481, 504, 687 A.2d 489 (1996), cert. denied, 521 U.S. 1121, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997); *State v. Brown*, 235 Conn. 502, 526, 668 A.2d 1288 (1995); *State v. Breton*, 235 Conn. 206, 250, 663 A.2d 1026 (1995); *State v. Jones*, 234 Conn. 324, 346-47, 662 A.2d 1199 (1995); *State v. Garcia*, 233 Conn. 44, 91, 658 A.2d 947 (1995); *Kaufman v. Zoning Commission*, 232 Conn. 122, 149, 653 A.2d 798 (1995); *Bennett v. Automobile Ins. Co. of Hartford*, 230 Conn. 795, 806, 646 A.2d 806 (1994); *State v. Patterson*, 230 Conn. 385, 390, 397-98, 400, 645 A.2d 535 (1994).

[6] See *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989); *State v. Smith*, 207 Conn. 152, 162, 540 A.2d 679 (1988); *State v. Chung*, 202 Conn. 39, 44, 519 A.2d 1175 (1987); *State v. Ubaldi*, *supra*, 190 Conn. 570.

[7] See *State v. Delvalle*, 250 Conn. 466, 475-76, 736 A.2d 125 (1999); *State v. Schiappa*, 248 Conn. 132, 168, 728 A.2d 466 (1998), cert. denied, 528 U.S. 862, 120 S.Ct. 152, 145 L.Ed.2d 129 (1999); *Ireland v. Ireland*, 246 Conn. 413, 420-21, 717 A.2d 676 (1998); *State v. Santiago*, *supra*,

245 Conn. 301; *State v. Coleman*, 242 Conn. 523, 534, 700 A.2d 14 (1997); *State v. Gould*, 241 Conn. 1, 9, 695 A.2d 1022 (1997); *State v. Taylor*, 239 Conn. 481, 504, 687 A.2d 489 (1996), cert. denied, 521 U.S. 1121, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997); *State v. Brown*, 235 Conn. 502, 526, 668 A.2d 1288 (1995); *State v. Breton*, 235 Conn. 206, 250, 663 A.2d 1026 (1995); *State v. Jones*, 234 Conn. 324, 346-47, 662 A.2d 1199 (1995); *State v. Garcia*, 233 Conn. 44, 91, 658 A.2d 947 (1995); *Kaufman v. Zoning Commission*, 232 Conn. 122, 149, 653 A.2d 798 (1995); *Bennett v. Automobile Ins. Co. of Hartford*, 230 Conn. 795, 806, 646 A.2d 806 (1994); *State v. Patterson*, 230 Conn. 385, 390, 397-98, 400, 645 A.2d 535 (1994).

[8] See *State v. Arroyo*, 292 Conn. 558, 575, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S.Ct. 1296, 175 L.Ed.2d 1086 (2010); *State v. Connor*, 292 Conn. 483, 506, 973 A.2d 627 (2009); *State v. Gore*, 288 Conn. 770, 786-87, 955 A.2d 1 (2008); *State v. Ledbetter*, 275 Conn. 534, 547, 570, 575, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S.Ct. 1798, 164 L.Ed.2d 537 (2006); *State v. Padua*, 273 Conn. 138, 178, 869 A.2d 192 (2005); *Duperry v. Solnit*, 261 Conn. 309, 312, 326-27, 329, 803 A.2d 287 (2002); *State v. O'Neil*, 261 Conn. 49, 74, 801 A.2d 730 (2002); *State v. Payne*, 260 Conn. 446, 450-53, 797 A.2d 1088 (2002); *State v. Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002); *Roth v. Weston*, 259 Conn. 202, 232, 789 A.2d 431 (2002); *State v. Revelo*, 256 Conn. 494, 502-504, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S.Ct. 639, 151 L.Ed.2d 558 (2001); *State v. Griffin*, 253 Conn. 195, 209-10, 749 A.2d 1192 (2000).

[9] In addition to today's decision, see *Lapointe v. Commissioner of Correction*, *supra*, 316 Conn. 268-72; *State v. Carrion*, 313 Conn. 823, 851-53, 100 A.3d 361 (2014); *State v. Elson*, *supra*, 311 Conn. 730, 777; *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, *supra*, 311 Conn. 169; *Kervick v. Silver Hill Hospital*, 309 Conn. 688, 710, 72 A.3d 1044 (2013); *Tanzman v. Meurer*, 309 Conn. 105, 117, 70 A.3d 13 (2013); *State v. Medrano*, 308 Conn. 604, 606-607, 631, 65 A.3d 503 (2013); *State v. Polanco*, 308 Conn. 242, 245, 248, 255, 260, 61 A.3d 1084 (2013); *State v. Rose*, 305 Conn. 594, 605-606, 46 A.3d 146 (2012); *Saleh v. Ribeiro Trucking, LLC*, 303 Conn. 276, 283, 32 A.3d 318 (2011); *State v. Pena*, 301 Conn. 669, 683-84, 22 A.3d 611 (2011); *In re Joseph W.*, 301 Conn. 245, 268, 21 A.3d 723 (2011); *State v. Ouellette*, 295 Conn. 173, 191, 989 A.2d 1048 (2010).

[10] In addition to those two categories, there are two decisions in which we have relied on our authority to deter prosecutorial misconduct. See *State v. Payne*, 260 Conn. 446, 450-53, 797 A.2d 1088 (2002); *State v. Ubaldi*, *supra*, 190 Conn. 570-75. Finally, in a small number of cases, we have relied on our supervisory authority to address claims that would otherwise be unreviewable. See, e.g., *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, *supra*, 311 Conn. 169; *State v. Revelo*, 256 Conn. 494, 503, 775 A.2d 260, cert. denied, 534 U.S. 1052, 122 S.Ct. 639, 151 L.Ed.2d 558 (2001); *State v. Smith*, 207 Conn. 152, 162-63, 540 A.2d 679 (1988); *State v. Chung*, 202 Conn. 39, 44, 519 A.2d 1175 (1987).

[11] In *State v. Elson*, *supra*, 311 Conn. 770 n.30, this court incorrectly categorized the decision in *State v. Brown*, *supra*, 235 Conn. 502, as one in which we applied a newly announced rule to reverse the judgment at issue in the appeal. Actually, in *Brown*, the court reversed the judgment on the basis of its conclusion that the trial court abused its discretion in failing to conduct a sua

sponte preliminary inquiry. *Id.*, 525-26. The court reserved its reliance on its supervisory authority for announcing the new rule. As in other cases in which the court had remanded a case on other grounds at the same time that it adopted a new rule, however, the court directed that on remand to the trial court, the new rule must be applied. *Id.*, 532; see, e.g., *State v. Breton*, 235 Conn. 206, 249-50, 663 A.2d 1026 (1995) (in decision reversing death sentence on other grounds, announcing new rule requiring special verdict form in death penalty cases, and instructing that new rule should be applied on remand).

[12] The father filed an objection to the proposed permanency plan, which he subsequently withdrew.

[13] I agree with the majority that the third *Mathews* factor, which considers the government's interest in the proceeding and the fiscal and administrative burdens attendant to increasing procedural requirements, is neutral. See *Mathews v. Eldridge*, *supra*, 424 U.S. 335.

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Appellate Court of Connecticut 12/22/2015 130 A.3d 917 162 Conn.App. 273

No negative treatment in subsequent cases

Case Summary:

Connecticut Supreme Court exercised its supervisory authority to require a canvass prior to a termination of parental rights trial.

Areas of practice: Appellate: Civil/Constitution/Family

Judge: Dennis Eveleigh

Summary:

“Due to the respondent’s various arrests and her mental health and substance abuse issues, the petitioner filed petitions to terminate the respondent’s parental rights in November 2012. The trial court terminated the parental rights of the respondent as to both the minor children on November 13, 2013. The Appellate Court affirmed the judgments of the trial court, concluding that the respondent failed to demonstrate that the failure to canvass her was plain error and that her constitutional claim failed under the third prong of *State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). The respondent then filed a petition for certification to appeal which the Connecticut Supreme Court granted. The Connecticut Supreme Court, having considered the three factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2D 18 (1976), concluded that due process did not require that a trial court canvass a respondent who was represented by counsel when the respondent did not testify or present witnesses and the respondent’s attorney did not object to exhibits or cross-examine witnesses. Although it was evident that the parent had an important interest to be protected, the strength of the second *Mathews* factor outweighed the instant court’s conclusions regarding the first and third factors. The court therefore concluded that the respondent had failed to sustain her burden of proof as to the third prong of *Golding* and it rejected her claim on that basis. Further, the court noted that, because the parental rights involved in such a canvass were so important in ensuring the fairness of the process, the court did not believe it would be prudent to require that the public wait for the adoption of a new rule of practice. The court concluded, therefore, that imposing the canvass rule announced that day was an appropriate exercise of the supervisory authority. Accordingly, the judgment of the Appellate Court was reversed and the case was remanded to that court with direction to reverse the judgments of the trial court and to remand the case to the trial court for further proceedings consistent with the instant opinion.

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311 Conn. 726 (Conn. 2014)

91 A.3d 862

STATE OF CONNECTICUT

v.

ZACHARY JAY ELSON

SC 18737

Supreme Court of Connecticut

June 3, 2014

Argued September 24, 2012

[91 A.3d 863] [Copyrighted Material Omitted]

[91 A.3d 864] Two part information charging the defendant, in the first part, with the crimes of assault in the first degree, attempt to commit assault in the first degree and unlawful restraint in the first degree, and, in the second part, with having committed an offense while on pretrial release, brought to the Superior Court in the judicial district of Danbury, where the first part of the information was tried to the jury before Schuman, J.; verdict of guilty of assault in the first degree and unlawful restraint in the first degree; thereafter, the defendant was presented to the court, Schuman, J., on a plea of guilty to the second part of the information; judgment of guilty in accordance with the verdict and the plea, from which the defendant appealed to the Appellate Court, Harper and Dupont, Js., with Bishop, J., dissenting in part, which affirmed the trial court's judgment; subsequently, the Appellate Court granted the defendant's motion for reconsideration and reargument en banc, and that court, DiPentima, C. J., and Gruendel, Harper, Beach, Robinson, Alvord and Dupont, Js., with Bishop and Lavine, Js., dissenting in part, again affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court.

Reversed; further proceedings.

Hubert J. Santos, with whom, on the brief, were Hope C. Seeley, Benjamin B. Adams and Jessica M. Santos, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were Stephen J. Sedensky III, state's attorney, and Warren C. Murray, supervisory assistant state's attorney, for the appellee (state).

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Espinosa, Js.^[*]
NORCOTT, J. In this opinion the other justices concurred.

OPINION

[91 A.3d 865]

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NORCOTT, J.

This certified appeal raises several significant issues concerning the review of unpreserved claims under both *State v. Golding*, 213 Conn. 233, 239-40, 567 A.2d 823 (1989), and our supervisory authority over the administration of justice, in connection with the well established

constitutional principle that " the [a]ugmentation of sentence based on a defendant's decision to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty is clearly improper." (Internal quotation marks omitted.) *State v. Kelly*, 256 Conn. 23, 81, 770 A.2d 908 (2001). The defendant, Zachary Jay Elson, appeals, upon our grant of his petition for certification, [1] from the judgment of the Appellate Court affirming the judgment of the trial court, rendered after a jury trial, convicting him of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and committing an offense while on [91 A.3d 866] pretrial release in violation of General Statutes § 53a-40b (1). [2] *State v. Elson*, 125 Conn.App. 328, 331, 9 A.3d 731 (2010) (en

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banc). The defendant claims, inter alia, that: (1) the Appellate Court improperly declined to review, under *Golding*, his unpreserved claim that the trial court improperly penalized him for exercising his right to a jury trial, as indicated by the court's comments at sentencing; and (2) given the adverse effect of such comments on the public perception of our criminal justice system, this court should exercise its supervisory authority to vacate his sentence and remand the case for resentencing. Because we overrule the requirement, articulated in, inter alia, *State v. Ramos*, 261 Conn. 156, 171, 801 A.2d 788 (2002), that a party must " affirmatively request" *Golding* review in its main brief in order to receive appellate review of unpreserved constitutional claims, we conclude that the Appellate Court improperly declined to review the defendant's constitutional claims on that ground. We then reach the merits of the defendant's constitutional claims and conclude that under *State v. Kelly*, supra, 81-82, the defendant has not established that the trial court penalized him for exercising his right to a jury trial. Finally, however, we agree with the defendant that the use of our supervisory authority is warranted in order to prevent the adverse implications on the public's perception of the procedural fairness of the criminal justice system that arise when a trial judge refers to, and could appear to have considered, a defendant's decision to exercise his right to a trial. Accordingly, we reverse in part the judgment of the Appellate Court.

The record and the Appellate Court opinion set forth the following relevant facts and procedural history. On September 3, 2004, the defendant, who was intoxicated, entered a classroom at Western Connecticut State University and made a romantic overture toward the victim, who was a student working alone on an art project. *State v. Elson*, supra, 125 Conn.App. 331-33. After the victim rebuffed him, the defendant left the classroom,

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only to return shortly thereafter, threaten her with a knife and then physically assault her, causing numerous physical injuries to her fingers, right hand, arm and face, some of which required surgical treatment. [3] *Id.*, 332-34.

The state subsequently charged the defendant with assault in the first degree in violation of § 53a-59 (a) (1), attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 and 53a-59 (a) (1), unlawful restraint in the first degree in violation of § 53a-95 (a), and committing an offense while on pretrial release in violation of § 53a-40b (1). After trial, the jury returned a verdict of guilty on the charges of assault in the first degree and unlawful restraint in the first degree. [4] After the jury returned its verdict, the defendant entered a plea of guilty on the

charge of committing an offense while on pretrial release. The trial court subsequently rendered judgment in accordance with the jury's verdict and the defendant's plea.

[91 A.3d 867] Thereafter, the trial court conducted a sentencing proceeding, which forms the basis for the claims in this certified appeal. " At the commencement of the proceeding, the prosecutor addressed the court, ultimately recommending a total effective sentence of thirty-five years incarceration, suspended after twenty-five years, followed by five years probation with special conditions. Thereafter, the victim read an impact statement she had written.^[5] The defendant's attorney

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addressed the court, suggesting that the court consider factors that supported a lenient sentence. The court listened to statements made by a family friend of the defendant as well as the defendant's father. The defendant exercised his right of allocution, expressing remorse for the criminal conduct underlying his convictions. He stated in relevant part: 'I'd like to apologize to [the victim] and her family . . . I've hurt you, I've terrified you, and I've destructed your sense of security, viciously. What I did was horrible, and from the bottom of my heart I'm so sorry for what I did to you and your family. I know I probably can't make it okay right now, but I'm going to do my best. And, again, I'm just so sorry. I'd also like to apologize to the court and also [to] the [Western Connecticut State University] community

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because in violating one of their student's safety and security-and I violated all of this. I'd also like to apologize to my family. I wish I hadn't done this to any of them.'

