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LANDAU, J., concurring. I agree with the conclusion reached by the majority, but write separately to express my considerations with respect to the analysis in part II of the opinion. The majority relies on *State v. Payne*, 63 Conn. App. 583, 777 A.2d 731 (2001), rev'd on other grounds, 260 Conn. 446, 797 A.2d 1088 (2002), to conclude that the defendant did not satisfy the third prong of *Golding*<sup>1</sup> and, therefore, that his claim of constitutional error cannot be sustained.

In *Payne*, the court adopted the reasoning of *State v. Cooper*, 38 Conn. App. 661, 669–70, 664 A.2d 773, cert. denied, 235 Conn. 908, 665 A.2d 903 (1995), cert. denied, 517 U.S. 1214, 116 S. Ct. 1837, 134 L. Ed. 2d 940 (1996), in which this court held that the defendant could not satisfy the third prong of *Golding* because, at trial, he implicitly *waived* a challenge to the alleged constitutional deprivation that was the basis of his claim on appeal. *State v. Payne*, supra, 63 Conn. App. 588. *Payne* held that a defendant could not prevail under *Golding* on a claim that he implicitly waived at trial. *Id.*<sup>2</sup>

Respectfully, I do not read *Cooper* in the manner in which it was applied in *Payne* and its progeny. The basis of the court's holding in *Cooper* was a waiver analysis, not a *Golding* analysis. The reasoning of the *Cooper* court is set out in part I A of the opinion. *State v. Cooper*, supra, 38 Conn. App. 664–71. In that case, the defendant claimed that the court violated his constitutional rights by improperly instructing the jury “that the highway in question is a public highway. So you need not deal with that element and you need not make that finding.”<sup>3</sup> (Internal quotation marks omitted.) *Id.*, 664. He did not preserve his claim at trial and sought review pursuant to *Golding*.

The *Cooper* court began a *Golding* analysis, first concluding that the issue was reviewable in that the record was adequate, and second, that the claim was of constitutional magnitude. *Id.*, 665–66. The court then turned to the third prong of *Golding*, i.e., whether a constitutional violation clearly existed, noting that the statute under which the defendant had been charged contained the element of operating a motor vehicle on a public highway. *Id.*, 666.

The defendant in *Cooper* argued that the court's instruction violated the doctrine against mandatory presumptions enunciated in *Sandstrom v. Montana*, 442 U.S. 510, 517–24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). *State v. Cooper*, supra, 38 Conn. App. 666–67. This court concluded, however, that it “need not decide whether the *Sandstrom* doctrine applied to [the defendant in *Cooper*] because the defendant waived his right to require the state to prove the public highway element

of the offense beyond a reasonable doubt.” Id., 667.

The court continued: “In the usual *Golding* situation, the defendant raises a claim on appeal which, while not preserved at trial, at least was not waived at trial. The due process clause prescribes that the defendant has a right to require the fact finder to determine each element of an offense charged beyond a reasonable doubt. . . . Under the circumstances, however, the record reveals that the defendant conceded the element in question, and, therefore, waived his right to require the fact finder to determine the element.” (Citations omitted; internal quotation marks omitted.) Id., 667. The court continued to travel the “waiver road” for the next several pages of the opinion until it concluded that the defendant had “waived his due process right to require the state to prove that element.” Id., 670. The court never returned to *Golding*. Although I clearly see how one can be led down the *Golding* path, I am convinced that the *Cooper* court arrived at its *holding* on the basis of a waiver analysis.

My reading suggests that a *Cooper* analysis does not provide us with the rule that “a defendant cannot prevail under *Golding* on a claim that he implicitly waived at trial.” *State v. Payne*, 63 Conn. App. 588. *Cooper* holds that a waiver is a waiver is a waiver. Consequently, I would resolve the defendant’s claim by way of a waiver analysis, rather than by way of a *Golding* examination.

For those reasons, I respectfully concur.

<sup>1</sup> *State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).

<sup>2</sup> This court also applied the *Payne-Cooper* analysis in *State v. Corona*, 69 Conn. App. 267, 271–73, 794 A.2d 565, cert. denied, 260 Conn. 935, 802 A.2d 88 (2002).

<sup>3</sup> The defendant in *Cooper* had been charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a (a), which provides in relevant part: “No person shall operate a motor vehicle while under the influence of intoxicating liquor . . . on a public highway of this state . . . .”