KATZ, J., with whom NORCOTT and PALMER, Js., join, concurring. The issue presented in this case—under what circumstances a defendant will be deemed to have waived appellate review of a constitutional challenge to a jury instruction under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989)—is one of the most significant decisions with which this court recently has wrestled. This court's jurisprudence, namely our well established doctrines of waiver and induced error, dictate that *Golding* review of unpreserved instructional errors should be foreclosed *only* when the record reflects that the defendant, through defense counsel, knowingly and intentionally relinquished his objection to the error. Instead, the majority conflates and mischaracterizes this court's precedents in order to lend credence to a wholly novel system of categorizing unpreserved trial errors under which, essentially, a defendant will be deemed to have waived *Golding* review of an instructional claim merely by participating in a charging conference and failing to object to jury instructions proposed by the court or the state.[1] In order to justify this approach, the majority employs a public policy analysis that contravenes the purpose and underlying principles, established over forty years of jurisprudence, of appellate review of unpreserved trial errors.

I

In setting forth its new rule, the majority relies on a flawed analysis of this court's case law concerning waiver of *Golding* review of trial errors.[2] In order to provide a context for this analysis, I begin with the fundamental principles and purpose of *Golding* review. It is well settled that, as a general rule, appellants are not entitled to appellate review of errors that were not distinctly raised at trial. See *State* v. *Evans*, 165 Conn. 61, 66, 327 A.2d 576 (1973). Nonetheless, nearly forty years ago in *Evans*, this court recognized "two situations that may constitute 'exceptional circumstances' such that newly raised claims can and will be considered by this court. The first is . . . [when] a new constitutional right not readily foreseeable has arisen between the time of trial and appeal. . . . The second 'exceptional circumstance' may arise [when] the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." (Citation omitted.)[3] Id., 70. Thereafter, in *State* v. *Golding*, supra, 213 Conn. 239–40, the court reformulated the standard announced in *State* v. *Evans*, supra, 61, after the state had urged it 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." *State* v. *Golding*, supra, 239. The court decided "neither to

adopt a pure plain error standard for alleged constitutional violations, nor to attempt to reconcile past *Evans* decisions. Instead, [i]t articulate[d] guidelines designed to facilitate a less burdensome, more uniform application of the present *Evans* standard in future cases involving alleged constitutional violations that are raised for the first time on appeal." Id. Relying on the methodology of *State* v. *Whistnant*, 179 Conn. 576, 427 A.2d 414 (1980), the court adopted the now familiar four part *Golding* test.[4]

This history reflects that the rationale of *Golding* and its predecessors is that "fundamental constitutional rights are of such importance that appellate courts should review claims of alleged constitutional violations even when a defendant fails to take an exception to the alleged violation at the trial court level." *State* v. *Wright*, 114 Conn. App. 448, 461, 969 A.2d 827 (2009). The *Evans/Golding* rubric was intended to be capacious enough to rectify any constitutional trial court errors that affect the outcome of a criminal case. "[B]ecause constitutional claims implicate fundamental rights, it . . . 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." *State* v. *Canales*, 281 Conn. 572, 581, 916 A.2d 767 (2007).

Despite our recognition of the essential function of *Golding* review, we also have recognized that a defendant, through defense counsel, may, in a few narrowly defined instances, waive such review. Within the specific context of jury instructions, we have drawn from the traditional understanding of waiver as a knowing and intentional relinquishment of a right; see *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); in holding that a defendant waives appellate review of even a properly preserved instructional error only when the record demonstrates that the defendant affirmatively and knowingly accepted the instruction.[5] See *State* v. *Whitford*, 260 Conn. 610, 632–33, 799 A.2d 1034 (2002) (defendant waived preserved challenge to instructional error because "the defendant's conduct at trial indicated that he accepted the supplemental charge as sufficient to cure the claimed instructional error"); *State* v. *Jones*, 193 Conn. 70, 87–89, 475 A.2d 1087 (1984) (defendant waived preserved challenge to erroneous charge by participating in fashioning supplemental instruction and failing to object to that instruction). Recently, we explicitly extended the waiver doctrine to *Golding* review of instructional errors. See *State* v. *Fabricatore*, 281 Conn. 469, 478, 915 A.2d 872 (2007) ("A defendant in a criminal prosecution

may waive one or more of his or her fundamental rights. . . . 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." [Citations omitted; internal quotation marks omitted.]). Our cases applying waiver to *Golding* review are consistent with prior cases applying waiver to appellate review, generally, in that they indicate that a defendant will waive *Golding* review only by affirmatively agreeing to a *specific* jury instruction discussed on the record. See, e.g., *State* v. *Holness*, 289 Conn. 535, 543, 958 A.2d 754 (2008) (defense counsel waived challenge to jury instruction by agreeing to limiting instruction suggested by state); *State* v. *Fabricatore*, supra, 481 (defense counsel waived challenge to jury instruction by failing to object to instruction, expressing satisfaction with instruction, arguing that instruction was proper and adopting language of instruction in his summation).

The majority goes well beyond the circumscribed approach to waiver outlined in these cases by improperly expanding our waiver cases into three categories: (1) express acknowledgment of and agreement with an instruction; (2) trial conduct consistent with acceptance of the instruction, even when there was no on-the-record consideration of the instruction; and (3) acquiescence to an instruction following one or more opportunities to review the instruction. I agree with the majority that waiver occurs in the first category of cases—when the record demonstrates a defendant's express acknowledgment and knowing acceptance of a specific instruction. The remaining two categories do not accord, however, with our established case law and the majority misconstrues the holdings and approaches of *State* v. *Fabricatore*, supra, 281 Conn. 469, and *State* v. *Brewer*, 283 Conn. 352, 927 A.2d 825 (2007), in order to support these novel categories of waiver.