" Thereafter, the court stated that it would 'make some introductory remarks before [proceeding] to formal sentencing.' At that time, the court indicated that it had considered a letter submitted to the court from the defendant's mother and the statement of the defendant's father. The court then stated: ' We've all heard the **[91 A.3d 868]** 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 court discussed the victim's 'credible' trial testimony, noting that '[t]here is no reason in my mind to doubt her testimony that the defendant came at her from behind with a knife to her throat.' The court stated: 'A person intends the natural consequences of his acts. And the natural consequences of that act is to cause serious physical injury. [The] [d]efendant came about six inches away from killing this young woman or completely ruining her life; for that, I suppose, the victim and the defendant should both consider themselves fortunate.

" 'As the state correctly points out, the victim was totally blameless. This is not a case in which the victim knew the defendant, provoked the defendant, enticed the defendant or did anything to threaten the defendant. The victim bears no part of the blame for this incident. Despite that, the defendant threatened to rob [the victim] of the prime of her life. He threatened to rob the victim of being a wife, a mother, an adult daughter, a

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college educated artist or a person with some other promising career. Thus, it is fully appropriate

that I take away the defendant's liberty during the prime of his life.

" 'The defendant's defense was intoxication. There is no question that the defendant had been drinking to an excess on September 3, 2004. But the defendant is responsible for his own actions. He had been through a well-known alcohol rehabilitation program, undoubtedly paid for by his caring parents, and thrown away all the good that this program had done him.

" 'On the day in question, the defendant put a . . . knife with a six inch blade in his pants as he walked into [Western Connecticut State University]. Why did he do that?

" 'Even if the defendant had drunk to an excess, there must be some deep-seated anger within the defendant that explains this act of rage and violence, which the state aptly points out appears to be part of a pattern. This, in my view, makes the defendant a dangerous person, one from whom the victim, [Western Connecticut State University], and society should be protected.

" 'It also points out, incidentally, the dangers of substance abuse. There's no evidence, I don't think, that the defendant was using drugs on the day in question, but he does have a history of drug and alcohol abuse and . . . it has long been clear to me that drug and alcohol abuse is not a victimless crime. And today's sentencing provides graphic evidence of that.

" 'Furthermore, intoxication simply does not explain his statement to the police and his testimony in court that this was an accident. Did the accident supposedly occur because of intoxication? I never understood that. But I do know that this was no accident. I do not believe the defendant's testimony that he just happened to get poked in the leg with his knife, that he just happened

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to pull the knife out at that time and that [the victim] just happened to turn around at that time. I believe the defendant gave a false explanation to the police, that he testified falsely in court and that he essentially obstructed justice in doing so. And this is an aggravating factor .'

" The court observed that the defendant had committed the crimes at issue while he **[91 A.3d 869]** was released on bail after having been charged with other felony crimes. The court stated: 'A judge in Norwalk trusted the defendant and released him. The defendant abused that trust in the worst way. No judge has a crystal ball. We cannot tell for certain when we make bail decisions who will commit crimes while on bail and who will not. We make mistakes. But if we do not punish those who do commit crimes while given a privilege of release, we will not be doing all we can to deter others from abusing that privilege.

" 'By committing these crimes while out on bail, the defendant not only committed a crime against the victim but also committed a crime against the court. The defendant broke his word to the court and showed disrespect for the law. *The only mitigating factor I can find in this situation is that the defendant at least admitted the bail status violations.*^[6] . . . [I]n due course, it will be entirely up to the judge in Norwalk to decide how to sentence in those cases. . . . [T]he current convictions are separate offenses from the ones in the Norwalk [court]' Thereafter, the court sentenced the defendant on each count, imposing a total effective sentence of twenty-five years imprisonment, execution suspended after twenty years, followed by five years of probation with special conditions. The sentencing

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proceeding concluded without any additional comments by defense counsel." (Emphasis added; footnotes added.) *Id.*, 335-38.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, inter alia,^[7] that the trial court " deprived him of his right to due process when it considered improper factors at the time of sentencing." *State v. Elson*, 116 Conn.App. 196, 235, 975 A.2d 678 (2009). Specifically, " [t]he defendant argue[d] that the court improperly considered (1) the fact that he proceeded to trial rather than accepting a plea bargain offered by the state and (2) the knife that was a full exhibit at the trial." ^[8] *Id.* In affirming the judgment of the trial court, the three judge panel of the Appellate Court that initially heard the defendant's appeal, *Bishop, Harper and Dupont, Js.*, split three ways in addressing the sentencing claim. *Id.*, 235-36. Judge Harper, authoring the lead opinion for the panel, declined to review the defendant's sentencing claim, concluding that it was unpreserved and that he had not properly made an " affirmative request" for review in his main brief under *State v. Golding*, supra, 213 Conn. 239-40. *State v. Elson*, supra, 116 Conn.App. 239-40.

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Judge Dupont concurred in the result, concluding that,

[91 A.3d 870] although the defendant's sentencing claim was reviewable under the application of *Golding* in *State v. Wright*, 114 Conn.App. 448, 463, 969 A.2d 827 (2009), resentencing nevertheless was not required. *State v. Elson*, supra, 116 Conn.App. 241, 245-46. Judge Bishop dissented in part, agreeing with Judge Harper's conclusion as to reviewability under *Golding*, but concluding ultimately that " the defendant's sentencing claim raises a troubling issue warranting resentencing" under the Appellate Court's supervisory powers over the administration of justice. *Id.*, 246-47.

Thereafter, the Appellate Court granted the defendant's motion for reargument and reconsideration en banc. *State v. Elson*, supra, 125 Conn.App. 331. The en banc Appellate Court majority concluded that the defendant had not properly made an " [affirmative] request" for *Golding* review of his unpreserved sentencing claim in his main brief and, therefore, declined to review that claim. *Id.*, 356. In so concluding, the en banc Appellate Court interpreted that requirement to " eschew the notion that it necessarily includes the use of talismanic words or phrases, such as a citation to the *Golding* opinion or a recitation of any specific language from that opinion in an analysis of the reviewability of the claim." *Id.*, 353. Rather, relying on our decision in *In re Melody L.*, 290 Conn. 131, 154, 962 A.2d 81 (2009), the Appellate Court determined that " what is required in making an affirmative request for review, is that a party present an analysis consistent with the principles codified in *Golding* for the review of unpreserved claims of constitutional magnitude. As a starting point, a party seeking review of such claim must alert the reviewing court to the fact that the claim is unpreserved or that there is a possibility that the reviewing court may determine that the claim is not properly preserved for appellate review. Thereafter, the party must, in its

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main brief, present an analysis based in law and tailored to the unique circumstances surrounding the claim that, if the reviewing court determines that the claim is not preserved, the claim nevertheless is reviewable on appeal because (1) the record is adequate to review the claim and

(2) the claim is of constitutional magnitude, alleging the deprivation of a fundamental constitutional right." (Footnote omitted.) *State v. Elson*, supra, 125 Conn.App. 354. Further, the Appellate Court overruled its decision in *State v. Wright*, supra, 114 Conn.App. 463, to the extent that it supported the reviewability of the defendant's claims. *State v. Elson*, supra, 125 Conn.App. 359.

The Appellate Court majority then declined to use its supervisory authority over the administration of justice to reach the defendant's claims, noting that the defendant did not make that request until his reply brief and, therein, only skeletally. *Id.*, 359-60. In dicta, the Appellate Court majority relied on *State v. Kelly*, supra, 256 Conn. 79-84, and concluded that the "totality of the circumstances" indicated that the trial court had not violated the defendant's due process rights by penalizing him at sentencing for having elected to stand trial.^[9]

[91 A.3d 871] *State v. Elson*, supra, 125 Conn.App. 365-66. The Appellate Court's en banc reconsideration of this case, which again affirmed the judgment of the trial court, resulted in numerous separate opinions, including an opinion concurring in part and dissenting in part issued by Judge

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Bishop; *id.*, 388; a concurring opinion issued by Judge Robinson; *id.*, 369; and an opinion concurring in part issued by Judge Dupont.^[10] *Id.*, 378. This certified appeal followed. See footnote 1 of this opinion.

Originally, we granted certification in this appeal solely to consider whether the defendant's briefing of his unpreserved sentencing claim in the Appellate Court constituted an adequate request for *Golding* review. See *id.* Following oral argument, however, we ordered the parties, sua sponte, to submit simultaneous supplemental briefs on the following issues, both of which had been raised in the defendant's petition for certification, but were not previously granted certification by this court: (1) "Should the doctrine of *State v. Golding*, [supra, 213 Conn. 233], apply to an unpreserved claim that a trial judge commented improperly during sentencing on the defendant's exercise of his constitutional

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right to a jury trial?" and (2) "Should this court exercise its supervisory powers in the present matter to vacate the defendant's sentence and remand the case to the trial court for resentencing?"

For reasons explained in greater detail subsequently in this opinion, we conclude that the defendant's briefing of his unpreserved sentencing claim in the Appellate Court constituted an adequate request for *Golding* review, because we overrule the "affirmative request" requirement as articulated in, inter alia, *State v. Ramos*, supra, 261 Conn. 171.^[11] We **[91 A.3d 872]** further conclude that the defendant failed to carry his burden, under *State v. Kelly*, supra, 256 Conn. 81-82, of proving that the totality of the circumstances demonstrates that the trial court's comments at sentencing indicated that it had penalized him for exercising his right to a jury trial by lengthening his sentence. Finally, we answer the second supplemental issue in the affirmative and exercise our supervisory powers to order resentencing in the present case to prevent the potentially deleterious effect of such remarks by a trial court on the public's perception of the procedural fairness of the criminal justice system.

I

CONSTITUTIONAL CLAIMS

We begin with the defendant's constitutional claims that we originally certified, namely, that: (1) the Appellate Court improperly concluded that his claims were not reviewable under *State v. Golding*, supra, 213 Conn. 239-40, because he had failed to make the necessary "affirmative request" for such review; and (2) *Golding* review and relief was necessary because "the trial
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court's consideration of 'put[ting the victim through the trial] infringed on the defendant's state and federal constitutional rights, and warrants a remand from this court for resentencing."

A

Affirmative Request Requirement

With respect to reviewability, the defendant contends that the Appellate Court should have reviewed his claim because his briefing demonstrated that the first two prongs of *State v. Golding*, supra, 213 Conn. 239-40, which pertain to reviewability, had been satisfied. The defendant further contends that the line of cases establishing the "affirmative request" rule, as interpreted by the en banc Appellate Court, "unduly restrict[s] a defendant's ability to present legitimate but unpreserved claims of a deprivation of a fundamental constitutional right." He relies on Judge Dupont's concurrence in the present case, and the Appellate Court's opinion in *State v. Wright*, supra, 114 Conn.App. 448, as establishing that the affirmative request requirement has a "shaky foundation" in this court's case law. He further argues that, consistent with the concurring opinion authored by Justice Palmer in *Johnson v. Commissioner of Correction*, 288 Conn. 53, 68, 951 A.2d 520 (2008), we should interpret the affirmative request requirement consistently with *Wright*; see *State v. Wright*, supra, 463-64; to avoid "unjust results, and diminish[ing] a defendant's right to effective appellate review of otherwise fully-analyzed claims." Thus, the defendant contends that we should review unpreserved constitutional claims pursuant to *Golding*, regardless of a brief's failure to request that level of review by name or by tracking the party's entitlement thereto, if the requesting party has "present[ed] a record that is [adequate] for review and affirmatively [demonstrates] that his claim is indeed a violation of a fundamental constitutional right." (Internal
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quotation marks omitted.) *State v. Wright*, supra, 463.

In response, the state endorses the en banc Appellate Court's interpretation of the "affirmative request" requirement as "embod[ying] long-standing and well-settled principles of notice and adequate briefing," and contends that the approach in *Wright*, advocated by the defendant, is deficient because it does not alert the court of appeal that review of an unpreserved claim is being requested. The [91 A.3d 873] state further contends that *Wright*: (1) "fails to draw any meaningful distinction between preserved and unpreserved claims of error," thus "remov[ing] any meaningful consequence of not contemporaneously objecting to a perceived error at trial"; and (2) "effectively transforms the defendant's burden of demonstrating his entitlement to extraordinary review into the state's burden of disproving such entitlement." Finally, the state contends that the rule adopted by the en banc Appellate Court in the present case has the salutary effect of being consistent with this court's approach "in cases in which a party seeks review of a

state constitutional claim" under *State v. Geisler*, 222 Conn. 672, 684-85, 610 A.2d 1225 (1992). We agree, however, with the defendant, and conclude that the analysis contained within *State v. Wright*, supra, 114 Conn.App. 448, embodies the proper approach to determining the reviewability of claims under *Golding*. We further conclude that, because the approach embodied in *Wright* is inconsistent with the affirmative request requirement as it has been implemented in this court's case law, the decision of this court in *State v. Ramos*, supra, 261 Conn. 171, along with its progeny, should be overruled insofar as those cases require a request for *Golding* review to be made in some particular manner beyond the adequate briefing of a constitutional claim.^[12]

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Consideration of the continuing vitality of the affirmative request requirement must begin with a review of what the Appellate Court aptly described as the "bedrock principle of appellate jurisprudence" that this court generally will not review unpreserved claims made for the first time on appeal." *State v. Elson*, supra, 125 Conn.App. 340-41. Specifically, in *State v. Evans*, 165 Conn. 61, 69, 327 A.2d 576 (1973), this court stated that "[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." One of those "exceptional circumstances" is "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." *Id.*, 70.

As this court later recognized, however, the *Evans* standard lent itself to "inconsistent application" as evidenced by the "disparate approaches" by this court and the Appellate Court to "the *Evans* criteria." *State v. Golding*, supra, 213 Conn. 239. Accordingly, in *Golding*, this court refined the *Evans* framework, articulating "guidelines designed to facilitate a less burdensome, more uniform application of the . . . *Evans* standard . . ." *Id.* Specifically, *Golding* held that "a defendant [91 A.3d 874] can prevail on a claim of constitutional error not preserved

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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 omitted; footnote omitted.) *Id.*, 239-40. "[T]he first two [prongs of *Golding*] involve a determination of whether the claim is reviewable"; (internal quotation marks omitted) *State v. Whitford*, 260 Conn. 610, 621, 799 A.2d 1034 (2002); and under those two prongs, "[t]he defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error." *State v. Golding*, supra, 240.

