ROBINSON, J., concurring. I concur with the majority that the trial court's sentencing of the defendant, Zachary Jay Elson, should be affirmed but write 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. I share the same concern expressed by Judge Bishop in his concurring and dissenting opinion, namely, that such a practice by a court has the potential to chill a defendant's decision to exercise his or her fundamental right to trial by jury. Under the facts of the present case, however, I would not invoke our supervisory authority to reach the defendant's sentencing claim. Accordingly, I concur in the judgment of the majority.

At the outset, I believe it necessary to address why a trial court should not consider among its factors at sentencing whether a defendant chose to exercise his or her constitutional right to trial by jury. In our judicial system, the court plays a crucial role in promoting "public confidence in the integrity . . . of the judiciary." (Internal quotation marks omitted.) *Swenson* v. *Dittner*, 183 Conn. 289, 297, 439 A.2d 334 (1981). This role requires the court to assume the duties both of "impartial and detached" decision maker; *State* v. *Floyd*, 10 Conn. App. 361, 369, 523 A.2d 1323, cert. denied, 203 Conn. 809, 525 A.2d 523, cert. denied, 484 U.S. 859, 108 S. Ct. 172, 98 L. Ed. 2d 126 (1987); and "minister of justice." *Cameron* v. *Cameron*, 187 Conn. 163, 169, 444 A.2d 915 (1982).

To fulfill its duty as impartial and detached decision maker, the court must avoid the appearance of bias or impropriety during proceedings. See id. ("[T]he trial judge should be cautious and circumspect in his language and conduct. . . . A judge should be scrupulous to refrain from hearing matters which he feels he cannot approach in the utmost spirit of fairness . . . ." [Citation omitted; internal quotation marks omitted.]). To fulfill its duty as minister of justice, the court must act to safeguard a criminal defendant's constitutional rights during criminal proceedings. *State* v. *Phidd*, 42 Conn. App. 17, 33, 681 A.2d 310 ("The United States and Connecticut constitutions have afforded individuals certain minimum rights in criminal proceedings. The trial court safeguards these rights and ensures that none is violated during a criminal prosecution."), cert. denied, 238 Conn. 907, 679 A.2d 2 (1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1115, 137 L. Ed. 2d 315 (1997). Therefore, the public's confidence in the judiciary directly correlates to the public's perception as to whether the court is fulfilling its duties. Consequently, any action by the

court suggesting that it has strayed from these duties has the effect of undermining the public confidence in the judiciary.

When a court considers a defendant's exercise of a constitutional right in a nonneutral manner, such as a factor used at sentencing, it crosses that fine line that separates proper and improper administration of justice; see *State* v. *Floyd*, supra, 10 Conn. App. 369; and gives the impression that the court has strayed from its duty to safeguard the constitutional rights of the criminal defendant. By taking such factors into consideration during sentencing, a court can send a powerful message that a criminal defendant has the *ability* to exercise a constitutional right but the *consequences* may be less than favorable. In effect, by taking away the defendant's ability to decide freely whether to exercise a constitutional right, the court fails to safeguard the right and, thus, fails to fulfill one of its duties. As a result, the criminal defendant becomes less willing to exercise his or her fundamental right and the public loses confidence in the integrity of the judiciary.

With this being said, I agree with Judge Bishop that it "will have a chilling effect on a defendant's exercise of [his right to trial by jury]" if the trial court can consider the defendant's choice as "a significant sentencing factor . . . ." Judge Bishop and I reach the proverbial fork in the road, however, on the issue of whether we should review the defendant's claim in the present case. The main issue of contention centers on whether this court should exercise its supervisory authority to protect the integrity of the judiciary.

The defendant asks this court to exercise its supervisory power to review his sentencing claim because, as he contends, the trial court improperly considered "the fact that he proceeded to trial rather than accept a plea bargain extended by the state" as a significant factor during sentencing. In support of his contention, the defendant relies solely on the following statement made by the court during sentencing: "We've all heard the defendant's apology. I don't know how sincere it is, but it is certainly unfortunate that it comes so late in the process. If the defendant had been truly apologetic, he wouldn't have put the victim through the trial. To a large extent, it seems to me that the defendant's apology represents thinking of himself rather than the victim."