The majority relies on *Fabricatore* for the proposition that this court has found waiver when there was no on-the-record discussion of the challenged jury instruction, but the defendant engaged in other trial conduct consistent with acceptance of the instruction. This represents a gross misreading of the facts in *Fabricatore*. As a preliminary matter, it is clear that, in that case, there had been an on-the-record discussion concerning the later challenged instruction on self-defense, which included the duty to retreat.[6] *State* v. *Fabricatore*, supra, 281 Conn. 475 n.10 (providing excerpt of discussion between defense counsel and trial court). Additionally, the state had requested an instruction on the duty to retreat, thereby explicitly putting the defendant on notice that that limitation on the defense was under consideration. Moreover, we specifically noted: "[D]efense counsel not only failed to object to the instruction as given or to the state's original request to charge the jury with the duty to retreat, but clearly expressed his satisfaction with that instruction, and in

fact subsequently argued that the instruction as given was proper. Indeed, defense counsel himself addressed the duty to retreat in his own summation." Id., 481. The facts in *Fabricatore* therefore fit squarely within our previously established doctrine of waiver, which required explicit acknowledgment and acceptance of a later challenged instruction. See *State* v. *Holness*, supra, 289 Conn. 543; *State* v. *Whitford*, supra, 260 Conn. 632–33; *State* v. *Jones*, supra, 193 Conn. 87–89.

In addition, the majority relies on *Brewer* for the proposition that this court has recognized yet a third category of cases within which an appellant waives review of an instructional error by failing to object to, and acquiescing in, the instructions following one or more opportunities to review them and contends that the present case, in which defense counsel acquiesced generally to a set of jury instructions, is analogous to *Brewer*. Again, these conclusions represent a misapprehension of our case law. In *Brewer*, defense counsel and the trial court discussed on the record the later challenged instruction and defense counsel explicitly acquiesced to the instruction as given. *State* v. *Brewer*, supra, 283 Conn. 357. We noted: "Defense counsel took no exceptions from the instructions given by the trial court. The state, however, registered its objection to the trial court's inclusion of a lesser included offense charge. The trial court explained its reasons for including the lesser included offense charge, and then specifically asked defense counsel if the charge as read was *what had been requested*. Defense counsel responded: 'That is correct, Your Honor.' " (Emphasis in original.) Id. In addition, we emphasized: "This is not an instance of defense counsel's failure to take exception to the instruction as given, which included the language that he now attacks, but rather is a case in which he specifically expressed his satisfaction with that instruction when queried by the trial court. As we recently concluded in [*State* v. *Fabricatore*, supra, 281 Conn. 481–82], '[u]nder this factual situation, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial.' " *State* v. *Brewer*, supra, 360–61. It is apparent that this case involved explicit discussion, on the record, of the specific jury instruction later challenged by the defendant, followed by the defendant's express agreement to that instruction.[7] Accordingly, *Brewer* lends no credence to the majority's conclusion that we have long recognized the facts in the present case to constitute waiver.

Rather than acknowledge the limited nature of waiver reflected in these cases, the majority unduly focuses on the purportedly unworkable holding in *State* v. *Ebron*, 292 Conn. 656, 682, 975 A.2d 17 (2009). I recognize that our response to the Appellate Court's treatment of the doctrines of induced error and waiver[8] in

that case may not have been entirely clear. Nonetheless, our case law, consistent with the principles and purpose of *Golding*, provides a workable framework for evaluating when the conduct of defense counsel forecloses *Golding* review of a constitutional challenge, including jury instructions. As suggested in *Fabricatore*, the proper lens through which to view this inquiry derives from the well established principle of waiver. "Waiver is an intentional relinquishment or abandonment of a known right or privilege. . . . It involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim." (Internal quotation marks omitted.) *State* v. *Velez*, 113 Conn. App. 347, 357–58, 966 A.2d 237 (2009).

Accordingly, consistent with our case law, waiver is effectuated by what this court has deemed "active inducement" of an error or any other intentional relinquishment or abandonment of a known right or privilege. Moreover, waiver may be implied from defense counsel's conduct only when that conduct demonstrates that counsel affirmatively and knowingly forwent any objection to the later challenged instruction. Consistent with this framework, within the specific context of jury instructions, waiver includes both actively inducing an error by providing the later challenged instruction to the court (which we have called induced or invited error) as well as affirmatively embracing an instruction offered by opposing counsel or the court, so long as that conduct demonstrates that counsel affirmatively and knowingly forwent any objection to the later challenged instruction.[9]

Because this approach requires a case-by-case analysis to determine when waiver occurs, which has not been entirely helpful to the Appellate Court, I suggest that we turn to related federal case law to further illuminate the distinction between waived error and unpreserved error. Cf. *State* v. *Evans*, supra, 165 Conn. 69 ("Only 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. The same general rule has been adopted by the federal courts."). Federal review of unpreserved trial errors—so called "plain error" review—is governed by rule 52 (b) of the Federal Rules of Criminal Procedure.[10] In applying this rule, the federal courts distinguish between errors that are merely "forfeited" (what we

call unpreserved errors), which may be reviewed, and those that are "waived," which cannot be reviewed. See, e.g., *Government of the Virgin Islands* v. *Rosa*, 399 F.3d 283, 290–91 (3d Cir. 2005) ("[s]tated most simply, where there was forfeiture, we apply a plain error analysis; where there was waiver, we do not" [internal quotation marks omitted]). With the exception of this distinction in terminology, the approach of the federal courts is consistent with that of this court. The United States Supreme Court has explained: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (Internal quotation marks omitted.) *United States* v. *Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). In applying the waiver doctrine, federal courts have emphasized that, in order to find waiver, the defendant who allegedly waived the error must have done so knowingly, intentionally and deliberately. For example, the Tenth Circuit Court of Appeals has explained: "[W]aiver is accomplished by intent, but forfeiture comes about through neglect . . . . Waiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it." (Citations omitted.) *United States* v. *Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009).

Federal cases applying the waiver doctrine reveal three guiding principles regarding when a defendant, through defense counsel, will be deemed to have waived appellate review by agreeing to a later challenged error. First, to establish waiver, the record, itself, must demonstrate the party's awareness of an issue and his deliberate decision to forgo a challenge; such conditions are never presumed or inferred.[11] See, e.g., *United States* v. *Zubia-Torres*, 550 F.3d 1202, 1207 (10th Cir. 2008) ("The record is simply devoid of any evidence that defense counsel knew of the argument or considered making it. We will not presume a waiver or infer one from a record as sparse as this."); *United States* v. *Hamilton*, 499 F.3d 734, 736 (7th Cir. 2007) ("The government asks us to pick through the record with a fine-tooth comb and infer that the defendant's lawyer must have thought the instruction okay, in which event his failure to object would be deliberate . . . . But we cannot find any indication of that, and doubts should be resolved against a finding of waiver . . . for by precluding judicial review it invites a challenge that the lawyer's failure to object constituted ineffective assistance of counsel." [Citations omitted.]), cert. denied, 552 U.S. 1129, 128 S. Ct. 951, 169 L. Ed. 2d 782 (2008); *United States* v. *Perez*, 116 F.3d 840, 845 (9th Cir. 1997) ("[w]hat we are concerned with is evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right").