We first alluded to an expansion of the defendant's burden to demonstrate entitlement to review under *Golding* in *State v. Waz*, 240 Conn. 365, 692 A.2d 1217 (1997), which involved an unpreserved state constitutional claim. The state argued that this court should decline to review the claim because the defendant made "no express reference to the guidelines governing our review of unpreserved constitutional claims set forth in *State v. Golding* [supra, 213 Conn. 239-

40]." *State v. Waz*, supra, 371 n.11. Notwithstanding the defendant's " failure to invoke our review under the criteria specified in *Golding* ," we reached the merits of the claim, but " admonish[ed] defendants who seek consideration of unpreserved constitutional claims . . . that they bear the burden of establishing their entitlement to such review under the guidelines enumerated in *Golding* ." [13]

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Id. Thus, in *Waz* this court appeared to read the first two prongs of *Golding* not merely as setting forth uniform rules governing entitlement to review of unpreserved constitutional claims, but also as requiring a defendant specifically to invoke that entitlement in his brief—as opposed to briefing only the merits of the constitutional claim itself—unless, as in *Waz*, the record otherwise is clear that the defendant is entitled to review of that claim. Subsequent to *Waz*, this court declined on multiple occasions to reach unpreserved

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constitutional claims when the appellant expressly failed to seek review under *Golding* . See, e.g., *State v. Andresen*, 256 Conn. 313, 323-24, 773 A.2d 328 (2001) (sufficiency of evidence to support conviction for selling unregistered securities); *Ghant v. Commissioner of Correction*, 255 Conn. 1, 17, 761 A.2d 740 (2000) (claim of state constitutional right to appeal).

Subsequently, in *State v. Ramos*, supra, 261 Conn. 171, the affirmative request requirement made its appearance for the first time in our case law. In *Ramos*, we quoted this passage from *Waz*, namely, that defendants " bear the burden of establishing their entitlement to such review under the guidelines enumerated in *Golding* " ; (internal quotation marks omitted) *id.*, quoting *State v. Waz*, supra, 240 Conn. 371 n.11; in support of the proposition that a " party is obligated . . . affirmatively to request review under" either *Golding* or the plain error doctrine. (Emphasis added.) *State v. Ramos*, supra, 171. In *Ramos*, we then declined to review the defendant's " claim that the trial court's [jury] instruction on provocation was defective." *Id.*, 171-72. In support of this decision, we cited *Ghant v. Commissioner of Correction*, supra, 255 Conn. 17, for the proposition that it is " inappropriate to engage in [a] level of review not requested," and noted that the defendant had " requested neither *Golding* nor plain error review." *State v. Ramos*, supra, 171-72.

The decisions of this court following *Ramos* repeatedly used the term " affirmative request" in describing the obligation to invoke *Golding* review. Although none of those cases ever explained that term specifically, those opinions nevertheless implied that a requesting party was required to cite *Golding*, or at the very least engage in a threshold layer of briefing demonstrating the party's entitlement to *Golding* review. See, e.g., *In re Melody L.*, supra, 290 Conn. 154 (" [T]he respondent does not seek a review under *Golding* . Her brief makes

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no mention of, or request for *Golding* review. Consequently, we decline to review the respondent's constitutional claims."); *id.* (noting that constitutional claim was inadequately briefed so " therefore [we] could not address this claim even if *Golding* review had been sought"); *State v. McKenzie-Adams*, 281 Conn. 486, 533 n.23, 915 A.2d 822 (declining to reach unpreserved confrontation clause claim after concluding claim was inadequately briefed because " the defendant failed to

brief his entitlement either to *Golding* review or to plain error review in his main brief"), cert. denied, 552 U.S. 888, 128 S.Ct. 248, 169 L.Ed.2d 148 (2007), overruled on other grounds by **[91 A.3d 876]** *State v. Payne*, 303 Conn. 538, 548, 34 A.3d 370 (2012); *Lebron v. Commissioner of Correction*, 274 Conn. 507, 532, 876 A.2d 1178 (2005) (stating that court will reach unpreserved constitutional claims if " party affirmatively requests and adequately briefs his entitlement to *Golding* review," and declining to reach constitutional claim as inadequately briefed where " the [defendant] ma[de] only a passing reference to *Golding* for the first time in his reply brief and fail[ed] to brief his entitlement to *Golding* review"); see also *Smith v. Andrews*, 289 Conn. 61, 80, 959 A.2d 597 (2008) (The court declined to engage in *Golding* review of unpreserved claims of improprieties by defense counsel during summation because " the plaintiff's brief is devoid of legal analysis regarding any of the *Golding* prongs or plain error review. In fact, the only discussion of *Golding* or plain error review in the plaintiff's brief consists of a lone citation, in a footnote, to *Golding* and to 'the plain error doctrine.' In addition, none of the cases that the plaintiff cites relate to either *Golding* review or plain error review." [Emphasis omitted.]). Numerous other decisions from this court after *Ramos* also failed to define the phrase " affirmative request" and summarily declined to afford *Golding* review in the absence of some form of express request by the party

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seeking review.^[14] See, e.g., *In re Jan Carlos D.*, 297 Conn. 16, 20 n.10, 997 A.2d 471 (2010); *Johnson v. Commissioner of Correction*, supra, 288 Conn. 60; *State v. Commins*, 276 Conn. 503, 515, 886 A.2d 824 (2005).

These decisions reciting the affirmative request requirement make clear the existence of a threshold briefing requirement to establish a party's entitlement to *Golding* review. Far less clear, however, is *why* we apparently imposed such a threshold requirement-in essence adding a fifth prong to *Golding* . The " affirmative request" requirement might well have been a result of a non sequitur in a single opinion, namely *Ramos*, taking on a jurisprudential life of its own. This conclusion is borne out by the fact that none of our decisions have ever explained the purpose of requiring a defendant seeking *Golding* review to brief both his underlying constitutional claim and the adequacy of his request for review of that claim.^[15] This likely is because requiring parties to undertake an ill-defined, mechanistic layer of threshold briefing to demonstrate their entitlement to review of an unpreserved constitutional claims is fundamentally at odds with the policy goals of *Golding*, which is a judicially created rule of reviewability designed to balance the twin policy goals of vindicating

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constitutional rights while ensuring fairness to the parties and the courts alike by safeguarding against the tactical use of **[91 A.3d 877]** unpreserved claim on appeal. As we explained in *State v. Brunetti*, 279 Conn. 39, 55, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S.Ct. 1328, 167 L.Ed.2d 85 (2007), " *Golding* is a narrow exception to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court. The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial-after it is too late for the trial court or the opposing party to address the claim-would encourage trial by ambush, which is unfair to both the trial court and the opposing party. . . . Nevertheless, because

constitutional claims implicate fundamental rights, it also would be unfair automatically and categorically to bar a defendant from raising a meritorious constitutional claim that warrants a new trial solely because the defendant failed to identify the violation at trial. *Golding* strikes an appropriate balance between these competing interests: the defendant may raise such a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review." (Citation omitted.) In achieving this balance, *Golding* implicitly chooses among competing policy concerns; notice to the trial court and to the opposing party yields to the principle that colorable constitutional claims should receive review, the onus of establishing the factual and legal basis for such claims remaining, as it must, with the defendant. See *State v. Golding*, supra, 213 Conn. 239-40.

In our view, Judges Bishop and Dupont, in their separate opinions in this case, best summarized why the additional briefing hurdle for an appellant imposed by the affirmative request requirement does nothing to enhance the notice concerns already addressed by the
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first two prongs of *Golding*, namely, "to prevent unfair surprise and to give the state the opportunity to fully respond to the defendant's claims." *State v. Elson*, supra, 125 Conn.App. 388 n.2 (*Bishop, J.*, concurring in part and dissenting in part); see id., 381 (*Dupont, J.*, concurring). Specifically, if a defendant's main brief properly identifies those portions of the record that form the factual basis for the unpreserved claim and a legal basis for the constitutional nature of that claim, then the opposing party and the reviewing court are more than able to respond to or address that claim as a matter of reviewability. If the defendant's brief fails to identify the relevant record sections, identify the governing constitutional principles, or apply law to fact in demonstrating the existence of a constitutional violation requiring reversal, then the claim likely will be deemed inadequately briefed and will fail on that ground anyway, regardless of some threshold invocation of *Golding* review prior to the briefing of the merits. See, e.g., *In re Melody L.*, supra, 290 Conn. 154; accord *State v. Golding*, supra, 213 Conn. 240-41 ("Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label. . . . For example, once identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed." [Citations omitted.]).

Further, requiring a defendant to acknowledge expressly that his claim is or may be unpreserved as a precondition to *Golding* review; see *State v. Elson*, supra, 125 Conn.App. 358-59; does not add anything to the reviewability calculus. The issue of preservation is often hotly contested. See, e.g., *State v. Dalzell*, 282 Conn. 709, 718-19, 924 A.2d 809 (2007). When the constitutional claim is one that is especially fact dependent, such as a suppression matter, the failure to preserve the [91 A.3d 878] claim before the trial court often results in an inadequate
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factual record for review, thus leading to the claim's failure on the merits.^[16] See, e.g., id., 721-22 (under first prong of *Golding*, record inadequate to review unpreserved claim that traffic stop was unconstitutionally based on pretextual seat belt violation because of failure to raise issue, and obtain factual findings, at suppression hearing); *State v. Brunetti*, supra, 279 Conn. 63-64 (under first prong of *Golding*, record inadequate to review defendant's claim that consent of both present

joint occupants is necessary for search because " the issue of the defendant's mother's consent was not before the court, the facts relevant to the issue of the defendant's mother's consent never were adduced in the trial court"). If a reviewing court deems a claim of constitutional dimension to be unpreserved, declining to review that claim for failure of a defendant to either acknowledge that claim's unpreserved nature or incant the word *Golding* would represent a triumph of form over substance. Put differently, the affirmative request requirement, which has often caused appellants to adopt a belt and suspenders approach to the briefing of constitutional claims by

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arguing preservation *and* affirmatively claiming entitlement to *Golding* review as a safeguard, has served only to swell briefs with boilerplate and block quotes that are the understandable product of abundant caution by the appellants' counsel.^[17]

Indeed, beyond expediting the writing of appellate opinions disposing of seemingly specious unpreserved claims on direct appeal, we agree with Judge Dupont that all articulating a fifth threshold prong of *Golding* accomplishes-particularly when the merits of the underlying claim have been briefed adequately to demonstrate reviewability and potential reversibility under the four prongs of *Golding*- is sowing grounds 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" *State v. Elson*, supra, 125 Conn.App. 387 (*Dupont, J.*, concurring). This, of course, serves no judicial economy, as the rapidly written appellate opinion of today is nothing more **[91 A.3d 879]** than kicking the can down the road to be addressed in the habeas petition of tomorrow-a counterproductive action that " actually increases the net workload of the judicial system." (Emphasis omitted.) *State v. Kitchens*, 299 Conn. 447, 524, 10 A.3d 942 (2011) (*Katz, J.*, concurring).

Finally, what is most troubling is that the affirmative request requirement has appeared to function as a " magic words" test-notwithstanding, as noted by the Appellate Court, this court's refusal in a variety of contexts " to attach talismanic significance to the presence

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or absence of particular words or phrases." (Internal quotation marks omitted.) *State v. Elson*, supra, 125 Conn.App. 353; see also, e.g., *State v. Robinson*, 227 Conn. 711, 731, 631 A.2d 288 (1993) (" [t]he fact that the trial court did not utter the talismanic words that the evidence was 'more probative than prejudicial' does not indicate that it did not make such a determination"). For example, in *Johnson v. Commissioner of Correction*, supra, 288 Conn. 60, this court declined *Golding* review for the sole reason that the defendant " failed to request that we undertake such review" or, more to the point, to say some magic word or phrase. Such a rigid approach is irreconcilable with the strong principles of public policy weighing in favor of reviewability that lie at the heart of *Golding*, and is entirely inconsistent with our body of case law that values substance over matters of form.^[18] See id., 68 (*Palmer, J.*, concurring) (addressing merits of constitutional claim, notwithstanding petitioner's failure to acknowledge its unpreserved nature or " invoke *Golding* ," because " arguments and analysis that the [defendant] raised in support of his ex post facto claim are precisely the same arguments and analysis that he would have raised if he had invoked *Golding* ").

In this case, the Appellate Court accurately interpreted our body of case law applying the "affirmative request" prerequisite to *Golding* review to require "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." *State v. Elson*, supra, 125 Conn.App. 354-55. Nevertheless, we determine that the analysis of public policy and practical considerations underlying the affirmative request requirement set forth in *State v. Wright*, supra, 114 Conn.App. 463-64, although inconsistent with binding precedent from this court, is better reasoned.

[91 A.3d 880] Accordingly, we overrule *State v. Ramos*, supra, 261 Conn. 171, and its progeny to the extent that those cases require a defendant to affirmatively request such review or impart a threshold level of analysis of entitlement to review under *Golding*.^[19] We conclude, therefore, that to obtain review

of an unpreserved claim pursuant to *State v. Golding*, supra, 213 Conn. 239-40, a defendant need only raise that claim in his main brief, wherein he must "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.) *State v. Wright*, supra, 463. Accordingly, the defendant's failure in his main brief, as stated by the Appellate Court to (1) "identify or address any issues related to the reviewability of the claim," (2) "state that any extraordinary level of review is requested," (3) "refer to the *Golding* opinion either by name or in substance [or] address the issue of the adequacy of the record to review the claim," or (4) "present an analysis that, if the claim was not preserved, it nevertheless should be reviewed," did not preclude consideration of his federal constitutional claim, which otherwise was properly briefed, identified relevant constitutional authorities, and was founded on an adequate record for review. *State v. Elson*, supra, 125 Conn.App. 356; see also *State v. Wright*, supra, 463-64 (reviewing claim despite failure to mention *Golding* because "the defendant has provided a record adequate for review and has sufficiently demonstrated, by discussion of relevant authority, that his claim . . . implicates his sixth amendment right to confront witnesses and his fourteenth amendment due process right to obtain exculpatory evidence").

B

Merits of the Defendant's Constitutional Claim

We now turn to a review of the defendant's constitutional claim under *Golding*. Relying heavily on Judge

Bishop's concurring and dissenting opinion; see *State v. Elson*, supra, 125 Conn.App. 395-96;

[91 A.3d 881] the defendant contends that application of the "totality of the circumstances" analysis articulated in *State v. Kelly*, supra, 256 Conn. 81-82, demonstrates that the trial court improperly punished him at sentencing for exercising his constitutional right to a jury trial. Although

we conclude that the claim is reviewable under the first two prongs of *Golding*, we are guided by the totality of the circumstances analysis adopted in *Kelly*; see *id.*, 82; and conclude that the defendant's claim fails under *Golding*'s third prong, which requires that he demonstrate that " the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial" *State v. Golding*, *supra*, 213 Conn. 240.