Determining whether this court should exercise its supervisory power to review the defendant's claim requires us to take a closer look at the doctrine of supervisory authority. "In certain instances, *dictated by the interests of justice*, we may, sua sponte, exercise our inherent supervisory power to review an unpreserved claim that has not been raised appropriately under [*State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989)] or [the] plain error [doctrine]." (Emphasis added.) *State* v. *Ramos*, 261 Conn. 156, 172 n.16, 801

A.2d 788 (2002). "Appellate courts possess an inherent supervisory authority over the administration of justice. . . . The standards that [are] set under this supervisory authority are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as due process of law . . . . Rather, the standards are flexible and are to be determined in the interests of justice. . . . [O]ur supervisory authority [however] is not a form of free-floating justice, untethered to legal principle. . . . [T]he integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of our supervisory powers." (Citation omitted; internal quotation marks omitted.) *State* v. *Santiago*, 245 Conn. 301, 332–33, 715 A.2d 1 (1998). "Our supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts." *State* v. *Hines*, 243 Conn. 796, 815, 709 A.2d 522 (1998).

"Ordinarily, our supervisory powers are invoked to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy. . . . As our Supreme Court explained, [s]upervisory 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. . . . At the same time, [a]lthough [w]e previously have exercised our supervisory powers to direct trial courts to adopt judicial procedures . . . we also have exercised our authority to address the result in individual cases . . . because [certain] conduct, although not rising to the level of constitutional magnitude, is unduly offensive to the maintenance of a sound judicial process." (Citations omitted; internal quotation marks omitted.) *Somers* v. *Chan*, 110 Conn. App. 511, 533, 955 A.2d 667 (2008). Thus, the supervisory power has been invoked in at least two circumstances:[1] (1) to announce a new rule of procedure that the court believes is necessary to protect the integrity of the judiciary; see, e.g., *State* v. *Gore*, 288 Conn. 770, 787–88, 955 A.2d 1 (2008) (supervisory power invoked to adopt rule that "when a defendant . . . indicates that he wishes to waive a jury trial in favor of a court trial in the absence of a signed written waiver by the defendant, the trial court should engage in a brief canvass of the defendant in order to ascertain that his or her personal waiver of the fundamental right to a jury trial is made knowingly, intelligently and voluntarily"); *State* v. *Ledbetter*, 275 Conn. 534, 575–80, 881 A.2d 290 (2005) (supervisory power invoked to adopt rule requiring jury instruction where identification procedure fails to provide adequate warning to witness, unless no significant risk of misidentification), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006); and (2) to reverse a judgment of conviction in

the interest of justice. See, e.g., *State* v. *Ubaldi*, 190 Conn. 559, 572, 575, 462 A.2d 1001 (supervisory power invoked to reverse judgment of conviction on basis of prosecutorial impropriety), cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983).

In the present case, the defendant asks this court to reverse the judgment and remand his case for resentencing in the interest of justice. Although the defendant did not preserve his claim at the trial court level, he nevertheless argues that this court may invoke its supervisory authority sua sponte to consider his claim. The case relied on by the defendant for the proposition that this court may invoke its supervisory authority sua sponte to consider his claim is *State* v. *Ramos*, supra, 261 Conn. 156, a case very similar to the present case.[2]

Although *Ramos* found that an appellate court may exercise its supervisory power sua sponte to reverse a judgment of conviction in the interest of justice, it does not change the requirement that, in order to consider an alleged error, whether preserved or unpreserved, the court must have an adequate record before it upon which to base its decision. See *State* v. *Chambers*, 296 Conn. 397, 414, 994 A.2d 1248 (2010). As this court has long recognized: "Speculation and conjecture have no place in appellate review. . . . Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the defendant's claim] would be entirely speculative." (Internal quotation marks omitted.) *Narumanchi* v. *DeStefano*, 89 Conn. App. 807, 815, 875 A.2d 71 (2005); see also *State* v. *Brunetti*, 279 Conn. 39, 63, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). Furthermore, "it is the [defendant's] burden to provide an adequate record for review. . . . It is, therefore, the responsibility of the [defendant] to move for an articulation . . . where the trial court has failed to state the basis of a decision . . . . In the absence of any such attempts, we decline to review [the] issue." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 232, 828 A.2d 64 (2003).

Our Supreme Court's recent decision in *State* v. *Chambers*, supra, 296 Conn. 397, is instructive as to whether this court should invoke its supervisory powers in the present case. In *Chambers*, the defendant was charged with one count of assault in the first degree, one count of robbery in the first degree and one count of conspiracy to commit robbery in the first degree. Id., 400–401. Six days after the start of a jury trial, defense counsel requested that the defendant be permitted to testify in the narrative, if the defendant elected to testify, because of ethical concerns. Id., 401. The following day, the trial court held an in-chambers meet-

ing regarding the request at which only defense counsel and the prosecutor were present. Id. Afterward, the trial court held a hearing, at which the defendant was present, and granted defense counsel's motion to allow the defendant to testify in the narrative. Id., 401–402. The defendant testified in the narrative and subsequently was convicted of all three charges. Id., 406–407, 409–10.