A second, but related, principle holds that, in the context of challenges to jury instructions, waiver results only when: (1) the *specific* instruction that is later chal-

lenged is brought to the attention of defense counsel; (2) that instruction is discussed on the record; and (3) defense counsel nonetheless explicitly and actually approves of the instruction.[12] See *United States* v. *Conner*, 583 F.3d 1011, 1026 (7th Cir. 2009) (The court concluded that waiver had been established when "[the defendant] did not merely fail to object to the court's instruction regarding aiding and abetting. During the charging conference, [defense] counsel expressly stated that she preferred [the later challenged] aiding and abetting instruction over the alternative. At no time in this discussion did she indicate that she objected to instructing the jury on aiding and abetting at all."); *United States* v. *Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009) ("Faced with the parties' incompatible positions regarding the proposed definition . . . the [D]istrict [C]ourt proposed a third option. Presented with this option, [the defendant] indicated that the instruction was satisfactory. In these circumstances, by agreeing that the instruction was satisfactory, [the defendant] waived the right to challenge the instruction on appeal."); *United States* v. *Sanders*, 520 F.3d 699, 702 (7th Cir. 2008) (finding waiver when, during colloquy, defense counsel expressly and repeatedly stated that later challenged instruction was acceptable to him); *United States* v. *Perez*, supra, 116 F.3d 845 ("[w]aiver occurred . . . because the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction"); *United States* v. *Lakich*, 23 F.3d 1203, 1207–1208 (7th Cir. 1994) (finding waiver when trial court and counsel had been alerted to issue with court's original jury instruction by note from jury, court gave attorneys overnight to consider ways to remedy problem, and defense counsel agreed to precise instruction defendant later challenged). Courts decline to find waiver when any one of these elements is missing. See *United States* v. *Wisecarver*, 598 F.3d 982, 988 (8th Cir. 2010) (The court concluded that no waiver had been established when it was "not clear that [defense counsel's statement] was an 'intentional relinquishment or abandonment' of a known right . . . . He did not, for example, explicitly say that he had no objection to the [later challenged] aspect of the instruction or that it was a correct statement of the law that he was willing to be bound by."); *United States* v. *DiSantis*, 565 F.3d 354, 361 (7th Cir. 2009) (defense counsel thanking judge after judge rejected counsel's proposed instruction not "the . . . type of actual approval of a jury instruction that would constitute waiver"); *United States* v. *Hamilton*, supra, 499 F.3d 736 ("a failure to object, which for all we know was inadvertent—there were nearly fifty pages of instructions, and while the judge invited objections he didn't ask the defendant's lawyer whether the lawyer agreed to the instructions to which he did not object, or ask the lawyer specifically about [the later challenged] instruction—is not an '*intentional* relin-

quishment of a known right,' the canonical definition of waiver" [emphasis in original]); *Government of the Virgin Islands* v. *Rosa*, supra, 399 F.3d 293 (no waiver when "[t]here is no indication that [the defendant's] attorney knew of and considered the controlling law, and despite being aware of the [flaw], accepted the flawed instruction").

Third, there may indeed be a rare instance of tactical waiver of an improper instruction that a defendant later challenges on appeal. While findings of tactical waiver are necessarily fact-bound, and therefore difficult to reduce to clear rules, they do reveal a common thread. Tactical waiver may result from a failure to object; see *United States* v. *Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995); but courts find waiver only when the tactical value of defense counsel's action or inaction, as reflected in the record, is obvious and indisputable, and when the other requirements for waiver are met.[13] See *United States* v. *Quinones*, 511 F.3d 289, 321–22 (2d Cir. 2007) ("We have no doubt that it was a tactical decision for [the] defendants . . . to agree that a life sentence was the only alternative to death. . . . The tactical value of such a concession is obvious."). As a result, most of the cases dealing with tactical waiver do so in the context of an evidentiary claim where the strategic value in not objecting is easiest to recognize. See *United States* v. *Cooper*, 243 F.3d 411, 416 (7th Cir. 2001) ("[t]his was clearly a strategic decision rather than a mere oversight"); *United States* v. *Yu-Leung*, supra, 1122 ("[i]t is apparent that [the defendant's] failure to object at trial to the challenged testimony was a strategic choice"); *United States* v. *Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) ("[u]nder these circumstances, we have no difficulty concluding that [the defendant] has waived appellate review of this evidentiary claim").

II

Ignoring both this court's precedent and well established federal jurisprudence concerning waiver, the majority attempts to use public policy concerns to justify its fabrication of both a new framework for categorizing waivers and a new rule pursuant to which a defendant waives *Golding* review by participating in a charging conference pursuant to our rules of practice. The majority's analysis of the relevant public policy concerns, however, is unsound. First, it ignores the fundamental principles and purposes of *Golding* review, namely the essential role that *Golding* review plays in the protection of individual constitutional rights. Second, it contradicts several of the implicit understandings and presumptions this court has embraced concerning the value of appellate review of error, and the role of trial and appellate counsel in that process. Finally, it fails to recognize the detrimental effect that the new rule likely will have on the court system and overestimates the positive impact of the

new rule in encouraging trial judges to provide meaningful opportunity for the review of jury instructions.

To understand the practical effects of the majority's new rule, and thereby to evaluate the relevant public policy concerns, it is critical to examine closely the application of that rule in the present case. Counsel for the defendant, Marvin Kitchens, essentially participated in several on-the-record conferences in which he declined to raise any concerns related to the instruction at issue in this appeal. The trial court then provided the parties with written jury instructions. At a subsequent conference, the prosecution raised several issues unrelated to the challenged instruction. The trial court asked defense counsel if he had had an opportunity to review the instructions, to which counsel replied, "my copy is downstairs, but I didn't have any major revisions." The court then ended the conference without further comment from the attorneys.