We note at the outset that this unpreserved claim is reviewable under the first two prongs of *State v. Golding*, *supra*, 213 Conn. 239, because: (1) the record is adequate for review as the trial court's remarks during sentencing are set forth in the transcripts in their entirety; ^[20] and (2) the claim is of constitutional magnitude, as demonstrated by the defendant's discussion of relevant authority in his main brief. See, e.g., *State v. Kelly*, *supra*, 256 Conn. 80-81 (discussing sixth amendment to United States Constitution and article first, § 8, of the Connecticut constitution). We now turn to the third prong of *Golding*, and determine whether " the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial" *State v. Golding*, *supra*, 240.

Our analysis under the third prong of *Golding* begins with *State v. Kelly*, *supra*, 256 Conn. 79-80, which is

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our leading decision^[21] with respect to whether a trial court violates a defendant's " federal and state constitutional rights by improperly considering, at the sentencing phase of the proceedings, the defendant's decision to proceed to trial." ^[22] In *Kelly*, the defendant challenged the trial **[91 A.3d 882]** court's remark at " the conclusion of the defendant's sentencing hearing, and prior to imposing sentence . . . that '[t]he general factors which I have considered in this matter is whether or not there was

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a plea or a complete trial, and that is one of the legal factors to consider in sentencing.'" ^[23] *Id.*, 80.

In resolving this claim we noted that, " [a]s a general matter, a trial court possesses, within statutorily prescribed limits, broad discretion in sentencing matters. On appeal, we will disturb a trial court's sentencing decision only if that discretion clearly has been abused. . . . *In spite of that discretion, however, the [a] ugmentation of sentence based on a defendant's decision to stand on [his or her] right to put the [g] overnment to its proof rather than plead guilty is clearly improper ."* (Citation omitted; emphasis added; internal quotation marks omitted.) *Id.*, 80-81. Reviewing other federal and state courts' approaches to similar claims, we adopted

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what we deemed to be the majority view,^[24] and concluded " that review of claims that a trial court lengthened a defendant's sentence as a punishment **[91 A.3d 883]** for exercising his or her constitutional right to a jury trial should be based on the totality of the circumstances. We further [held] that the burden of proof in such cases rests with the defendant." *Id.*, 82. In so concluding, we rejected as a constitutional matter a minority view employing a " 'per se' rule requiring a remand for resentencing whenever a colorable claim is raised by a defendant that his sentence was lengthened because of his choice to stand trial." ^[25] *Id.*

Applying this majority view in *Kelly*, we determined that " [n]o fair reading of the record would

permit the conclusion that the trial court's comment should be understood to mean that it was lengthening the defendant's sentence based on his choice to stand trial. Rather, we interpret[ed] the trial court's remark as a reminder to the defendant of the oft acknowledged truth that many factors favor relative leniency for those who acknowledge their guilt . . . and thus help conserve
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scarce judicial and prosecutorial resources for those cases that merit the scrutiny afforded by a trial. . . . *State v. Coleman*, 242 Conn. 523, 544, 700 A.2d 14 (1997). There is a world of difference between that reminder and a clear showing that the defendant received a lengthier sentence because he chose to exercise his right to a jury trial." [26] (Internal quotation marks omitted.) *State v. Kelly*, supra, 256 Conn. 84. We then concluded that the " totality of the circumstances surrounding the defendant's sentencing gave no indication that the trial court improperly augmented the defendant's sentence based on his decision to stand trial. As the trial judge [in *Kelly*] noted, he gave particular consideration to the age of the victim, the age of the defendant, the lack of closure of the matter for the eleven years preceding the second trial, the fact that the sentence was not influenced by other criminal matters pending against the defendant and, finally, proportionality." *Id.*, 83; accord *State v. Fisher*, 121 Conn.App. 335, 350-52, 995 A.2d 105 (2010) (applying *Kelly* totality of circumstances analysis to claim that trial court improperly took defendant's silence into account, thereby penalizing him for exercise of fifth amendment rights, in dispositional phase of violation of probation proceeding).

Having reviewed the totality of the sentencing record in the present case, we conclude that the defendant

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has not carried his burden of proving that the trial court penalized him for exercising his constitutional right to a jury trial. First, we note that the length of the sentence that the defendant received must be evaluated relative to the maximum sentence faced by the defendant and the sentence recommended by the state. In this case, the [91 A.3d 884] maximum sentence would have been thirty-five years imprisonment,^[27] and the state recommended that the trial court sentence the defendant to thirty-five years imprisonment, suspended after twenty-five years, followed by five years probation with special conditions. See *State v. Elson*, supra, 125 Conn.App. 335. The trial court, however, did not follow that recommendation and, instead, sentenced the defendant to a total effective sentence of twenty-five years imprisonment, execution suspended after twenty years, followed by five years of probation with special conditions, fifteen years less than the defendant's maximum exposure, and five years less than what the state recommended. See *id.*, 338. The trial court's decision to sentence the defendant to a term of imprisonment shorter than both the maximum sentence and what the state had recommended indicates that the trial court did not intend to penalize the defendant for exercising his right to a trial.

The lack of vindictiveness evinced in the length of the sentence is supported by the fact that the vast majority of the trial court's sentencing remarks reflected a detailed focus on " legitimate sentencing considerations," namely, victim impact evidence; see *State v. Coleman*, supra, 242 Conn. 546-47; and the defendant's demeanor, criminal history, presentence investigation report, prospect for rehabilitation and " general lack of

remorse for the crimes" of which he has been convicted. *State v. Anderson*, 212 Conn. 31, 50, 561 A.2d 897 (1989); see also *State v. Eric M.*, 271 Conn. 641, 653-54, 858 A.2d 767 (2004); *State v. Barnes*, 33 Conn.App. 603, 610, 637 A.2d 398 (1994), *aff'd*, 232 Conn. 740, 657 A.2d 611 (1995). Indeed, it is significant that, when the trial court made the specific comments at issue, it did so in the context of discounting the mitigating factors, including the defendant's allocution, statements from a family friend and his father, and a letter from his mother, rather than in its separate recitation of factors that would justify lengthening the defendant's sentence, including the victim impact evidence, the severity of the defendant's attack on the victim, the randomness of the attack, the defendant's dangerousness as reflected by his pattern of violent behavior, which has been exacerbated by his substance abuse problems that have not been treated successfully, his incredible trial testimony, and the fact that he committed the crimes while on pretrial release for other pending felony charges. See *State v. Elson*, *supra*, 125 Conn.App. 337-38. Thus, the totality of the circumstances indicates that the trial court's actions were consistent with the maxim that, "[a]lthough a court may deny leniency to an accused who . . . elects to exercise a statutory or constitutional right, a court may not penalize an accused for exercising such a right by increasing his or her sentence solely because of that election." *State v. Revelo*, 256 Conn. 494, 513, 775 A.2d 260, *cert. denied*, 534 U.S. 1052, 122 S.Ct. 639, 151 L.Ed.2d 558 (2001). Accordingly, we conclude that the defendant has not carried his burden of proving, on the basis of the totality of the circumstances, that the trial court augmented his sentence in retaliation for the exercise of his right to stand trial.

II

SUPERVISORY AUTHORITY CLAIMS

We next turn to the dispositive supplemental issue, namely, whether we should **[91 A.3d 885]** use our supervisory authority to remand this case for a new sentencing proceeding. In his supplemental brief, the defendant claims that the exercise of our supervisory power, on a *sua sponte* basis, is appropriate because the state's appellate case law on this point is inconsistent and, therefore, " does not effectively put defendants and their counsel on notice as to what is required in this jurisdiction in order to properly preserve claims of sentencing impropriety" Relying on *State v. Coleman*, *supra*, 242 Conn. 523, and *State v. Rose*, 305 Conn. 594, 46 A.3d 146 (2012), the defendant further argues that the use of our supervisory powers is appropriate to ensure public confidence in the integrity and fairness of the judicial system, including with respect to sentencing matters. Thus, the defendant contends that we should " invoke [our] supervisory authority to warn the trial courts that their consideration of a defendant's election to proceed to trial, or other fundamental constitutional right, in sentencing the defendant shall not be tolerated, and more specifically, that the trial courts must not equate a defendant's exercise of his right to trial with a lack of remorse."

In response, the state contends that we should not exercise our supervisory authority because the defendant failed to request that relief properly in his main brief in the Appellate Court and the record is ambiguous and, therefore, inadequate with respect to whether the trial court

actually lengthened the defendant's sentence because he had elected to stand trial. Citing *State v. Lockhart*, 298 Conn. 537, 577, 4 A.3d 1176 (2010), *State v. Andrews*, 248 Conn. 1, 20, 726 A.2d 104 (1999), and *State v. Hines*, 243 Conn. 796, 815, 709 A.2d 522 (1998), the state further emphasizes that we should invoke our

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supervisory powers only "rare[ly]" and "with great caution" when "traditional protections are inadequate to ensure the fair and just administration of the courts." Positing that the trial court's comments were constitutionally indistinguishable from those determined not to require reversal in *State v. Kelly*, supra, 256 Conn. 79-84, the state further emphasizes that the exercise of our supervisory powers is inappropriate because there is no indication of a "judicial practice or tendency among sentencing courts to improperly comment upon and/or penalize a defendant's exercise of his right to stand trial," either systemically or with regard to the trial judge in this case. In this vein, the state contends that existing doctrines of extraordinary review, such as *Golding* and plain error, provide sufficient protection to criminal defendants and that remanding the case for resentencing on this ambiguous record would contravene the usual presumption that the trial court acted correctly. See, e.g., *State v. Crumpton*, 202 Conn. 224, 231, 520 A.2d 226 (1987). We, however, agree with the defendant, and utilize our supervisory powers to emphasize that it would be inappropriate for a trial judge to consider, at sentencing, a defendant's decision to exercise his right to a trial, including with respect to an assessment of the defendant's remorse, given the negative impact such comments are likely to have on the public's perception of the criminal justice system. Accordingly, we remand this case to the trial court for a new sentencing proceeding.

A

Scope of This Court's Supervisory Powers

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are [91 A.3d 886] of utmost seriousness, not only

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for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (Internal quotation marks omitted.) *State v. Rose*, supra, 305 Conn. 607. "Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State v. Lockhart*, supra, 298 Conn. 576. Indeed, there is "no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum" because articulating a rule of policy and reversing a conviction under our supervisory powers "is perfectly in line with the general principle that this court 'ordinarily invoke[s] [its] supervisory powers to enunciate a rule that

is not constitutionally required but that [it] think[s] is preferable as a matter of policy." [28]

(Emphasis

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omitted.) *State v. Rose*, supra, 607-608, quoting *State v. Marquez*, 291 Conn. 122, 166, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S.Ct. 237, 175 L.Ed.2d 163 (2009).

We begin with the state's arguments with respect to the propriety of the use of our supervisory powers in this case. The state contends that we should not use our supervisory powers to reach the defendant's unpreserved sentencing claim because he failed to request this type of review in his main brief before the Appellate Court, doing so only in his reply brief filed in that court. The state correctly observes that, to receive review, a claim must be raised and briefed adequately in a party's principal brief, and that the failure to do so constitutes the abandonment of the claim. See, e.g., *State v. Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007); *State v. Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997). The purpose of this rule is to provide the court with "the full benefit of . . . written argument" and to eliminate the unfair surprise to the appellee that would be created were an appellant to be permitted to raise a new claim on appeal in its reply brief. (Internal quotation marks omitted.) *State v. Garvin*, supra, 312. An appeals court may, however, raise the question of whether to use [91 A.3d 887] its supervisory powers sua sponte. See, e.g., *State v. Santiago*, 245 Conn. 301, 332 n.20, 715 A.2d 1 (1998). When an appellate court chooses to exercise this authority after oral argument, as we have in the present appeal, concerns regarding unfair surprise and inadequate argumentation can be alleviated by an order requiring the parties to file supplemental briefs. See, e.g., *State v. Rose*, supra, 305 Conn. 604-605 (sua sponte order requiring parties to brief supervisory powers issue after oral argument of appeal where certified question concerned applicability of constitutional harmless error analysis to defendant's compelled appearance in prison

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attire); accord *State v. Dalzell*, supra, 282 Conn. 715 (" [i]f the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue"). Accordingly, we conclude that the defendant's failure to brief his supervisory authority claim properly in the Appellate Court does not preclude us from raising that issue sua sponte and deciding it subsequent to the receipt of supplemental briefing from the parties.

We next turn to the state's contention that existing constitutional, statutory and procedural rules, including bypass doctrines permitting the review of unpreserved claims such as *State v. Golding*, supra, 213 Conn. 239-40, and plain error,^[29] are " generally adequate to protect the rights of the defendant and the integrity of the judicial system" ; (internal quotation marks omitted) *State v. Lockhart*, supra, 298 Conn. 576; thus rendering it unnecessary and inappropriate to utilize our supervisory

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authority " for the sole purpose of vacating some portion or all of a criminal judgment merely to redress a perceived error in an individual case." See also *State v. Pouncey*, 241 Conn. 802, 813, 699 A.2d 901 (1997) (noting that supervisory authority " is not a form of free-floating justice,

untethered to legal principle" [internal quotation marks omitted]). We agree with the state that the supervisory authority of this state's appellate courts is not intended to serve as a bypass to the bypass, permitting the review of unpreserved claims of case specific error-constitutional or not-that are not otherwise amenable to relief under *Golding* or the plain error doctrine. " Rather, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers."

[91 A.3d 888] (Internal

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quotation marks omitted.) *State v. Anderson*, 255 Conn. 425, 439, 773 A.2d 287 (2001). Thus, a defendant seeking review of an unpreserved claim under our supervisory authority must demonstrate that his claim is one that, as a matter of policy, is relevant to " the perceived fairness of the judicial system as a whole," most typically in that it lends itself to the adoption of a procedural rule that will " guide the lower courts in the administration of justice in all aspects of the criminal process." ^[30] (Internal quotation marks omitted.)

[91 A.3d 889] *State v. Rose*, supra, 305

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Conn. 607; see also *State v. Anderson*, supra, 255 Conn.