On appeal, the defendant claimed that he was denied due process of law when he was excluded from the in-chambers meeting, arguing that the meeting was a critical stage of the proceeding at which he had a constitutional right to be present. Id., 410–11. Because the defendant had not raised the issue at the trial court level, he sought review under both *Golding* and the court's supervisory authority. Id.

In reviewing the defendant's claim, our Supreme Court stated that "whether a particular [in-chambers] proceeding qualifies as a critical stage of the prosecution is a necessarily fact intensive inquiry. . . . [I]t is imperative that the record reveal the scope of discussion that transpired." (Internal quotation marks omitted.) Id., 412–13. Thereafter, the court found that the record was deficient and did not permit review of the claim because "the only evidence *in the record* regarding what transpired in chambers consist[ed] of two passing references by [the trial court] indicating merely that there had been such a meeting." (Emphasis in original.) Id., 413. The court noted that the defendant had the burden of providing an adequate record and that he had failed to request an articulation or rectification of the record. Id., 414. On the basis of the limited record, the court held that it would "not speculate about the constitutional significance of the in-chambers discussions or reverse the defendant's conviction on the basis of that speculation. Accordingly, irrespective of whether review is sought under *Golding* or pursuant to our supervisory authority, we conclude that the record is inadequate for us to review the defendant's constitutional challenge to his absence from that proceeding." Id.

Similarly, in the present case, pursuant to *State* v. *Kelly*, 256 Conn. 23, 82, 770 A.2d 908 (2001), review of claims that a trial court augmented the defendant's sentence "as a punishment for exercising his or her constitutional right to a jury trial [is] . . . based on the totality of the circumstances. . . . [T]he burden of proof in such cases rests with the defendant." Therefore, in order to review the defendant's claim, this court must consider the facts in the record to discern whether, based on the totality of the circumstances, the court improperly enhanced the defendant's sentence.

Under the present facts, however, we are unable to evaluate the totality of the circumstances because the defendant did not provide this court with an adequate

record upon which to review his claim. The only evidence provided in the record regarding the court's consideration of the defendant's choice to exercise his constitutional right is the statement set forth previously, which was made following the victim's statement and the defendant's statement to the court. As evidenced by the well reasoned opinions in this case, however, it is clear to me that reasonable minds can disagree as to whether the court's statement concerning the defendant's remorse actually was factored into the court's sentence. More specifically, the court's statement is simply ambiguous and does not disclose whether the court considered the defendant's exercise of his constitutional right as a sentencing factor or merely opined as to the defendant's sincerity. Consequently, I do not believe that we should exercise our supervisory authority when the record before us only indicates that there is but the possibility that the trial court penalized the defendant for taking advantage of his constitutional right to trial by jury. Furthermore, although it may have been awkward for the defendant, I do not agree that the defendant's preservation of the issue would have been extraordinarily difficult and would have served no useful purpose.

In light of the uncertainty, it was incumbent on the defendant to seek an articulation from the court that set forth the factors it considered when it imposed the sentence. In the absence of such articulation, any attempt on our part to discern what weight, if any, the court accorded to the defendant's exercise of his fundamental right would require us to speculate, a practice in which this court will not engage.

For the foregoing reasons, I respectfully concur in the majority opinion.

[1] Our Supreme Court also has exercised its supervisory authority in other circumstances, such as to relax the strict application of the appellate rules; see *State* v. *Reid*, 277 Conn. 764, 778–79, 894 A.2d 963 (2006); and to reach a defendant's due process claim even though the claim fell outside the purview of the statute under which he was appealing. See *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).

[2] In *Ramos*, the defendant was convicted of, among other crimes, two counts of murder. *State* v. *Ramos*, supra, 261 Conn. 158. On appeal, the defendant argued that "the trial court improperly instructed the jury as to the provocation exception to the justification of self-defense." Id., 169. In the body of the opinion, our Supreme Court determined that the defendant had not properly preserved this claim and, furthermore, that he was not entitled to review under *Golding* or the plain error doctrine because he had not "affirmatively . . . request[ed] review under these doctrines." Id., 171. Notwithstanding this finding, the court stated, in a footnote, that "[i]n certain instances, dictated by the interests of justice, we may, sua sponte, exercise our inherent supervisory power to review an unpreserved claim that has not been raised appropriately under the *Golding* or plain error doctrines." Id., 172 n.16. After extensive review of the jury instruction, however, the court held that "the interests of justice do not require that we review the defendant's claim regarding the provocation instruction." Id.