The majority emphasizes several facts about the present case, seemingly in an attempt to demonstrate that defense counsel had a "meaningful" opportunity to review and object to the instructions. First, the majority notes that the trial court asked defense counsel several times whether he was going to file a request to charge and defense counsel declined to do so. I note, however, that a failure to file a request to charge has no bearing in any *Golding* inquiry because, had defense counsel done so, the error would have been preserved properly for direct appellate review. See *State* v. *Terwilliger*, 294 Conn. 399, 406, 984 A.2d 721 (2009) ("A party may preserve for appeal a claim that a jury instruction was improper either by submitting a written request to charge or by taking an exception to the charge as given. Practice Book § 16-20."). Second, the majority notes that defense counsel, the prosecution and the trial court engaged in discussions about unrelated parts of the instruction. I cannot, however, understand how a discussion of one jury instruction bears on whether the failure to object to a *different* jury instruction meets the requirement for waiver, namely, that it was knowing and intelligent. See part III of this concurring opinion. Third, the majority emphasizes the prosecutor's repeated attempts to obtain his preferred instructional language. Again, I fail to comprehend the connection between a prosecutor's actions and whether defense counsel's failure to object to a set of jury instructions constitutes waiver. Accordingly, the majority's opinion effectively stands for the proposition that a defendant waives *Golding* review of an instructional error, even if the challenged instruction is never specifically discussed, as long as the trial court provides a set of written jury instructions, allows defense counsel adequate time to review those instructions, and then holds a charging conference in which defense counsel acquiesces, generally, to the instructions. In other words, if the trial court follows the procedures set forth in the Practice Book

concerning jury instructions, a defendant will be denied access to *Golding* review.

Accordingly, the practical effect of the majority's approach contravenes the underlying principles and purpose of *Golding*—the elimination of the hurdle of "failure to preserve" constitutional claims at the trial court level in order to facilitate appellate review for unpreserved constitutional claims.[14] See part I of this concurring opinion. In devising a rule that depends on the use of the charging conference to determine whether the defendant has waived his right to challenge a defective instruction, the majority, in essence, establishes that participation in that conference and advanced notice of the instructions provide a sufficient basis upon which to presume that, when the defendant nevertheless fails to object to the instruction, he is acting intentionally, as opposed to being merely negligent. This approach undermines this court's exhortation that *Golding* review is intended to *break down* any categorical or absolute bars to appellate review by foreclosing review of an entire class of trial errors. Moreover, by concluding that mere failure to object to an improper instruction constitutes a waiver of the defendant's appellate rights, the majority essentially singles him out to bear the consequences of the error despite the equal obligations on the trial court and the prosecutor to identify and to correct the error.

The majority's approach also flies in the face of several fundamental understandings, implicit in our *Golding* jurisprudence, about the nature and value of appellate review of criminal convictions and our expectations of advocates at both the trial and appellate level. First, the majority's approach undervalues the role that appellate review of unpreserved errors plays in fulfilling the appellate courts' essential functions. Appellate courts serve "two basic functions: (1) correction of error (or declaration that no correction is required) in the particular litigation; and (2) declaration of legal principle, by creation, clarification, extension or overruling. These are . . . respectively the corrective and preventive functions." J. Phillips, Jr., "The Appellate Review Function: Scope of Review," 47 Law & Contemp. Probs. 1, 2 (Spring 1984). In its approach to public policy concerns, the majority focuses solely on the first function and fails to acknowledge the importance of the review of unpreserved errors to our ability to declare and clarify the law. Instructing the jury is a particularly critical point in a criminal trial; indeed, "[a]n improper instruction has a watershed effect on the jury's understanding of the law." D. Carter, "A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases," 46 U. Kan. L. Rev. 947, 960 (1997–1998). Beginning with *Golding* itself, this court has set forth or clarified substantial questions regarding the propriety of jury instructions in cases in which we reviewed unpreserved instructional errors.

See, e.g., *State* v. *Cook*, 287 Conn. 237, 250, 947 A.2d 307 (2008) (defendant charged with carrying dangerous weapon entitled to instruction that jury must consider factual circumstances surrounding alleged threat); *State* v. *Flowers*, 278 Conn. 533, 547–48, 898 A.2d 789 (2006) (clarifying proper intent instruction for burglary charge and setting forth circumstances under which closing argument rectifies improper charge); *State* v. *Scott*, 256 Conn. 517, 528–29, 779 A.2d 702 (2001) (clarifying proper instruction for sexual assault in first degree by fellatio); *State* v. *Golding*, supra, 213 Conn. 238 (concluding that amount obtained by fraud is essential element of crime, and therefore, court must instruct jury concerning it). Indeed, for unpreserved claims advancing novel theories or seeking to overrule established law regarding jury instructions, direct review is the *only* opportunity for the appellate courts to clarify and correct the law, as habeas relief under an ineffective assistance of counsel theory would be foreclosed. See *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 461–62, 880 A.2d 160 (2005) ("[C]ounsel's failure to advance novel legal theories or arguments does not constitute ineffective performance. . . . Nor is counsel required to change then-existing law to provide effective representation." [Citations omitted; internal quotation marks omitted.]), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006).

Second, in contravention of our presumptions that counsel is both ethical and competent, the majority's approach allows appellate judges to presume, from nearly silent records, that trial counsel's failure to object to an instruction derived from strategic contrivance rather than mere negligence. It is well established that we presume that all trial advocates act within the ethical standards set forth in our Rules of Professional Conduct. See, e.g., *State* v. *Chambers*, 296 Conn. 397, 420, 994 A.2d 1248 (2010) (presuming that defense attorney ethically invoked rule of professional responsibility); *State* v. *Cator*, 256 Conn. 785, 794, 781 A.2d 285 (2001) ("[i]n the absence of evidence to the contrary, this court may presume that the attorney has performed his ethical obligation to inform his client of any potential conflict"). Although we also presume that attorneys have the competence to provide adequate representation to their clients; see Rules of Professional Conduct 1.1;[15] we do not expect any attorney, especially trial attorneys working under the pressure and intensity of an ongoing trial, to perform flawlessly. We must also recognize that appellate attorneys, with the benefit of time and hindsight, are often able to identify errors inadvertently missed by trial counsel. D. Carter, supra, 46 U. Kan. L. Rev. 951 ("the evolving expertise of appellate counsel assures the presentation of prejudicial [trial] errors"). Our *Golding* jurisprudence is founded on these principles, and any limitation of its scope must

take into account the understanding that most trial errors derive from negligence rather than strategic contrivance. See id. ("the American appellate system is premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel" [internal quotation marks omitted]).