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441 (Where the trial court had conducted the proper preliminary inquiry under *State v. Brown*, 235 Conn. 502, 528, 668 A.2d 1288 [1995], " the use of [this court's] supervisory authority [to order a new trial] would be inappropriate . . . because it would not have sufficient boundaries to guide future trial courts. Rather, it would more likely create confusion as to the proper procedures to follow in jury misconduct cases."). In our view, adherence to this unifying principle mitigates against the specter of arbitrary, result oriented, and undisciplined jurisprudence that may be a potential risk of the expansive use of our supervisory powers. Thus, we turn to the merits of the defendant's **[91 A.3d 890]** claims to determine whether they implicate the perceived fairness of the system as a whole.^[31]

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B

This Court's Supervisory Powers in the Sentencing Context

1

Background

We have previously utilized our supervisory powers to craft procedural rules that protect against the appearance of a judge penalizing a defendant for the exercise of his constitutional rights because " [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" (Citation omitted.) *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Most notably, in *State v. Coleman*, supra, 242 Conn. 541, we refrained from determining, " for state constitutional purposes, as to whether a presumption of vindictiveness attaches where a defendant previously has been sentenced under the terms of a plea agreement and, having successfully challenged his conviction, receives a greater sentence following a trial," ^[32] but nevertheless utilized our supervisory powers to

conclude

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that " such a defendant should be afforded an explanation, if one is requested, justifying the **[91 A.3d 891]** enhanced sentence." ^[33] In utilizing our supervisory powers, we emphasized that " [a]n important function of this court is to ensure public confidence in the integrity of the judicial system. This confidence is enhanced through the enactment of rules that safeguard the fairness of our system of justice. A requirement that the trial court articulate the objective criteria upon which it relied in imposing a greater sentence will promote public confidence in the fair and impartial administration of justice by dispelling concerns that the subsequent sentence was the product of prosecutorial or judicial vindictiveness." *Id.*

In *Coleman*, we determined that our use of supervisory powers to adopt this rule " dispels these concerns in two important respects. First, it aids in the eliminat[ion of] even the possibility of retaliation so that the defendant will have no apprehension about exercising the right of appeal. . . . Second, because it is [usually] exceedingly difficult to establish that a judge has retaliated against a defendant for exercising legal rights . . . the rule ensures that there will be an adequate record for appellate review of a defendant's claim of retaliation." ^[34] (Citations omitted; internal quotation marks omitted.) *Id.*, 541-42.

Similarly, in *State v. Revelo*, supra, 256 Conn. 503 and n.19, we deemed the presence or appearance of

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vindictiveness in sentencing to be a matter sufficiently important to justify the use of our supervisory power to reach an issue that was not preserved and, indeed, might well have been waived by the trial court's canvass informing the defendant that his appellate rights were limited under General Statutes § 54-94a^[35] to the substantive issues raised in his motion to suppress. In *Revelo*, we noted that the defendant's " due process claim gives rise to an important issue, namely, the proper role of our trial judges in the plea bargaining process, the significance of which transcends this particular case." *Id.*, 503. Citing *Bordenkircher v. Hayes*, supra, 434 U.S. 363, in support of the proposition that " principles of due process prohibit a court from retaliating against a defendant merely for exercising a statutory or constitutional right," we then concluded that the trial court^[36] had violated **[91 A.3d 892]** the defendant's due process rights by telling him that " he would be required to serve one extra year in prison if he agreed to plead guilty only after exercising his right to a judicial determination of his motion to suppress." *State v. Revelo*, supra, 513; see also *id.*, 514 (finding " no difficulty" in discerning from record that

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" trial court imposed a more severe sentence on the defendant solely because he asserted his right to a judicial ruling on his motion to suppress"). We emphasized that, to avoid the perception of vindictiveness in sentencing, " it also would be incumbent upon the court to explain why a greater sentence might be appropriate . . . to dispel any suggestion that the court was prepared to punish the defendant merely for exercising his right to a judicial determination of his motion." (Citation omitted.) *Id.*, 516.

2

Trial Courts' Commentary during Sentencing

In our view, concerns about the appearance of vindictiveness in sentencing expressed in *Coleman* and *Revelo* are not assuaged by the oft-repeated, but difficult to implement, "fine distinction" noted therein between extending lenience to those who plead guilty and penalizing those who exercise their rights to a trial.^[37] See,

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e.g., *State v. Revelo*, supra, 256 Conn. 513-14; *State v. Kelly*, supra, 256 Conn. 84; *State v. Coleman*, supra, 242 Conn. 544. Thus, we find persuasive Judge Bishop's comprehensive dissenting opinion, which utilizes the appellate courts' supervisory power to reach the defendant's unpreserved claims. *State v. Elson*, supra, 125 Conn.App. 388-89. In particular, we agree with Judge Bishop that, given our state's extremely heavy reliance on plea bargaining in resolving criminal cases; ^[38] see, e.g.,

[91 A.3d 893] *State v. D'Antonio*, 274 Conn. 658, 679-80 n.12, 877 A.2d 696 (2005); we "must be particularly vigilant in circumstances in which the right [to a jury trial] 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)." *State v. Elson*, supra, 125 Conn.App. 393. Thus, we too observe that, "[w]here 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." *Id.*, 393 n.7 (*Bishop, J.*, concurring and

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dissenting). Accordingly, we conclude, pursuant to our supervisory authority, that a trial judge should not comment negatively on the defendant's decision to elect a trial during sentencing, given the appearance of impropriety of that consideration.^[39]

Further, our conclusion, pursuant to our supervisory authority, at sentencing, that trial judges should not comment negatively on a defendant's election of a trial supplements the constitutional analysis in *State v. Kelly*, supra, 256 Conn. 81, wherein this court emphasized that the "[a]ugmentation of sentence based on a defendant's decision to stand on [his or her] right to put the [g]overnment to its proof rather than plead guilty is clearly improper." (Internal quotation marks omitted.) As noted previously,^[40] in *Kelly*, we adopted what we deemed to be the majority approach, and concluded "that review of claims that a trial court lengthened a defendant's sentence as a punishment for exercising his or her constitutional right to a jury trial should be based on the totality of the circumstances. We further [held] that the burden of proof in such cases rests with the defendant." *Id.*, 82. In so concluding, we rejected as a constitutional matter a minority view employing a "per se" rule requiring a remand for resentencing whenever a colorable claim is raised by a defendant that his sentence was lengthened because of his choice to stand trial." *Id.* Our conclusion **[91 A.3d 894]** in this case, made

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pursuant to our supervisory powers, supplements the constitutional rule identified in *Kelly*

because, although the totality of the circumstances analysis adopted therein is appropriate for constitutional due process purposes to determine whether the violation of a nonstructural rule amounts to harmful error requiring the remedy of reversal,^[41] it does not provide trial judges with the clear guidance that typically accompanies the exercise of our supervisory authority. See *State v. Rose*, supra, 305 Conn. 605-606 (utilizing supervisory power to adopt rule " that the conviction of a defendant who is compelled to stand trial in identifiable prison clothing in violation of his or her constitutional rights is reversible per se"). Moreover, and as Judge Bishop noted, except in the " most blatant" cases, it is difficult to ascertain meaningfully from the record whether a trial judge has actually held a defendant's election of a trial

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against him. *State v. Elson*, supra, 125 Conn.App. 392 n.6; see also, e.g., *United States v. Perez*, 904 F.2d 142, 146 (2d Cir. 1990) (" this court recognizes . . . that it is not always easy to demonstrate actual vindictiveness" [citation omitted]). This is particularly so, given the " fine line between considering a defendant's lack of remorse and penalizing a defendant for refusing to plead guilty and insisting on his right to trial" ; *State v. Knight*, 701 N.W.2d 83, 87 (Iowa 2005); see also footnote 37 of this opinion and accompanying text; and the fact that Connecticut lacks sentencing guidelines that might create norms from which otherwise unexplained deviations could be objective evidence of retaliation. See *State v. Elson*, supra, 125 Conn.App. 392 n.5 (*Bishop, J.* , concurring and dissenting). That such comments are, therefore, not truly amenable to a traditional constitutional harmless error analysis is a factor that is a " core [consideration] . . . identified as [a prerequisite] to the invocation of our supervisory authority." *State v. Rose*, supra, 608; see also *id.*, 614 (noting that " unlike most other constitutional errors, compelling a defendant to stand trial in identifiable prison clothing is not just highly demeaning but also potentially highly prejudicial in a manner the effects of which may be very [91 A.3d 895] difficult to measure because they involve a subtle but ever present cognitive bias"); *id.*, 614 n.20 (stating that " ill effects of a defendant's compelled appearance in prison clothing being very difficult to measure, we are loath to engage in . . . harmless error analysis").

3

Application to the Merits of This Case

Relying on Judge Robinson's concurrence in this case, the state contends, however, that the record is ambiguous with respect to whether the trial court actually lengthened the defendant's sentence as a result of his election of a trial, and that this ambiguity renders

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it inadequate for review. See *State v. Elson*, supra, 125 Conn.App. 375-77. We disagree. The record in this case is perfectly adequate for review in that the transcript of the sentencing proceeding tells us verbatim what happened in the trial court; the only question or ambiguity remaining concerns the possible inferences to be drawn from the trial court's comments therein.

[42] Put differently, finding this particular record inadequate for review of this claim would mean that, absent the extremely unlikely admission by a trial judge that he or she is lengthening a defendant's sentence as a result of the trial election,^[43] no record would ever be adequate

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for review of a claim like this without the aid of a crystal ball or mind reader.

Moreover, Judge Robinson's observations with respect to the content of the record in this case capture the very need for the exercise of our supervisory authority in this context. He aptly observed that " reasonable minds can disagree as to whether the court's statement concerning **[91 A.3d 896]** the defendant's remorse actually was factored into the court's sentence." *Id.*, 377. The apparent ambiguity in the trial court's remarks with respect to the court's intent to penalize the defendant for exercising his right to a trial, and the disparate inferences that could be drawn therefrom, lend support to the exercise of our supervisory authority in order to prevent the *appearance* of improper action that reflects poorly on the " perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) *State v. Rose*, supra, 305 Conn. 607; see also *State v. Pena*, 301 Conn. 669, 684, 22 A.3d 611 (2011) (" we suggest that our trial courts in future sentencings refrain from expressing disagreement with the jury's verdict" because doing so " may undermine public confidence in the jury system"); cf. *State v. D'Antonio*, supra, 274 Conn. 693 n.22 (due process requires " that a defendant receive a trial before a court who, at the very least, appears free of bias"); *Cameron v. Cameron*, 187 Conn. 163, 170, 444 A.2d 915 (1982) (" [t]he appearance as well as the actuality of impartiality on the part of the trier is an essential ingredient of a fair trial").

Finally, we do not in any way intimate that trial courts are precluded from considering or discussing at sentencing the defendant's *conduct* during the trial and sentencing proceedings, including the apparent veracity of the defendant's testimony therein. Beyond forgoing

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the potential and permissible exercise of leniency in exchange for a guilty plea, a defendant who elects a trial generally incurs greater exposure at sentencing because " the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." *Alabama v. Smith*, 490 U.S. 794, 801, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); accord *State v. Coleman*, supra, 242 Conn. 543-44. The defendant's demeanor, criminal history, presentence investigation report, prospect for rehabilitation and " general lack of remorse for the crimes" of which he has been convicted remain " legitimate sentencing considerations." ^[44] *State v. Anderson*, supra, 212 Conn.

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50;
[91 A.3d 897] see also *State v. Eric M.*, supra, 271 Conn. 653-54 (same); *State v. Barnes*, supra, 33 Conn.App. 610 (" a continued protestation of innocence and lack of remorse indicate to the sentencing judge the individual's prospect for rehabilitation"). To this end, the Iowa Supreme Court has emphasized that a sentencing court is " not preclude[d] . . . from finding a lack of remorse based on facts other than the defendant's failure to plead guilty," but " must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact [the] defendant had not pleaded guilty but had put the prosecution to its proof." (Internal quotation marks omitted.) *State v. Knight*, supra, 701 N.W.2d 87; see also *Jennings v. State*, 339 Md. 675, 688, 664 A.2d 903 (1995) (" [A] sentencing court may consider, on the issue of a defendant's prospects for rehabilitation, the defendant's lack of remorse. The record in this case

does not indicate that the trial court was considering the defendant's refusal to plead guilty. Instead, it was the [defendant's] present tense refusal to accept responsibility, or show remorse, for his actions on which the court focused."); *State v. Shreves*, 2002 MT 333, 313 Mont. 252, 260, 60 P.3d 991 (2002) (" [W]e cannot uphold a sentence that is based on a refusal to admit guilt. To do so would reflect an inquisitorial system of justice rather than our adversarial system."); *State v. Burgess*, 156 N.H. 746, 760, 943 A.2d 727 (2008) (the court held " that a sentencing court may not draw a negative inference of lack of remorse from a defendant's

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silence at sentencing," but emphasized that " this holding does not preclude a court from considering other evidence besides a defendant's silence that indicates a defendant's lack of remorse. . . . Nor does it prevent a trial court from considering a defendant's false trial testimony as a sentencing factor." [Citation omitted.]

We conclude, therefore, that the trial court's remarks, which created an appearance of impropriety insofar as they referred adversely to the defendant's election of a trial in evaluating the defendant's remorse and addressing the effect of the offense and trial on the victim,^[45] warrant the invocation of our supervisory authority to grant the defendant a new sentencing **[91 A.3d 898]** proceeding. An observer hearing the comments at issue in this case could have perceived that the trial court " equated the defendant's exercise of the right to trial with the absence of remorse" ; *State v. Elson*, supra, 125 Conn.App. 395 (*Bishop, J.*, concurring and dissenting); thereby tainting the public's perception of the sentencing decision in this case. This is particularly so when the specific comment, namely, that, " [*i*] f the defendant had been truly apologetic, he wouldn't have put the victim through the trial ," is viewed in the context of the trial court's subsequent remark apparently discounting the defendant's decision to plead guilty to the bail status offense under § 53a-40b (1), by noting that it " would

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have been a simple trial and the violation was obvious, so *the admission really did not save the state any resources .*" (Emphasis added.) Although these remarks, when viewed in the totality of the circumstances surrounding the rest of the defendant's sentencing, cannot be understood as violating the defendant's due process rights by penalizing him for exercising his right to a trial; see part I B of this opinion; they nevertheless, viewed together, create the perception- *if not the actuality* -that the trial court, in crafting the sentence, improperly took into account the defendant's exercise of his rights, which the court viewed as an unnecessary imposition on the system and the victim. Accordingly, given the adverse effects such commentary may have on the public's perception of the inherent fairness of the criminal justice system, we conclude that a new sentencing proceeding is required.^[46]

The judgment of the Appellate Court with respect to the defendant's sentencing is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court in part and to remand the case to the trial court for a new sentencing proceeding.

In this opinion the other justices concurred.

Notes:

[*] This case originally was argued before a panel of this court consisting of Chief Justice Rogers and Justices Norcott, Palmer, Zarella and Eveleigh. Thereafter, the court, pursuant to Practice Book § 70-7 (b), sua sponte, ordered that the case be considered en banc. Accordingly, Justices McDonald and Espinosa were added to the panel, and they have read the record and briefs and listened to a recording of the oral argument prior to participating in this decision.

