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PALMER, J., with whom KATZ and NORCOTT, Js., join, concurring. I agree with, and join, Justice Katz' thoughtful concurrence. I write separately, however, to underscore why, in my view, the majority is incorrect in finding that defense counsel knowingly and intentionally waived the claim of the defendant, Marvin Kitchens, concerning the constitutionality of the jury charge solely on the basis of counsel's statement that he had no objection to the court's jury instructions after having been afforded a reasonable opportunity to review and comment on those instructions. In reaching its conclusion, the majority disregards the well established principle that, to be effective, the record must demonstrate that counsel's failure to object to the charge on constitutional grounds represented the *intentional* relinquishment of a *known* right. Under the majority's flawed application of the concept of implied waiver, counsel will be found to have purposefully waived any claim that the defendant may have had with respect to his due process right to a proper jury charge, thereby foreclosing appellate review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[1] even though there is absolutely nothing in the record to demonstrate that counsel actually was aware of any potential defect in the charge. Indeed, the majority concedes that, under its holding, the record will be deemed sufficient to infer that the defense had knowledge of the alleged instructional impropriety and voluntarily relinquished the right to challenge the instruction on appeal, even though the record contains no evidence that the alleged impropriety was induced or invited, that the court had a discussion about the instructional issue with counsel or that counsel otherwise engaged in conduct indicating that the failure to object was tactical rather than inadvertent. Lacking a record establishing both that counsel in the present case was aware of that right and elected to waive it on behalf of the defendant, the majority nevertheless denies the defendant appellate review of a constitutional claim that otherwise satisfies the reviewability requirements of *Golding*. As I explain more fully hereinafter, the majority's approach is predicated on an inference that is not supported by the facts, namely, that, whenever defense counsel has been afforded a fair opportunity to review and comment on the court's instructions, and, thereafter, counsel informs the court that he has no objection to those instructions, it is appropriate to conclude, as a factual matter, that counsel was aware of and consciously rejected *every conceivable constitutional challenge* to the jury instructions. Moreover, the weakness of the majority's analysis is reflected in the fact that, under well established principles of waiver, defense counsel can readily avoid the majority's holding, and thereby ensure *Golding* review

of any and all unpreserved claims challenging the constitutionality of the court's instructions, simply by advising the trial court that his failure to raise a constitutional objection is due to the fact that *he is aware of no such objection*, and *not* because of an intent to waive any potential constitutional claims. Finally, the unsound approach that the majority adopts will make it significantly more difficult, and in some cases impossible, for a defendant to obtain a new trial even when he can establish a deprivation of his due process right to a fair and accurate jury instruction.[2]

Before commencing my review of the majority's analysis, I first set forth several unchallenged principles concerning the issue of waiver. "What suffices for waiver depends on the nature of the right at issue. [W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. *United States* v. *Olano*, 507 U.S. 725, 733 [113 S. Ct. 1770, 123 L. Ed. 2d 508] (1993). For certain fundamental rights, the defendant must personally make an informed waiver. See, e.g., *Johnson* v. *Zerbst*, 304 U.S. 458, [464–65, 58 S. Ct. 1019, 82 L. Ed. 1461] (1938) (right to counsel); *Brookhart* v. *Janis*, 384 U.S. 1, 7–8 [86 S. Ct. 1245, 16 L. Ed. 2d 314] (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. *Taylor* v. *Illinois*, 484 U.S. 400, [417–18, 108 S. Ct. 646, 98 L. Ed. 2d 798] (1988). As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. *Link* v. *Wabash R. Co.*, 370 U.S. 626, 634 [82 S. Ct. 1386, 8 L. Ed. 2d 734] (1962) . . . . Thus, decisions by counsel are generally given effect as to what arguments to pursue, see *Jones* v. *Barnes*, 463 U.S. 745, 751 [103 S. Ct. 3308, 77 L. Ed. 2d 987] (1983), what evidentiary objections to raise, see *Henry* v. *Mississippi*, 379 U.S. 443, 451 [85 S. Ct. 564, 13 L. Ed. 2d 408] (1965), and what agreements to conclude regarding the admission of evidence, see *United States* v. *McGill*, 11 F.3d 223, [226–27 (1st Cir. 1993)]. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." (Citation omitted; internal quotation marks omitted.) *New York* v. *Hill*, 528 U.S. 110, 114–15, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000); see also *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71, 967 A.2d 41 (2009) ("It is well settled that a criminal defendant may waive rights guaranteed to him under the constitution. . . . The mechanism by which a right may be waived, however, varies according to the right at stake.

. . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel." [Citations omitted; internal quotation marks omitted.]); *State* v. *Smith*, 289 Conn. 598, 620, 960 A.2d 993 (2008) (same).

There is no dispute that, for reasons of strategy, counsel may knowingly and intentionally waive a defendant's constitutional right to a particular jury instruction despite the fundamental nature of the defendant's due process entitlement to an adequate jury charge.[3] When such a waiver occurs, the defendant is precluded from appellate review of the defective charge because, "[t]o allow the defendant 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." *State* v. *Fabricatore*, 281 Conn. 469, 480–81, 915 A.2d 872 (2007). In such circumstances, moreover, the defendant cannot satisfy the third *Golding* prong; see footnote 1 of this opinion; because it cannot be said that "the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial . . . ." *State* v. *Golding*, supra, 213 Conn. 240.

Of course, such a waiver may be express or may be implied by conduct. See, e.g., *State* v. *Smith*, supra, 289 Conn. 621. Thus, "[w]aiver does not have to be express . . . but may consist of acts or conduct from which waiver may be implied . . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." *State* v. *Gaskin*, 116 Conn. App. 739, 753, 977 A.2d 681, cert. denied, 294 Conn. 914, 983 A.2d 851 (2009). Both this court and the Appellate Court consistently have concluded, however, that waiver of a constitutionally protected trial right is not valid unless it represents "the intentional relinquishment or abandonment of a known right."[4] (Internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, supra, 291 Conn. 71; accord *State* v. *Woods*, 297 Conn. 569, 583, 4 A.3d 236 (2010); *State* v. *Gaskin*, supra, 753; *State* v. *Thomas W.*, 115 Conn. App. 467, 487, 974 A.2d 19, cert. granted, 294 Conn. 911, 983 A.2d 276 (2009). This standard, which aptly has been characterized as a strict one; see, e.g., *State* v. *Woods*, supra, 583; first was adopted by the United States Supreme Court more than seventy years ago; see *Johnson* v. *Zerbst*, supra, 304 U.S. 464; and reflects that court's "unyielding . . . insistence that a defendant's waiver of his trial rights cannot be given effect unless it is knowing and intelligent."[5] (Internal quotation marks omitted.) *Illinois* v. *Rodriguez*, 497 U.S. 177, 183, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). Thus, such a waiver necessarily "involves the idea of assent, and assent is an act of understanding."[6] (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 449, 978 A.2d 1089 (2009).

Because the conduct of the parties " 'is of great importance' " in determining waiver; id.; we look to the record to discern whether the right was waived by counsel *with full knowledge of the existence of the right*. See id. In other words, "[a]n effective waiver presupposes full knowledge of the right or privilege allegedly [being] waived and some act done designedly or knowingly to relinquish it. . . . Moreover, the waiver must be accomplished with sufficient awareness of the relevant circumstances and likely consequences." (Internal quotation marks omitted.) *Perricone* v. *Perricone*, 292 Conn. 187, 207, 972 A.2d 666 (2009); accord *State* v. *Santiago*, 245 Conn. 301, 310–11, 715 A.2d 1 (1998). Furthermore, in determining whether this stringent standard has been met, "a court must inquire into the totality of the circumstances of each case." (Internal quotation marks omitted.) *State* v. *Woods*, supra, 297 Conn. 583; see also *State* v. *Foreman*, 288 Conn. 684, 697, 954 A.2d 135 (2008) (validity of purported waiver is question of fact that depends on circumstances of particular case). Because a fundamental constitutional right is at stake, "we will indulge every reasonable presumption against waiver . . . and . . . [will] not presume acquiescence in the loss of [such a right]. . . . In addition, a waiver of a fundamental constitutional right is not to be presumed from a silent record." (Internal quotation marks omitted.) *State* v. *Woods*, supra, 583–84.