Rather than recognize these principles, the majority's approach depends upon an assumption that the defendant's attorney behaved unethically by knowingly failing to correct a mistake of law in violation of rule 3.3 of the Rules of Professional Conduct.[16] I would not presume, except in the most obvious of cases, that the defendant has engaged in a tactical decision to forgo an objection to an instruction that he knew to be faulty. In addition to the aforementioned presumption that attorneys behave ethically, I express my reluctance for several other reasons. First, it simply makes no sense for an attorney who recognizes that the court has made a mistake in the instructions to say nothing to the trial court to correct the error in the hopes of challenging the instruction later on appeal, convincing the reviewing court that a true constitutional error was made and that it was harmful to the defendant. In light of the statistics showing that reviewing courts rarely conclude that the defendant can prevail on a *Golding* challenge to an improper jury instruction,[17] not only would an attorney engaging in this behavior be unethical, but he would be incompetent as well. See D. Carter, supra, 46 U. Kan. L. Rev. 951 ("[n]othing is gained from sandbagging, except a disparaged reputation or an attorney grievance claim"); H. Friendly, "Is Innocence Irrelevant? A Collateral Attack on Criminal Judgments," 38 U. Chi. L. Rev. 142, 158 (1970) ("[it] is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed"). Second, appellate judges are not mind readers. See *United States* v. *Frokjer*, 415 F.3d 865, 871 (8th Cir. 2005) (declining to find tactical waiver because record not clear enough to determine counsel's state of mind). Therefore, any finding that waiver has resulted from a strategic choice should be dependent upon a *demonstrated* inconsistency, apparent from the record, between defense counsel's trial strategy, as reflected in counsel's course of action at trial, and the strategy reflected in the later challenge to the error. See, e.g., *United States* v. *Cooper*, supra, 243 F.3d 416 (counsel waived objection to substance of tip by referring to tip throughout opening statement and closing argument in order to bolster theory of case); *United States* v. *Coonan*, supra, 938 F.2d 1561 (counsel waived objection to evidence concerning violent gang activities by welcoming admission of evidence in order to convince jury that defendant was not violent or brutal enough to gain admission into gang). Again, such a case, by definition,

will be rare, and will, in the majority of cases, be governed by our traditional waiver doctrine. See footnote 13 of this concurring opinion. Accordingly, although it may be necessary to acknowledge the existence of strategic waiver, I do not believe that that exception should drive the rule.

Moreover, the majority's new rule likely will have a detrimental impact on the effective functioning of the court system. As a preliminary matter I note that the number of cases in which a defendant obtains reversal of his conviction on the basis of *Golding* review of instructional errors is negligible. See footnote 17 of this concurring opinion. Therefore, attorneys well versed in our *Golding* jurisprudence do not see review under its umbrella as a panacea. Collapsing the distinction between negligence and intentional waiver serves merely to delay resolution of the claimed error and to increase the workload of our trial courts by requiring the defendant to bring a habeas petition for ineffective assistance of counsel. The vast majority of appellants requesting *Golding* review of instructional errors also seek review of properly preserved errors or *Golding* review of unpreserved noninstructional errors. Under the majority's approach, these appellants will be entitled to a direct appeal of some of their claims before an appellate court, but will have to pursue their unpreserved instructional error claims in a separate habeas proceeding. Even those appellants who seek review only of *Golding* instructional error claims will have to raise those claims on direct appeal in order to preserve them for habeas review.[18] At best, therefore, this approach merely shifts the venue, and thus the responsibility for evaluating these claims to the habeas courts, and, at worst, actually *increases* the net workload of the judicial system.

Finally, I disagree that the majority's approach is likely to impact significantly whether trial courts provide written copies of proposed instructions, afford time to review those instructions and then hold on-the-record charging conferences. First, the majority's rule is premised on the presumption that trial judges will not fulfill their duty to ensure a fair trial without the dangling carrot of limited appellate review. This represents an undeservedly skeptical view of the trial judges of this state that is entirely unsupported by any data or anecdotal evidence. Similarly, the majority's approach is predicated on the presumption that defense counsel will not submit requests to charge or request charging conferences when they recognize potential problematic or important issues relating to the jury instructions. As set forth previously, this contravenes our established presumptions that defense counsel acts competently and ethically, as well as the understanding that *Golding* review provides no incentive for defense counsel to purposefully withhold meritorious legal claims. Finally, even if the majority's approach encour-

ages defense attorneys to file a request to charge concerning instructions that they *identify* as important, and to contest any instructions they *recognize* as erroneous, it will have no impact when defense counsel, through negligence or inadvertance, fails to recognize an erroneous instruction. Indeed, these are the precise errors that *Golding* review is meant to rectify.[19] See part I of this concurring opinion.

III

Drawing from both this court's precedent and federal precedent, it is evident that a defendant should not be deemed to have waived a challenge to a jury instruction unless the record *clearly* reflects that the defendant was aware of the particular challenged aspect of the instruction and the defendant expressed satisfaction with that part of the instruction.[20] See part II of this concurring opinion. Applying this standard, I cannot agree with the majority that waiver resulted in the present case merely because the defendant failed to take exception to the charge he now challenges. Although the trial court provided a written copy of the instructions and twice asked the parties for their concerns or exceptions, nothing in the record demonstrates that the defendant was aware of the *specific* problem with the instruction at issue in this appeal and nonetheless intentionally relinquished his right to challenge it. Accordingly, I would conclude that the defendant did not waive *Golding* review.