The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] We granted the defendant's petition for certification limited to the following issue: " Did the Appellate Court properly conclude that the defendant's claims were not reviewable under *State v. Golding*, [supra, 213 Conn. 233]?" *State v. Elson*, 300 Conn. 904, 12 A.3d 572 (2011).

[2] General Statutes § 53a-40b was amended by No. 10-36, § 21, of the 2010 Public Acts, which made certain changes to the statute that are not relevant to the present appeal. For purposes of clarity, we refer to the current revision of the statute.

[3] For a more detailed recitation of the underlying facts of this case, see *State v. Elson*, supra, 125 Conn.App. 331-34.

[4] The jury found the defendant not guilty on the charge of attempt to commit assault in the first degree.

[5] In her impact statement, the victim stated that: " On September 3, 2004, the defendant changed my life forever. At the time, I was a newlywed, married just two months, working on completing my degree at Western Connecticut State University.

" As I worked on a drawing in White Hall, [the defendant] brutally attacked me with a knife. . . . As I put up my hands to protect my face he slashed me with the knife. I don't know how I found the strength to fight him off, especially given the pain I was in and the blood covering me, but somehow I escaped and ran to campus police for assistance. I was in such shock that I refused to stop running, despite offers of help from other students. I felt that if I could reach a police officer I would be safe. I cannot stop thinking about what would have happened if I did not manage to escape, most likely I would not be here today.

" After the attack my family and I lived in fear that the defendant would not be found and I would live my life afraid that he would return and . . . continue to attack or kill other victims. My husband and other family members and friends stayed with me at all times so I would not be alone. He was apprehended, but I am so fearful.

" I underwent surgery for my hand and had several months of therapy. I have visible scars on my face and body that will never go away.

" Beyond the physical injuries I've suffered, this crime has had a tremendous impact on my life emotionally. Before this happened, I was open and trusting. Now I am guarded and cautious, always fearing that this could happen to me again.

" I am now the mother of a four month old-in fact, I testified at the trial when my baby was only four weeks old. During the trial, it was awful for me to relive the brutal attack and for my husband, parents, friends, and the many other family members to hear firsthand the events of that day.

" The fact that the defendant denied he had the capacity to commit this crime is shocking and shows me that he has not taken responsibility for what he has done to me. In my opinion, anyone capable of such a brutal and unprovoked attack will strike again.

" It is my sincere hope that the court recognizes the viciousness of the crime and the apparent lack of remorse by the defendant and sentences him to an appropriate punishment. Please protect me and other innocent victims from further attacks. Thank you."

[6]The trial court qualified that observation, however, noting that the bail status charge " would have been a simple trial and the violation was obvious, so the admission really did not save the state any resources."

[7]The defendant also claimed that: " (1) with regard to his assault conviction, the court improperly permitted the jury to find that his hands were dangerous instruments, (2) the court improperly admitted certain evidence, (3) the court, in its jury charge, improperly commented on his interest in the outcome of the case, improperly commented on the state's interest in protecting innocent persons from being convicted of crimes and delivered an instruction on reasonable doubt that diluted the state's burden of proof, [and] (4) the evidence did not support the jury's verdict with regard to the assault charge" *State v. Elson*, 116 Conn.App. 196, 199, 975 A.2d 678 (2009). The Appellate Court rejected these claims, and they are not at issue in this certified appeal. See *id.*; see also *State v. Elson*, *supra*, 125 Conn.App. 331.

[8]We note that the defendant does not contend in this certified appeal that the trial court improperly considered the knife at sentencing and, thus, limits his challenge to the trial court's comments regarding his decision to stand trial.

[9]The Appellate Court's dictum relying on *State v. Kelly*, *supra*, 256 Conn. 79-84, was a response to a dissenting opinion issued by Judge Bishop. *State v. Elson*, *supra*, 125 Conn.App. 365-66 and 366-67 n.15. The Appellate Court determined that " the interests of justice do not require that we exercise our supervisory powers to grant the defendant relief" ; *id.*, 361; because " [t]he record in the present case is inherently ambiguous with regard to whether the court, in fact, augmented the defendant's sentence because he elected to stand trial," and " [o]n appeal, the rulings of the trial court are entitled to a presumption of correctness; a reviewing court does not presume error on the basis of an incomplete or ambiguous record." *Id.*, 365.

[10]With respect to these separate opinions, we note that Judge Bishop, joined by Judge Lavine, agreed with the majority's decision to overrule *Wright*, but concluded that, although the defendant had not adequately requested *Golding* review of his unpreserved constitutional claim, he would reach that " issue by invoking our supervisory power over the administration of justice in resolving the present appeal." *State v. Elson*, *supra*, 125 Conn.App. 388-89. After reviewing the record, Judge Bishop then concluded that the case should be remanded for resentencing because the trial court's remarks were distinguishable from those deemed not reversible in *State v. Kelly*, *supra*, 256 Conn. 79-84, and had violated the defendant's due process rights. See *State v. Elson*, *supra*, 125 Conn.App. 395-96, 398-99.

Judge Robinson concurred with the judgment of the Appellate Court, including the majority's decision not to utilize its supervisory powers to reach the defendant's claims, but wrote " separately to emphasize the point that a trial court should never take into consideration whether a person exercised his or her constitutional right to trial by jury and also to dispel any suggestion that this court's decision represents tacit approval for such a practice." *Id.*, 369.

Judge Dupont again concurred in the result separately, concluding that the defendant's

unpreserved constitutional claim was raised adequately under *State v. Wright*, supra, 114 Conn.App. 463, which she would not overrule, but also concluding that the defendant had failed to prove that the trial court violated his due process rights at sentencing. See *State v. Elson*, supra, 125 Conn.App. 386-87.

[11] Accordingly, we leave for another day the first question raised by way of our supplemental briefing order, namely, whether " the doctrine of *State v. Golding*, [supra, 213 Conn. 233], [should] apply to an unpreserved claim that a trial judge commented improperly during sentencing on the defendant's exercise of his constitutional right to a jury trial?"

[12] As the state points out, we acknowledge that the defendant does not expressly request the overruling or abolition of the affirmative request requirement. Nevertheless, given the significant inconsistency between the analysis in *State v. Wright*, supra, 114 Conn.App. 463-64, and our post- *Ramos* case law, we view the defendant's extensive arguments in support of the *Wright* standard as seeking, de facto, the overruling of the affirmative request requirement. Thus, for the purpose of providing clear guidance to litigants and the lower courts in this important area of appellate procedure, we do not intimate that our adoption of the *Wright* analysis urged by the defendant is anything less than complete abandonment of the affirmative request rule. Further, the state's brief, which focuses primarily on the consistency of the affirmative request rule as interpreted by the Appellate Court in this case with existing principles of appellate review, and the inconsistency of *Wright* as a corollary, essentially mirrors the stare decisis considerations in support of rejecting *Wright* -meaning that the state has not been prejudiced by not having the opportunity to brief a specific claim objecting to the elimination of the affirmative request rule.

[13] In determining that *Golding* review was appropriate in *Waz*, this court cited by analogy to *State v. Roy*, 233 Conn. 211, 212, 658 A.2d 566 (1995) (per curiam), wherein the " state [had] conceded that such review is appropriate, despite the defendant's failure to invoke the guidelines set forth in *State v. Golding*, [supra, 213 Conn. 239-40], for review of his unpreserved claim of constitutional error." See *State v. Waz*, supra, 240 Conn. 371 n.11. We note that, in its en banc opinion in this case, the Appellate Court distinguished *Roy* on the ground that it involved a challenge to the sufficiency of the evidence and, therefore, belonged in a category that this court has specifically " disconnected" from the need to brief entitlement to *Golding* review on the ground that a defendant convicted based on insufficient evidence " 'would therefore necessarily meet the four prongs of *Golding* .' " *State v. Elson*, supra, 125 Conn.App. 350, quoting *State v. Adams*, 225 Conn. 270, 276 n.3, 623 A.2d 42 (1993).

We acknowledge that *Roy* appears to have sowed some confusion about whether its principle of permitting review under the principles of *State v. Golding*, supra, 213 Conn. 239-40, despite the defendant's failure to invoke that decision, " applies to all alleged constitutional deprivations or only those that relate to a claim that the evidence was insufficient to convince a trier that every element of an offense has been proven beyond a reasonable doubt." *State v. Rogers*, 38 Conn.App. 777, 788 n.10, 664 A.2d 291, cert. denied, 235 Conn. 918, 665 A.2d 610 (1995), cert. denied, 516 U.S. 1084, 116 S.Ct. 799, 133 L.Ed.2d 747 (1996). The Appellate Court " interpret[ed] the words '[i]n the circumstances of this case' to refer to unpreserved sufficiency claims and not to the particular factual situation presented in *Roy* ." *Id.*; see *State v. Thomas*, 62 Conn.App. 356,

361 n.6, 772 A.2d 611 (same), cert. denied, 256 Conn. 912, 772 A.2d 1125 (2001); see also *State v. Wright*, supra, 114 Conn.App. 462-63 (citing *Roy* and *Waz* in support of proposition that, " in a number of instances, both [our Appellate Court] and our Supreme Court have reviewed an unpreserved alleged constitutional claim despite the defendant's failure to request a *Golding* review"); *State v. Liebowitz*, 65 Conn.App. 788, 805 n.7, 783 A.2d 1108 (citing *Roy* in rejecting the state's claim " that *Golding* review is inappropriate because the defendant, in his brief, summarily states that his confrontation clause rights were violated without any citation to authority or analysis" stating that " [a]lthough the defendant did not provide this court with an overwhelming analysis of his claim, neither an inadequate briefing of a constitutional issue nor a failure to invoke the word 'Golding' prevents us from reviewing the claim"), cert. denied, 259 Conn. 901, 789 A.2d 992 (2001).

[14] Other decisions of this court affording *Golding* review after *Ramos* acknowledged the affirmative request requirement without explicating in detail how the party requesting review complied. See *State v. Cutler*, 293 Conn. 303, 324-25, 977 A.2d 209 (2009); *State v. Bowman*, 289 Conn. 809, 815, 960 A.2d 1027 (2008); *State v. Reid*, 277 Conn. 764, 781, 894 A.2d 963 (2006); see also *State v. Cameron M.*, 307 Conn. 504, 530 n.23, 55 A.3d 272 (2012) (noting state's claim to contrary, and " assum[ing], without deciding, that the defendant's brief adequately makes an 'affirmative request' for *Golding* review of his unpreserved constitutional claim"), cert. denied, U.S. , 133 S.Ct. 2744, 186 L.Ed.2d 194 (2013).

[15] The closest we came to an explanation was a rather circular and perfunctory citation to *Ghant v. Commissioner of Correction*, supra, 255 Conn. 17, for the proposition that " [i]t is not appropriate to engage in a level of review that is not requested." (Internal quotation marks omitted.) See, e.g., *In re Melody L.*, supra, 290 Conn. 154; *State v. Ramos*, supra, 261 Conn. 171-72.

[16] Thus, we disagree with the state's contention that not requiring a defendant to acknowledge explicitly the unpreserved nature of his claim " removes any meaningful consequence of not contemporaneously objecting to a perceived error at trial." A defendant who fails to object to a perceived error at trial faces numerous " meaningful consequence[s]" with respect to the odds of his success on appeal, including raising risks that: (1) he may fail to establish a record adequate for appellate review, thus leading to a loss under the first prong of *Golding* ; (2) his claim may not be deemed constitutional in nature, thus leading to a loss under the second prong of *Golding* ; or (3) his or counsel's inaction may be construed as a waiver of his rights; see, e.g., *State v. Kitchens*, 299 Conn. 447, 467-68, 10 A.3d 942 (2011); thus leading to a loss under the third prong of *Golding* . Moreover, statistical analysis demonstrates that removing this artificial and contrived barrier to the availability of *Golding* review will not hand defendants the keys to the jailhouse door, even in jury instruction cases where the record is, by definition, adequate for review. See *id.*, 522 and n.17 (*Katz, J.*, concurring) (explaining and detailing " statistics showing that reviewing courts rarely conclude that the defendant can prevail on a *Golding* challenge to an improper jury instruction").

[17] Moreover, because this court may, on occasion, exercise its supervisory authority to consider a claim " that has not been raised appropriately under . . . *Golding* " ; *State v. Ramos*, supra, 261 Conn. 172 n.16; even the most stringent affirmative request requirement did not generally relieve

the prudent appellate prosecutor from responding to the merits of unpreserved constitutional claims.

[18] We disagree with the state's argument that the approach to the affirmative request requirement adopted by the en banc Appellate Court in the present case has the salutary effect of being consistent with this court's approach " in cases in which a party seeks review of a state constitutional claim" under *State v. Geisler*, supra, 222 Conn. 684-85. As our recent state constitutional case law makes clear, our " functional," rather than formulaic, approach to *Geisler* leads to the review of adequately briefed state constitutional claims despite technical lapses in the application of that decision's six factor approach to the analysis of such claims. See *State v. Santiago*, 305 Conn. 101, 250-51, 49 A.3d 566 (2012) (reviewing defendant's state constitutional claim that it violates Connecticut constitution for pecuniary gain aggravating factor to duplicate element of capital felony by murder for hire, despite his failure to cite *Geisler* " or outline his state constitutional analysis seeking greater protection using that decision's well-known factors," because " his brief functionally addresses in detail the subject matter of most of the factors, which *Geisler* and other cases indicate are appropriate for an independent state constitutional analysis").

[19] In overruling this body of case law, " we are mindful that [t]his court [often] has . . . acknowledged the significance of stare decisis to our system of jurisprudence because it gives stability and continuity to our case law. . . . The doctrine of stare decisis counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . Nevertheless, [s]tare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. . . . Consequently, [n]one of the foregoing [considerations] . . . necessarily constitutes an insurmountable barrier to a court's reconsideration of its prior precedent. With respect to the doctrine of stare decisis, we repeatedly have observed that [t]he value of adhering to [past] precedent is not an end in and of itself . . . if the precedent reflects substantive injustice. [Because] [c]onsistency must also serve a justice related end . . . [c]onsistency obtains its value best when it promotes a just decision. . . . [E]xperience can and often does demonstrate that a rule, once believed sound, needs modification to serve justice better. . . . Indeed, [i]f law is to have current relevance, courts must have and exert the capacity to change a rule of law when reason so requires. . . . [Thus] [t]his court . . . has recognized many times that there are exceptions to the rule of stare decisis. . . . In accordance with these principles, we have not hesitated to revisit and overrule our prior holdings, including prior holdings applicable to criminal matters . . . once we are convinced that they were incorrect and unjust." (Citations omitted; internal quotation marks omitted.) *State v. Moulton*, 310 Conn. 337, 362-63 n.23, 78 A.3d 55 (2013).