Thus, in the present case, counsel cannot be deemed to have waived the defendant's right to a constitutionally adequate jury charge 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 professional judgment, decided to forgo any claim concerning that possible infirmity. Of course, neither the state nor the majority claims that the record supports a finding of express waiver. Nevertheless, under our jurisprudence, counsel may be found to have impliedly waived a claim that the court's jury instructions were constitutionally deficient. To establish such an implied waiver, however, the state bears the burden of meeting the same stringent standard that is applicable to express waivers, namely, that the waiver represents the intentional relinquishment of a known right. Consequently, waiver may be implied—that is, it may be inferred—only if the record reveals conduct by counsel demonstrating *both* that counsel had *knowledge* of the potential constitutional claim *and intentionally* decided not to raise it, presumably for strategic reasons. See, e.g., *Wadia Enterprises*, *Inc.* v. *Hirschfeld*, 224 Conn. 240, 251–52, 618 A.2d 506 (1992) ("Waiver is the intentional relinquishment of a known right. . . . Waiver need not be express, but may consist of acts or conduct from which a waiver may be implied. . . . In other words, waiver may be inferred from the circum-

stances if it is reasonable to do so. . . . Assuming [the threshold applicability of the doctrine of] implied waiver [to the present case] . . . the plaintiff would still have to make a showing that the defendants knew of their right[s] . . . before they could [intentionally] waive [them].'' [Citations omitted; internal quotation marks omitted.]).

These waiver principles apply to unpreserved constitutional claims for good reason. The narrow *Golding* exception to the general rule that a reviewing court will not consider a claim not previously raised at trial is justified by the overriding importance of protecting the fundamental constitutional rights of the accused. See *State* v. *Golding*, supra, 213 Conn. 238–39 (explaining ''exceptional'' circumstance presented by unpreserved claim of constitutional violation if record sufficient for review); see also *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973) (predecessor to *Golding* identified '' 'exceptional circumstance' '' that arises when ''the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial''). In the present case, however, the majority fails to adhere to these principles with respect to a certain class or category of cases, that is, those cases in which defense counsel, following a charge conference at which counsel has been afforded timely notice of the charge, informs the court that he has no objection to the charge.[7]

The shortcoming of the majority opinion is attributable to the majority's determination of an implied waiver by conduct on the basis of a record that clearly does not support such an inference. According to the majority, when, as in the present case, defense counsel, having been given sufficient time to review the jury charge, expresses approval of the charge, it is reasonable to infer that counsel knowingly and intentionally waived any constitutional objection to the charge. In other words, in such circumstances, defense counsel will be *deemed* both to have known of the potential constitutional claim and to have decided not to raise it. The majority reaches this conclusion even though there is nothing in the record to indicate either that counsel was aware of the constitutional issue or that he intentionally opted to forgo any objection to the constitutionally defective instruction.

''An inference is [a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.'' (Internal quotation marks omitted.) *Walker* v. *Mortham*, 158 F.3d 1177, 1183 n.10 (11th Cir. 1998), cert. denied, 528 U.S. 809, 120 S. Ct. 39, 145 L. Ed. 2d 36 (1999); see also *State* v. *Fermaint*, 91 Conn. App. 650, 665, 881 A.2d 539 (*Bishop*, *J.*, dissenting) (''[i]n plain terms, an inference is simply a deduction or conclusion based on proven facts''), cert.

denied, 276 Conn. 922, 999 A.2d 90 (2005). Thus, "[a]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]." (Internal quotation marks omitted.) *Siewe* v. *Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007). "An inference is reasonable if the conclusion flows from logical and probabilistic reasoning." (Internal quotation marks omitted.) *United States* v. *Truong*, 425 F.3d 1282, 1288 (2005).