Having determined that the defendant did not waive *Golding* review, I must examine his claim of instructional impropriety. See footnote 4 of this opinion (setting forth four-pronged *Golding* test). Specifically, the defendant claims that the trial court's instructions improperly provided the jury with a definition of "intentionally" that included language concerning general intent, despite the fact that the defendant was charged only with crimes requiring specific intent. He further claims that this instruction improperly allowed the jury to find him guilty of kidnapping and unlawful restraint without determining that he had the specific intent to engage in the proscribed conduct. The state concedes that the instruction was improper, but contends that the instructions were nonetheless constitutionally adequate. I agree with the state.

The record reveals the following undisputed facts, which are relevant to the resolution of this claim. The defendant was charged with, inter alia, kidnapping in the second degree in violation of General Statutes § 53a-94 (a)[21] and unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a).[22] In instructing the jury on general principles of law, the trial court provided the following definition of intent: "As defined by our statute, a person acts intentionally with respect to a result or to conduct when his conscious objective is to cause such result or to engage in

such conduct." Later in the charge, the court explained that, to find the defendant guilty of kidnapping in the second degree, the state must prove beyond a reasonable doubt that the defendant abducted the victim, Jennaha Ward. The court further explained: " 'Abduct' means, as it pertains to this case, to restrain a person with intent to prevent his liberation by using or threatening the use of physical force or intimidation. The term 'restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty . . . . You will recall my earlier instructions on intent and apply them here also." The court gave a similar instruction on the charge of unlawful restraint in the first degree, first informing the jury that to find the defendant guilty on the charge, the state must prove beyond a reasonable doubt that the defendant restrained the victim and that such restraint exposed the victim to a substantial risk of physical injury. The court defined " 'restrain' " as "to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty . . . . You will recall my earlier instructions on intent and apply them here also."

As a preliminary matter, the defendant's claim meets the first two prongs of *Golding* and, therefore, is reviewable. First, the record contains a transcript of the jury instructions, and is therefore adequate for review. Second, it is well established that an improper instruction on an element of an offense is of constitutional magnitude; see *State* v. *DeJesus*, 260 Conn. 466, 472–73, 797 A.2d 1101 (2002) ("[a]n improper instruction on an element of an offense . . . is of constitutional dimension" [internal quotation marks omitted]); and that specific intent is an essential element of both kidnapping and unlawful restraint. *State* v. *Salamon*, 287 Conn. 509, 542, 572, 949 A.2d 1092 (2008). I, therefore, turn to whether the defendant may prevail on the merits of his claim.

"[T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . [I]n appeals involving a constitutional question, [the standard is] whether it is reasonably possible that the jury [was] misled. . . . In determining whether it was . . . reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect [on] the jury in guiding [it] to a correct verdict in the case. . . . The test to be applied . . . is whether the charge, consid-

ered as a whole, presents the case to the jury so that no injustice will result." (Internal quotation marks omitted.) Id., 572–73.

*Salamon* is instructive. That case also involved a crime of specific intent but the trial court improperly had provided only a general intent instruction. We concluded that this impropriety did not require reversal "because the court thereafter accurately explained that, to prove the element of restraint, the state was required to establish that the defendant had restricted the victim's movements intentionally and unlawfully in such a manner so as to interfere substantially with her liberty by confining her without her consent. . . . Under this explanation, there is no reasonable possibility that the jury could have found the defendant guilty of unlawful restraint unless it first had found that he had restricted the victim's movements with the intent to interfere substantially with her liberty. In other words, because restraint is itself defined in terms that include the requirement of a specific intent, and because the trial court properly instructed the jury on that definition, the defendant was not prejudiced by the trial court's failure to define intent in full compliance with [the definition under General Statutes] § 53a-3 (11)."[23] (Internal quotation marks omitted.) Id., 573–74.

As the state properly concedes in the present case, the trial court's definition of intent incorrectly encompassed both specific and general intent. See *State* v. *Francis*, 246 Conn. 339, 358, 717 A.2d 696 (1998) (although generally it is improper for trial court to provide entire statutory definition of intent when charge required specific intent, no error in context of particular case when jury not misled); *State* v. *Youngs*, 97 Conn. App. 348, 361, 904 A.2d 1240 (same), cert. denied, 280 Conn. 930, 909 A.2d 959 (2006). Therefore, as in *Salamon*, the question is whether it reasonably was possible that the jury relied on the general intent instruction to convict the defendant of a specific intent crime. Reading the jury instructions as a whole, I conclude that it was not reasonably possible that the jury was misled. In the present case, the trial court twice provided the exact same definition of restraint as was provided by the trial court in *Salamon*, which explicitly required the jury to find that the defendant had restricted the victim's movements with the intent to interfere substantially with her liberty. Therefore, I conclude that the trial court's instructions adequately presented the elements of the charges of kidnapping in the second degree and unlawful restraint in the first degree to the jury. Therefore, the defendant has failed to establish that there was a constitutional violation.

Accordingly, I concur.

[1] It is worth noting that, although the majority insists that it does not adopt the state's approach to waiver of *Golding* review of instructional errors, there is no significant difference, either in description or application, between the state's proposed rule and the rule adopted by the majority.

The majority characterizes the state as setting out a rule under which waiver occurs when a defendant acquiesces in jury instructions following a meaningful opportunity to review them outside the rush of trial, participates in a charging conference on the record and takes no exception to the charge after it has been delivered. Despite contending that it is not adopting the state's rule, the majority sets out a nearly identical rule under which waiver occurs when the trial court provides a set of written jury instructions to defense counsel, allows a meaningful review of and the opportunity to comment on those instructions, and defense counsel acquiesces to the instructions. See part II of this concurring opinion.