[20] For additional discussion of the adequacy of the record for review, including the state's claims to the contrary, see footnote 42 of this opinion and accompanying text.

[21] But see *State v. Rice*, 172 Conn. 94, 103, 374 A.2d 128 (1976) (rejecting similar claim with no analysis beyond observation that " [a]n essential ingredient in any plea bargaining situation is the

recognition by both the prosecution and the defense that a trial may produce a less favorable result for the defendant").

[22] In distinguishing *State v. Kelly*, supra, 256 Conn. 23, from the present case, Judge Bishop described the claim presented and decided in *Kelly* as " focus[ing] . . . on whether the court lengthened a defendant's sentence as punishment for exercising the right to trial," rather than " on whether the court impermissibly took the defendant's [decision to] exercise [that right] into consideration at sentencing." *State v. Elson*, supra, 125 Conn.App. 395 n.8. The defendant echoes this analysis, and contends that his constitutional claim in this case is focused on the impropriety of the trial court's *consideration* of his trial election, rather than the impropriety of the *elongation* of his sentence as a consequence of that consideration. We disagree with this assessment of the claims raised and decided in *Kelly* . Rather, we agree with the Appellate Court majority's view of the claims described in *Kelly*, namely, that the issue therein was framed based on the trial court's consideration of the defendant's exercise of his right to trial, rather than founded " solely upon a theory of sentence augmentation" *Id.*, 367 n.15. As noted by the Appellate Court majority, we stated in *Kelly* the impropriety of the action of *considering*, at sentencing, a defendant's decision to elect a trial; see *State v. Kelly*, supra, 79-80; but required the defendant to prove sentence augmentation to establish a " clear showing" of a due process violation. *Id.*, 84. In any event, the distinction between consideration and augmentation is, for the practical purpose of establishing a constitutional violation requiring reversal, is one that lacks a meaningful difference. Under *Kelly*, consideration and augmentation are inseparable with respect to establishing the existence of a constitutional violation requiring reversal; augmentation is necessary to establish the requisite harm. Put differently, our adoption of a totality of the circumstances analysis in *Kelly* indicates a rejection of an approach deeming consideration of the defendant's trial election to be, in essence, structural constitutional error requiring per se reversal.

[23] We noted in *Kelly* that the trial " court's complete statement regarding the factors that it had taken into account in sentencing the defendant was as follows: ' *The general factors which I have considered in this matter is whether or not there was a plea or a complete trial, and that is one of the legal factors to consider in sentencing* . Whether the motive accomplished-of accomplishing the act was either need-was need or greed, the defendant's degree of involvement, the violence and/or its potential for violence, physical injury to the victim, the mental injury to the victim, the relationship between the [d]efendant and the victim, the degree of planning, and the statutory seriousness of the offense convicted of.

" 'Mitigating factors which I have considered are age of the defendant, intelligence, school record or work record, prior criminal record, record since the offense in question, remorse, either drug addiction or alcohol involvement, mental problems, attitude, family support and community support.

" 'The law requires me to consider each and every single one of those factors in pronouncing the sentence and I have done so.

" 'I have given special consideration to five factors that I have noted here: the age of [the victim] a week after her sixteenth birthday; the age of [the defendant], a high school teenager; the lack of closure of this matter for a period of eleven years; the fact that this sentence is not punishing [the

defendant] for any matters for which he is currently awaiting disposition and/or trial.

" 'The final factor that I have considered is the rules on proportionality.'" (Emphasis added.) *State v. Kelly*, supra, 256 Conn. 80 n.27.

[24] We cited, as exemplars of this majority approach: *United States v. Tracy*, 12 F.3d 1186, 1202 (2d Cir. 1993); *United States v. Medina-Cervantes*, 690 F.2d 715, 716-17 (9th Cir. 1982); *Frank v. Blackburn*, 646 F.2d 873, 884-85 (5th Cir. 1980), cert. denied, 454 U.S. 840, 102 S.Ct. 148, 70 L.Ed.2d 123 (1981); *United States v. Araujo*, 539 F.2d 287, 291-92 (2d Cir.), cert. denied sub nom. *Rivera v. United States*, 429 U.S. 983, 97 S.Ct. 498, 50 L.Ed.2d 593 (1976); *United States v. Thompson*, 476 F.2d 1196, 1201 (7th Cir.), cert. denied, 414 U.S. 918, 94 S.Ct. 214, 38 L.Ed.2d 154 (1973); *Santana v. State*, 677 So.2d 1339, 1340 (Fla. App. 1996); *State v. Brown*, 131 Idaho 61, 72-73, 951 P.2d 1288 (App. 1998); *State v. Eastman*, 1997 ME 39, 691 A.2d 179, 184 (Me. 1997); *Mitchell v. State*, 114 Nev. 1417, 1428-29, 971 P.2d 813 (1998); *State v. Bonilla*, 1999-NMCA 096, 127 N.M. 566, 570, 985 P.2d 168 (App. 1999); *State v. Fitzgibbon*, 114 Or.App. 581, 586-87, 836 P.2d 154 (1992); and *State v. Tiernan*, 645 A.2d 482, 487-88 (R.I. 1994). See *State v. Kelly*, supra, 256 Conn. 81-82.

[25] As examples of the minority approach, we cited: *United States v. Capriola*, 537 F.2d 319, 321 (9th Cir. 1976); *Hess v. United States*, 496 F.2d 936, 938-39 (8th Cir. 1974); *People v. Wilson*, 43 Colo.App. 68, 71, 599 P.2d 970 (1979); and *Johnson v. State*, 274 Md. 536, 542-43, 336 A.2d 113 (1975). See *State v. Kelly*, supra, 256 Conn. 82.

[26] We observed that, " [c]onfronted with claims similar to that of the defendant in this case, courts in other jurisdictions generally have required remarks by a trial judge to threaten explicitly a defendant with a lengthier sentence should the defendant opt for a trial, or indicate that a defendant's sentence was based on that choice." *State v. Kelly*, supra, 256 Conn. 82. We noted further that, when " a trial court employed more ambiguous language, however, courts generally have rejected claims that the trial court infringed on the defendant's rights." *Id.*, 83; citing *State v. Tiernan*, 645 A.2d 482, 487 (R.I. 1994) (rejecting defendant's due process challenge to trial court's observation at sentencing that defendant had " required [the victim] to testify by exercising his right to stand trial" [internal quotation marks omitted]).

[27] See General Statutes (Rev. to 2003) § 53a-35a (6) and (8); see also General Statutes § 53a-59 (b) (first degree assault is class B felony); General Statutes § 53a-95 (b) (unlawful restraint in first degree is class D felony); General Statutes (Rev. to 2003) § 53a-40b (1) (ten year sentence enhancement for felonies committed while on pretrial release).

[28] In contrast, it would be inappropriate to use our supervisory power to adopt a new rule when doing so would mandate administrative or policy changes beyond the judicial milieu. See *State v. Lockhart*, supra, 298 Conn. 576-77 (deferring to legislature and declining to utilize supervisory power to adopt rule requiring confessions to be recorded to be admissible where its effect would go beyond judicial actors to require all law enforcement agencies to record confessions where defendants were protected by " procedures already in place to prevent the admission into evidence of involuntary or untrustworthy confessions, namely, the voluntariness determination that must be made by the trial court"); *State v. Marquez*, 291 Conn. 122, 165-67, 967 A.2d 56 (declining to utilize supervisory authority to mandate three procedural changes to identification

procedures because " development and implementation of identification procedures 'should continue to be the province of the law enforcement agencies of this state'" to be evaluated judicially on case-by-case basis for unnecessary suggestiveness), cert. denied, 558 U.S. 895, 130 S.Ct. 237, 175 L.Ed.2d 163 (2009).

[29] It is well settled that "[t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . .

" [W]e recently clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . We made clear . . . that this inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State v. Darryl W.*, 303 Conn. 353, 371-73, 33 A.3d 239 (2012); see also Practice Book § 60-5.

[30] A comprehensive catalog of cases wherein we have utilized our supervisory powers to articulate procedural rules in the criminal justice context is set forth in Justice Palmer's concurring opinion in *State v. Lockhart*, supra, 298 Conn. 601-603 n.12. Analysis of these cases, and several decided after *Lockhart*, reveals that they can be divided into two different categories. In the first category are cases wherein we have utilized our supervisory power to articulate a procedural rule as a matter of policy, either as holding or dictum, but without reversing convictions or portions thereof. In the second category are cases wherein we have utilized our supervisory powers to articulate a rule or otherwise take measures necessary to remedy a perceived injustice with respect to a preserved or unpreserved claim on appeal. Although we recently have noted that, "[o]ur cases have not always been clear as to the reason for this distinction" ; *State v. Diaz*, 302 Conn. 93, 107 n.11, 25 A.3d 594 (2011); a review of the cases in both categories demonstrates that, in contrast to the second category, the first category consists of cases where there was no perceived or actual injustice apparent on the record, but the facts of the case lent themselves to the articulation of prophylactic procedural rules that might well avert such problems in the future. Examples of the first category include: *State v. Medrano*, 308 Conn. 604, 631, 65 A.3d 503 (2013) (The court utilizes its supervisory power to " direct our trial courts in the future to refrain from instructing jurors, when a defendant testifies, that they may specifically consider the defendant's interest in the outcome of the case and the importance to him of the outcome of the trial. Instead, we instruct the trial courts to use the general credibility instruction to apply to a criminal defendant who testifies."); *State v. Pena*, 301 Conn. 669, 684, 22 A.3d 611 (2011) (declining to use supervisory power to overrule *State v. Huey*, 199 Conn. 121, 505 A.2d 1242 [1986], but stating that " we suggest that our trial courts in future sentencings refrain from expressing disagreement

with the jury's verdict"); *State v. Ouellette*, 295 Conn. 173, 191-92, 989 A.2d 1048 (2010) (when state attests to witness' cooperation at that witness' sentencing hearing, sentencing court must " inquire into the nature of any plea agreement between the state and the witness, and any representations concerning that agreement made during the trials at which the witness testified"); *State v. Ledbetter*, 275 Conn. 534, 578-79, 881 A.2d 290 (2005) (requiring jury instruction concerning certain risks inherent in eyewitness identification procedures), cert. denied, 547 U.S. 1082, 126 S.Ct. 1798, 164 L.Ed.2d 537 (2006); *State v. Padua*, 273 Conn. 138, 178-79, 869 A.2d 192 (2005) (requiring appeals court to address defendant's insufficiency of evidence claim first, if claim is properly briefed and sufficient record exists, even if another meritorious claim would result in new trial, because successful sufficiency claim would render new trial unnecessary); *Duperry v. Solnit*, 261 Conn. 309, 329, 803 A.2d 287 (2002) (when criminal defendant pleads not guilty by reason of mental disease or defect and state substantially agrees with defendant's plea, court must canvass defendant to ensure that plea is voluntary and made with full awareness of consequences); *State v. O'Neil*, 261 Conn. 49, 74-76, 801 A.2d 730 (2002) (revising and directing specific version of " Chip Smith" charge in future cases); *State v. Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002) (using supervisory power to avoid " danger of juror misunderstanding" by " direct[ing] our trial courts in the future to refrain from instructing jurors that one who uses a deadly weapon on the vital part of another 'will be deemed to have intended' the probable result of that act and that from such a circumstance the intent to kill properly may be inferred"); *State v. Griffin*, 253 Conn. 195, 209-10, 749 A.2d 1192 (2000) (prohibiting use of " two-inference" jury instruction as potentially misleading jury as to application of reasonable doubt standard); *State v. Delvalle*, 250 Conn. 466, 475-76, 736 A.2d 125 (1999) (precluding jury instruction stating that reasonable doubt is not doubt suggested by " 'ingenuity of counsel'"); *State v. Schiappa*, 248 Conn. 132, 168, 728 A.2d 466 (prohibiting use of jury instruction that requirement of proof beyond reasonable doubt is rule intended to " protect the innocent and not the guilty" [internal quotation marks omitted]), cert. denied, 528 U.S. 862, 120 S.Ct. 152, 145 L.Ed.2d 129 (1999); *State v. Coleman*, supra, 242 Conn. 541-42 (concluding that record indicated that reversal was not necessary after adopting rule requiring sentencing court, upon defendant's request, to articulate its reasons for imposing greater sentence after trial than that previously imposed under terms of withdrawn plea agreement); *State v. Gould*, 241 Conn. 1, 14-15, 695 A.2d 1022 (1997) (requiring that videotaped deposition testimony be replayed in open court, under supervision of trial judge, and in presence of parties and counsel, rather than in jury room, but holding no prejudice from failure to do so in that case); *State v. Patterson*, 230 Conn. 385, 397-400, 645 A.2d 535 (1994) (adopting unwaivable supervisory rule for future cases requiring trial judge to be present in court to oversee voir dire in criminal trial, but determining that defendant had waived his objection to judge's absence as constitutional matter); and *State v. Holloway*, 209 Conn. 636, 645-46, 553 A.2d 166 (establishing procedure to be followed during jury selection when defendant raises claim that state has peremptorily excluded juror on basis of race pursuant to *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S.Ct. 1712, 1715, 90 L.Ed.2d 69 [1996]), cert. denied, 490 U.S. 1071, 109 S.Ct. 2078, 104 L.Ed.2d 643 (1989).

Examples of the second category include: *State v. Polanco*, 308 Conn. 242, 256-58, 61 A.3d 1084

(2013) (overruling merger approach articulated in *State v. Chicano*, 216 Conn. 699, 584 A.2d 425 [1990], cert. denied, 501 U.S. 1254, 111 S.Ct. 2898, 115 L.Ed.2d 1062 [1991], with vacatur approach when defendant is convicted of greater and lesser included offenses); *State v. Rose*, supra, 305 Conn. 605-606 (adopting rule of per se reversal when defendant is compelled to stand trial in prison garb); *State v. Connor*, 292 Conn. 483, 518-19, 533, 973 A.2d 627 (2009) (remanding case to trial court for findings after adopting rule requiring trial court, upon finding that mentally ill or incapacitated criminal defendant is competent to stand trial and to waive right to counsel at that trial, to make additional determination that defendant is competent to conduct trial proceedings without counsel); *State v. Gore*, 288 Conn. 770, 787-90, 955 A.2d 1 (2008) (upholding reversal of conviction after articulating rule that when criminal defendant seeks to waive right to trial by jury without written waiver, court must canvass defendant to ensure that waiver is knowing, intelligent and voluntary); *State v. Santiago*, supra, 245 Conn. 340 (remanding case for further proceedings after expanding scope of inquiry required for general allegations of juror misconduct when alleged misconduct results from racial bias of juror or jurors); *State v. Brown*, 235 Conn. 502, 528-30, 668 A.2d 1288 (1995) (ordering remand for further proceedings after adopting rule requiring trial judge presented with allegations of juror misconduct to conduct preliminary inquiry into such allegations); and *State v. Jones*, 234 Conn. 324, 347-50, 662 A.2d 1199 (1995) (requiring bifurcation of jury trial proceedings in capital felony cases when defendant is charged under General Statutes § 53a-54b [3], requiring proof of prior intentional murder conviction, and placing burden on state to demonstrate lack of need for bifurcated proceeding). We have also utilized our supervisory powers in a very limited manner to address claims of and deter repeated instances of prosecutorial impropriety. For discussion of these cases, see footnote 31 of this opinion.