[2] I agree with the majority that this court has recognized that *Golding* analysis cannot be used to review unpreserved claims of induced, also known as invited, error regardless of the constitutional nature of the error. *State* v. *Cruz*, 269 Conn. 97, 104, 848 A.2d 445 (2004); *State* v. *Gibson*, 270 Conn. 55, 66, 850 A.2d 1040 (2004). I note that this court has found induced or invited error of *Golding* instructional claims *only* when a defendant has submitted or suggested the instructional language that he later challenges. See *State* v. *Coward*, 292 Conn. 296, 305, 972 A.2d 691 (2009) ("[w]ith respect to *Golding* review, the defendant concedes that he induced the claimed error by requesting the very jury charge that he now claims was improper"); *State* v. *Madigosky*, 291 Conn. 28, 35 n.7, 966 A.2d 730 (2009) (mere acquiescence to instruction did not constitute induced error); *State* v. *Griggs*, 288 Conn. 116, 126 n.13, 951 A.2d 531 (2008) ("[t]here was no induced instructional error in this case because the defendant had not submitted a request to charge or suggested any instructional language"); *State* v. *Gibson*, supra, 67–68 (defendant induced error by failing to respond affirmatively to court's question as to whether he wanted limiting instruction, *failing to correct court's statement that defendant had requested that court not give any limiting instructions*, and failing to file written request to charge or to object to charge); see *State* v. *Cruz*, supra, 105 n.7 (defendant induced error by affirmatively requesting jury instruction).

[3] The present case concerns only the second exceptional circumstance identified in *Evans*.

[4] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." *State* v. *Golding*, supra, 213 Conn. 239–40.

[5] This includes review for plain error. See *State* v. *Pierce*, 269 Conn. 442, 452, 849 A.2d 375 (2004).

[6] The majority disputes my reading of *Fabricatore* based in part on its conclusion that, in that case, there was never an on-the-record discussion of the allegedly improper language. In doing so, the majority fails to recognize that the defendant challenged the mere inclusion of the duty to retreat language in the self-defense instruction, an impropriety that was fully apparent throughout the on-the-record discussions regarding the instruction. See *State* v. *Fabricatore*, supra, 281 Conn. 474–75 (providing text of self-defense instruction); see also *State* v. *Brewer*, supra, 283 Conn. 360 ("[i]n *Fabricatore*, the defendant challenged the trial court's inclusion of the duty to retreat in the jury charge on self-defense because the case did not involve the use of deadly force"). Moreover, despite the blatancy of what he later claimed to be an error, defense counsel expressed his satisfaction with the charge, failed to object to the prosecutor's reference in his summation to the duty to retreat and went so far as to address the duty to retreat in his summation.

[7] The majority contends that the on-the-record discussion in the trial court concerned whether the court should give an instruction on lesser included offenses, not the unanimity requirement. I acknowledge that the excerpt of the colloquy cited by this court; *State* v. *Brewer*, supra, 283 Conn. 357 n.7; contains no express discussion of the unanimity requirement. In *Brewer*, however, we were responding to the defendant's claim that he had not waived review of his right to challenge the unanimity instruction required by *State* v. *Sawyer*, 227 Conn. 566, 576, 630 A.2d 1064 (1993), because any such claim to the trial court would have been futile. We reiterated that, "as we previously discussed, this is not a case of silence in the face of an allegedly improper charge; instead, it is a case in which defense counsel specifically expressed his satisfaction with that charge. Such an affirmative action by counsel simply cannot lend support to a claim of futility." *State*

v. *Brewer*, supra, 361 n.11. Because *Sawyer* specifically concerns unanimity instructions, I believe that the court's statement in *Brewer* that the defendant had "expressed his satisfaction with *that charge*"; (emphasis added) id.; necessarily refers to the unanimity charge.

[8] Although this court has maintained that any finding of waiver must derive from a defendant's clear and affirmative acceptance or suggestion of specific instructional language, some panels of the Appellate Court have suggested that a defendant's *mere acquiescence* to a set of jury instructions may preclude *Golding* review. See *State* v. *Velez*, 113 Conn. App. 347, 357–59, 966 A.2d 743 (2009) (failure to take exception to trial court's response to jury question about proof of intent constituted waiver under *Fabricatore*); *State* v. *Akande*, 111 Conn. App. 596, 608–609, 960 A.2d 1045 (2008) ("We decline to draw a distinction between defense counsel stating that he had no problem with a jury charge that he specifically requested and defense counsel stating that he had no problem with a jury charge that he had not specifically requested. There is also no difference between counsel stating that he has no comment about the charge and counsel stating that the charge as read was correct. In both cases, we find the objection to be waived."), aff'd, 299 Conn. , A.3d (2011); *State* v. *Farmer*, 108 Conn. App. 82, 88, 946 A.2d 1262 (failure to file request to charge or take exception to constancy of accusation instruction constituted waiver under *Fabricator*e), cert. denied, 288 Conn. 914, 954 A.2d 185 (2008). In these cases, the Appellate Court construed the defendant's acquiescence to constitute a waiver of *Golding* review, and in the process, conflated the distinction between waiver and failure to preserve. Partly in response to this approach by the Appellate Court, we attempted to clarify our approach to induced error and waiver in *State* v. *Ebron*, supra, 292 Conn. 682. In doing so, we suggested that waiver occurred only when the defendant actively induced the later challenged error. Id.; see also *State* v. *Ovechka*, 118 Conn. App. 733, 741, 984 A.2d 796 ("[w]here there is an indication that the defendant actively induced the trial court to give the [improper] instruction that he now challenges on appeal; *State* v. *Ebron*, [supra, 682]; the defendant's claim is waived and thus not reviewable under *Golding*" [internal quotation marks omitted]), cert. denied, 295 Conn. 905, 989 A.2d 120 (2010).

[9] I reiterate for the purpose of clarity that, as in the federal courts, invited or induced error is a subset of waiver. The federal courts deem instructions that the defendant expressly *provides* to the court to be invited errors, and generally treat such errors as a subset of waiver, thus foreclosing review. See *United States* v. *Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009) ("the waiver doctrine has been applied in situations of invited error"); *United States* v. *Hertular*, 562 F.3d 433, 444 (2d Cir. 2009) ("a defendant who has invited a challenged charge has waived any right to appellate review" [internal quotation marks omitted]); *United States* v. *Hamilton*, 499 F.3d 734, 736 (7th Cir. 2007) ("[h]ad [the challenged instruction] been one of the defendant's requested instructions, any objection to giving it would indeed have been waived . . . it would have been a case of 'invited error' " [citations omitted]), cert. denied, 552 U.S. 1129, 128 S. Ct. 951, 169 L. Ed. 2d 782 (2008); *United States* v. *Wall*, 349 F.3d 18, 24 (1st Cir. 2003) (defendant waived error by requesting and specifically approving later challenged charge). One federal circuit, however, has suggested that invited errors should be treated differently than waiver, and may be subject to review for " 'manifest injustice.' " *United States* v. *Rodriguez*, 602 F.3d 346, 350–51 (5th Cir. 2010).

[10] Rule 52 (b) of the Federal Rules of Criminal Procedure provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Although the federal courts refer to this doctrine as plain error review, it is treated in practical application like this court's *Golding* review.

The United States Supreme Court has set forth a four-pronged test to determine whether a trial error may be reviewed under rule 52 (b). "First, there must be an error or defect—some sort of [d]eviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. . . . Third, the error must have affected the appellant's substantial rights . . . . Fourth . . . if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." (Citations omitted; internal quotation marks omitted.) *Puckett* v. *United States*, U.S. , 129 S. Ct. 1423, 1429, 173 L. Ed. 2d 266 (2009);

see also *United States* v. *Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993).

[11] In suggesting that Justice Palmer and I have adopted inconsistent standards, the majority apparently overlooks my adoption of this fundamental principle of waiver, which states in general terms the same view articulated in Justice Palmer's concurring opinion regarding application of that principle in the specific context of *Golding* review—that waiver "cannot be deemed . . . in the absence of a record clearly demonstrating, *either* expressly *or* impliedly, counsel's knowledge that the charge, at least potentially, was constitutionally infirm and that counsel, in the exercise of his [or her] professional judgment, decided to forgo any claim concerning that possible infirmity." (Emphasis in original.) Therefore, the claimed inconsistency is illusory.

[12] I reiterate that these principles are consistent with this court's approach to waiver of jury instructions. See, e.g., *State* v. *Holness*, supra, 289 Conn. 543 (defense counsel waived challenge to jury instruction by agreeing to limiting instruction suggested by state); *State* v. *Fabricatore*, supra, 281 Conn. 481 (defense counsel waived challenge to jury instruction by failing to object to challenge, expressing satisfaction with instruction, arguing that instruction was proper and adopting language of instruction in his summation).

[13] Again, I note that this approach is consistent with our approach to strategic waivers. We have recognized that "[t]o allow the [petitioner] to seek reversal [after] his trial strategy has failed would amount to allowing him to induce potentially harmful error, and then ambush the state with that claim on appeal." (Internal quotation marks omitted.) *State* v. *Fabricatore*, supra, 281 Conn. 480–81. We have always, however, imposed the same requirements for finding waiver regardless of the suspected motivation or intent behind a defendant's actions, namely, that the record reflects that the waiver was knowing and intentional. Id., 480. I continue to believe that our traditional waiver doctrine is capacious enough to identify and preclude all waivers, including strategic waivers.

[14] The doctrine of "plain error," that is error that is so fundamental that the defendant will not lose his ability to challenge it on appeal, does not ameliorate a defendant's inability to access *Golding* review. Any reliance on the plain error doctrine as a fallback measure on which defendants may rely is misplaced because "[j]ust as a valid waiver calls into question the existence of a constitutional violation depriving the defendant of a fair trial for the purpose of *Golding* review, a valid waiver also thwarts plain error review of a claim. . . . [The] [p]lain [e]rror [r]ule may only be invoked in instances of forfeited-but-reversible error . . . and cannot be used for the purpose of revoking an otherwise valid waiver. This is so because if there has been a valid waiver, there is no error for us to correct. . . . The distinction between a forfeiture of a right (to which the [p]lain [e]rror [r]ule may be applied) and a waiver of that right (to which the [p]lain [e]rror [r]ule cannot be applied) is that [w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." (Citation omitted; internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 70–71, 967 A.2d 41 (2009). Therefore, the majority's reframing of implied waiver forecloses both *Golding* review and plain error review when a defendant acquiesces to jury instructions following the charging conference.

[15] Rule 1.1 of the Rules of Professional Conduct provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[16] Rule 3.3 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not knowingly:

"(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]

"(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . ."

[17] From January 1, 2000, to May 5, 2010, this court considered approximately 140 criminal appeals in which a defendant requested *Golding* review, not including cases in which the court determined that the defendant was entitled to other types of appellate review. Of those 140 cases, approximately 70 involved claims for *Golding* review of instructional errors, in which the court found reversible error in only 6 cases.

During the same period, the Appellate Court considered approximately 550 criminal appeals in which a defendant requested *Golding* review or the court, sua sponte, engaged in *Golding* review, not including cases in which the court determined that another legal framework governed its review. Of those 550 cases, approximately 250 involved claims for *Golding* review of instructional error, and the court found reversible error in only 17 cases.

[18] This court has held that *Golding* review is not available for unpreserved claims of error raised for the first time in a habeas appeal. *Safford* v. *Warden*, 223 Conn. 180, 190 n.12, 612 A.2d 1161 (1992); see also *Cupe* v. *Commissioner of Correction*, 68 Conn. App. 262, 271 n.12, 791 A.2d 614 ("*Golding* does not grant . . . authority for collateral review and is . . . inapplicable to habeas proceedings"), cert. denied, 260 Conn. 908, 795 A.2d 544 (2002). Therefore, this leaves defendants in the position of having to raise *Golding* claims on appeal, knowing that the court will deem them to be waived, in order to preserve them for habeas review.

[19] Similarly, the majority's reliance on Practice Book § 42-16 is misplaced. Section 42-16 provides in relevant part: "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of exception. . . ." The majority suggests that this provision encourages defense counsel to file a request to charge, but fails to consider that § 42-16 sets forth the procedure by which counsel may properly preserve appellate review of an instruction, and thus is not applicable to *Golding* review. See, e.g., *State* v. *King*, 289 Conn. 496, 502–503, 958 A.2d 731 (2008) (engaging in *Golding* review of instructional error claim despite failure to comply with § 42-16).

[20] The state does not claim that the defendant's actions constituted induced or invited error.

[21] General Statutes § 53a-94 (a) provides: "A person is guilty of kidnapping in the second degree when he abducts another person."

[22] General Statutes § 53a-95 (a) provides: "A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury."

[23] General Statutes § 53a-3 (11) provides that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."