[31]As noted by the state, we also have utilized our supervisory authority to reach an unpreserved claim and reverse an individual conviction as a sanction " to redress repeated and deliberate misconduct by a prosecutor seeking to increase the likelihood of conviction even though that conduct does not necessarily require reversal as a due process violation. . . . [W]e pa[id] particular attention to the fact that the prosecutor knew or should have known that the conduct was improper and was part of a pattern of similar misconduct in other cases. We exercise[d] our supervisory authority in order to protect the rights of defendants and to maintain standards among prosecutors throughout the judicial system rather than to redress the unfairness of a particular trial. We [did] so in order to send a strong message that such conduct will not be tolerated." (Internal quotation marks omitted.) *State v. Payne*, 260 Conn. 446, 451-52, 797 A.2d 1088 (2002); see also *State v. Cohane*, 193 Conn. 474, 499-500, 479 A.2d 763 (relying on supervisory powers in reversing conviction after finding violation pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 [1963], that merited reversal), cert. denied, 469 U.S. 990, 105 S.Ct. 397, 83 L.Ed.2d 331 (1984); *State v. Ubaldi*, 190 Conn. 559, 576, 462 A.2d 1001 (utilizing supervisory power to reverse conviction because " [w]here a prosecutor . . . interjects remarks [during argument] deliberately intended to undermine the rulings of the trial court to the prejudice of the defendant, his conduct is so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal"), cert. denied, 464 U.S.

916, 104 S.Ct. 280, 78 L.Ed.2d 259 (1983). Our use of our supervisory authority to resolve these claims in *Payne* and *Ubaldi* remains consistent with the unifying principle that the supervisory power should be utilized when necessary to protect the system's integrity; leaving the prosecutorial violations in those cases unaddressed would have adversely affected public perception of the criminal justice system—at least in those particular judicial districts.

[32] Compare *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (adopting presumption of vindictiveness when trial court imposes more severe sentence after new trial challenging original conviction, and "to assure the absence of such a motivation," requiring "that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" and "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding"), with *Alabama v. Smith*, 490 U.S. 794, 801, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) (*Pearce* presumption of vindictiveness does not apply to higher sentence imposed after jury trial following successful challenge to guilty pleas).

[33] We did, however, note that *Coleman* did not raise any preservation issues because, although the defendant did not request an articulation of the second trial judge's reason for imposing a greater sentence, he did argue that the second trial judge could not impose a greater sentence, and the state did not object to the court's "consideration of the defendant's supervisory authority claim" *State v. Coleman*, supra, 242 Conn. 542 n.22.

[34] We further observed that this "rule places little, if any, additional burden on trial judges, who frequently are asked to articulate the reasons underlying particular sentencing decisions. Furthermore, the number of cases in which the rule will be applicable is likely to be extremely small." *State v. Coleman*, supra, 242 Conn. 542.

[35] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[36] We noted that, in contrast, under *Bordenkircher v. Hayes*, supra, 434 U.S. 363, the prosecutor may "[threaten] increased charges during the course of plea negotiations and mak[e] good on the threat if the defendant refuses to enter a plea"; *State v. Revelo*, supra, 256 Conn. 514; but emphasized that the trial court may not do so when participating in negotiations; the court may, however, apprise the defendant of the potential for a greater sentence should he not take the plea offer. See id., 516.

[37] "[I]n certain circumstances, it may be difficult to draw a meaningful distinction between 'enhancing' the punishment imposed on an accused who exercises a constitutional right and denying him the 'leniency' that he claims he would deserve if he waived that right. . . . Although the

distinction between refusing to show leniency to an accused who insists on asserting a constitutional right and punishing an accused for asserting that right may, at times, be a fine one, there is no difficulty in discerning what occurred in this case: the trial court imposed a more severe sentence on the defendant solely because he asserted his right to a judicial ruling on his motion to suppress. In doing so, the trial court unfairly punished the defendant for exercising that right in violation of the federal due process clause." (Citation omitted.) *State v. Revelo*, supra, 256 Conn. 513-14.

This "fine distinction" between extending leniency to defendants who plead guilty and penalizing those who exercise their right to a trial has recently been criticized as an analytical fiction that "changes merely the form of the problem, not the substance" and therefore "fails to alleviate the constitutional difficulties." C. Hessick & F. Hessick, "Recognizing Constitutional Rights at Sentencing," 99 Cal. L. Rev. 47, 64 (2011); see also id., 63 ("[t]he refusal to grant a defendant leniency that is given to others because the defendant performed some act-exercising his right to a jury-seems analytically indistinct from increasing that defendant's punishment because he performed that same act").

[38] In his concurring and dissenting opinion, Judge Bishop described our criminal justice system as "almost completely reliant on the plea bargaining process for the disposition of criminal cases," citing statistics from the Judicial Branch's biennial reports for the fiscal years of 2004-2005, 2005-2006, 2006-2007 and 2007-2008, demonstrating that approximately 95 percent of criminal cases are resolved by plea bargaining, rather than trial. *State v. Elson*, supra, 125 Conn.App. 393 n.7. The most recent statistics for the fiscal years of 2010-2011 and 2011-2012 indicate that Judge Bishop's observation retains its currency. See Connecticut Judicial Branch, Biennial Report and Statistics 2010-2012, pp. 50-51 (indicating that 5.1 percent, or 177 out of 3450, of criminal cases were disposed via trial in 2010-2011 and 4.8 percent, or 164 out of 3386, of criminal cases were disposed via trial in 2011-2012), available at <http://jud.ct.gov/Publications/BiennialReport2010-12.pdf> (last visited April 21, 2014).

[39] We acknowledge that there is no indication, in the record or otherwise, that judicial comments of this ilk are a pervasive or repeated occurrence, either systemically or on the part of the trial judge in this case, and we emphatically do *not* insinuate to the contrary. Thus, our use of supervisory powers to reverse the sentence in this case is not one intended as a penalty or "message," such as that sent in the prosecutorial misconduct cases discussed in footnote 31 of this opinion. We emphasize, however, that we view the very nature of the trial judge's comments in this case as implicating the public's perception of the fairness of the judicial system, despite their apparent infrequency.

[40] For a more detailed discussion of *State v. Kelly*, supra, 256 Conn. 79-82, see part I B of this opinion.

[41] See, e.g., *State v. Santiago*, 305 Conn. 101, 164, 49 A.3d 566 (2012) (for due process purposes, "determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it . . . including both the characteristics of the accused and the details of the interrogation" [internal quotation marks omitted]); *State v. Marquez*, supra, 291 Conn. 161 ("any analysis of unnecessary suggestiveness must be conducted in light of the

totality of the circumstances and must focus specifically on the presentation of the photographic array itself as well as the behavior of law enforcement personnel to determine if the procedure was designed or administered in such a way as to suggest to the witness that a particular photograph represents the individual under suspicion"); see also *State v. D'Antonio*, supra, 274 Conn. 693 n.22 (concluding that trial court's failure to follow rule set forth in *State v. Niblack*, 220 Conn. 270, 280, 596 A.2d 407 [1991], precluding judge who participated in plea bargaining from presiding at trial and sentencing is not due process violation that " require[s] per se reversal, but rather is protected by appellate review of the record for actual indications that the appearance of impartiality has been shattered"); see also *State v. D'Antonio*, supra, 680, 691-92 (violation of prophylactic *Niblack* rule, which " established a clear and bright line rule standing for the proposition that it is improper for a trial judge to preside over a defendant's trial after having participated actively in unsuccessful plea negotiations in the case" is not by itself plain error " requir[ing] reversal when the record demonstrates that the defendant otherwise has received a fair trial and sentencing before an impartial court, and that the core danger of judicial vindictiveness has not been realized").

[42] In his concurring opinion, Judge Robinson relied on our decision in *State v. Chambers*, 296 Conn. 397, 413-14, 994 A.2d 1248 (2010), in support of his conclusion that, in the absence of an articulation by the trial judge, the record was inadequate to sustain the Appellate Court's invocation of its supervisory powers. *State v. Elson*, supra, 125 Conn.App. 375-77. *Chambers* is, however, inapposite. In that case, we deemed the record inadequate to determine, under either *Golding* or our supervisory authority, whether a meeting in chambers between the court, the prosecutor and defense counsel was a critical stage of the proceeding at which the defendant had a constitutional right to be present. *State v. Chambers*, supra, 410-11. We noted the fact-intensive nature of that particular inquiry and concluded that, in the absence of an articulation or rectification, the record was inadequate because the only evidence concerning " what transpired in chambers consist[ed] of two passing references by [the trial court] indicating merely that there had been such a meeting." *Id.*, 413. This case is readily distinguishable from *Chambers* because the record in the present case contains a transcript of the sentencing proceeding that details exactly what happened in the courtroom while, in essence, the record in *Chambers* contained no information regarding what had transpired in the judge's chambers outside the presence of the defendant.

[43] We acknowledge that this does happen on rare occasion. See *State v. Kelly*, supra, 256 Conn. 82 (" I'm the kind of a judge where you get a fair trial . . . [but] [i]f I find that after the trial that you didn't have a defense at all, you're going to get the maximum, because you're playing games with me" [internal quotation marks omitted]), quoting *United States v. Cruz*, 977 F.2d 732, 733 (2d Cir. 1992); *United States v. Hutchings*, 757 F.2d 11, 13 (2d Cir. 1985) (The judge stated at the sentencing that the trial was " a 'total waste of public funds and resources . . . there was no defense in this case. [The defendant] was clearly and unquestionably guilty, and there should have been no trial.'"); *People v. Mosko*, 190 Mich.App. 204, 210, 475 N.W.2d 866 (1991) (" I am very concerned about this case . . . because it was a case that went to trial . . . [a]nd to get up on the stand and . . . [be] sanctimonious and you're self-righteous and you're guilty, that seems to me

to be something that is-that is beyond [decent]").

[44] Like Judge Bishop, we do not discount the importance of victim impact evidence in the sentencing determination. See *State v. Elson*, supra, 125 Conn.App. 397 and 397-98 n.11; see also *State v. Coleman*, supra, 242 Conn. 546-48 (describing trial testimony and information in presentence investigation report about traumatic effects of sexual assault on victim). Nevertheless, the exercise of a defendant's right to a trial, which includes its concomitant effect on victims or witnesses from the act of having to testify, remains an improper factor to consider in sentencing. See *Abdul-Maleek v. State*, 426 Md. 59, 73-74, 43 A.3d 383 (2012) (remanding for resentencing because trial court's remarks referring to victim having to testify twice could lead to inference that defendant was being penalized for exercising his right to trial de novo in higher trial court); *People v. Jackson*, 474 Mich. 996, 707 N.W.2d 597 (2006) (remanding case for resentencing because although " crime was extremely brutal . . . the sentencing judge stated that she did not believe that [the] defendant was entitled to the same sentence as his accomplices, 'who were able to step up to the plate and say what they did and to admit their guilt,' while [the] defendant subjected the victims to 'having to testify'"); *State v. Ambriez*, Docket No. L-03-105137, 2004-Ohio-5230, 2004 WL 2334176, * 4-5 (Ohio App. September 24, 2004) (concluding that trial court improperly augmented sentence on basis of trial election because 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'"); *State v. Reid*, 140 Or.App. 293, 299, 915 P.2d 453 (1996) (remanding for resentencing because, although " defendant's empathy-or lack thereof-is appropriate to a court's consideration of what sentence should be imposed," trial court's comments about putting daughter through trauma of trial resulted in " the exercise of his constitutional right to a trial [being] woven into the court's departure findings"); cf. *State v. Holmes*, Docket No. L-08-1034, 2009-Ohio-6255, 2009 WL 4270260, *3, 5 (Ohio App. November 20, 2009) (concluding that trial court's comments criticizing defendant for " 'violat[ing] [the victim] a second time by forcing us to go to trial in this case'" were improper but could not have affected sentence because " trial court made its comments after sentencing, without indicating whether its considerations were tied to the sentence" [emphasis omitted]); but see *State v. Farnham*, 479 A.2d 887, 892 (Me. 1984) (" [a]lthough [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) (rejecting due process challenge to trial court's observation at sentencing that defendant had " 'required [the victim] to testify' by exercising his right to stand trial").

[45] Like Judge Bishop, we are not " insensitive to the trauma realized by victims who must often relive the experiences of criminal acts inflicted upon them," and recognize that 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." *State v. Elson*, supra, 125 Conn.App. 397 n.11. To this end, the exercise of our supervisory authority in this appeal is calculated to minimize the need for new sentencing proceedings, with a retraumatizing effect, that might result from inherently subjective appellate evaluations under *State v. Kelly*, supra, 256 Conn. 79-80, of trial courts'

comments referring to a defendants' election to stand trial. The bright line rule that we articulate herein better illustrates the outer bounds of what trial judges permissibly may say in sentencing a defendant without raising due process concerns.

[46] In determining that resentencing is appropriate under our supervisory powers, we find instructive the balancing of interests utilized in determining whether to order a new trial under our supervisory powers as a remedy for prosecutorial impropriety; see footnote 31 of this opinion; namely, " the extent of prejudice to the defendant; the emotional trauma to the victims or others likely to result from reliving their experiences at a new trial; the practical problems of memory loss and unavailability of witnesses after much time has elapsed; and the availability of other sanctions for such misconduct." (Internal quotation marks omitted.) *State v. Diaz*, 302 Conn. 93, 107 n.11, 25 A.3d 594 (2011), quoting *State v. James G.*, 268 Conn. 382, 423, 844 A.2d 810 (2004). Under these factors, and particularly with respect to the victim in this case, as the defendant points out, our remedy in this certified appeal will not require her to relive the trauma created by the defendant's actions. The victim's previous statement is on record and may be considered by the trial court at the defendant's resentencing, should she desire not to return to court.

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No negative treatment in subsequent cases