It is apparent that the conduct of counsel in reviewing the charge and advising the court that he has no objection to it is insufficient to support the inference that counsel intentionally abandoned the defendant's right to raise a constitutional challenge to the charge. Counsel *might* have been aware of a potential constitutional infirmity in the charge and elected not to seek to remedy the impropriety, but there is no reasoned basis for concluding that counsel was, in fact, aware of the claim and decided to forgo it. In the absence of a discussion of the potential constitutional claim during the charge conference, or some other indication in the record that counsel was aware of the existence of such a claim, it simply is unreasonable to infer that counsel, with knowledge of the claim, intentionally abandoned it. Thus, far from "indulg[ing] every reasonable presumption against waiver of fundamental constitutional rights"; (internal quotation marks omitted) *State* v. *Woods*, supra, 297 Conn. 583–84; and otherwise adhering to the "strict standard" that this court demands for purposes of demonstrating the waiver of a constitutional right; (internal quotation marks omitted) id., 583; the majority applies a test that, by any measure, falls well short of what is required to support a finding of implied waiver. Indeed, the majority provides no explanation as to why it is reasonable to infer that counsel intentionally has abandoned a constitutional claim, with full knowledge of that claim, merely because counsel agreed to the jury charge after having been afforded a reasonable opportunity to review it. In fact, in terms of probabilities, it is far more likely that counsel raised no constitutional objection to the charge because he was aware of no such objection.

The majority's reasoning cannot withstand scrutiny for another, albeit related, reason. Under that reasoning, we must presume that defense counsel was aware of and elected to waive *every constitutional claim that conceivably could have been raised* with respect to the court's instructions. This is so because the majority treats as waived *any and all* constitutional claims to which the defense had not objected after having had an adequate opportunity to review the charge. Thus, although it may appear, at first glance, that the majority's inference of a knowing and intentional waiver pertains only to the specific claim at issue on appeal, under the majority's reasoning, defense counsel necessarily is deemed to have waived every single constitutional

claim that possibly could have been made with respect to the court's jury instructions. Of course, such an inference is unreasonable; no defense attorney or team of defense attorneys, no matter how capable or prescient, could possibly be expected to recognize each and every constitutional claim—meritorious and unmeritorious, innovative and not so creative—that conceivably might be raised to challenge the constitutionality of the court's jury charge. Nevertheless, that is precisely the inference on which the majority relies in finding that defense counsel in the present case impliedly waived the defendant's constitutional claim.[8]

Furthermore, because the majority's inference of waiver is unsupported and, therefore, bears no reasonable relation to counsel's *actual* intent in failing to raise a claim, in future cases, counsel can readily avoid the inherent unfairness of the majority's decision. To do so, counsel who does not wish to have a reviewing court treat his failure to object as a waiver for *Golding* purposes may avoid such treatment simply by informing the trial court that he has not raised a constitutional challenge to the charge *because he is unaware of any such claim, and not because he has elected to waive the claim.* In view of the fact that the doctrine of implied waiver is employed for the purpose of ascertaining an actor's intent when that intent remains *unstated*, counsel's express statement disavowing waiver—reflecting counsel's *actual intent*—necessarily would trump any finding of implied waiver by this court or the Appellate Court under the approach that the majority adopts.[9] The fact that defense counsel can so easily overcome the inference on which the majority's decision is predicated demonstrates the inherent weakness in the majority's reasoning and completely defeats the import and purpose of the majority's holding.[10]

It is clear that the majority's approach constitutes a marked departure from our waiver jurisprudence generally and from our *Golding* jurisprudence specifically.[11] In fact, the majority's analysis does not truly implicate waiver at all, for it is unreasonable to infer that counsel knowingly and intentionally waived any and all constitutional claims that might have been raised with respect to the jury charge solely on the basis of the fact that counsel reviewed the charge in advance and raised no objection to it. Rather, the majority decides to deny *Golding* review in the present case primarily on the basis of policy considerations that have nothing to do with traditional waiver principles. The considerations that the majority identifies are: "[1] our rules of practice, which provide for substantial participation by counsel in formulating and reviewing jury instructions, [2] basic principles of fundamental fairness that favor placing responsibility with the trial court and the parties' counsel to take all necessary measures at the time of trial to ensure that the instructions are correct, and [3] the availability of habeas review to determine whether

counsel's failure to take exception, or to suggest any changes, to the jury instructions constituted ineffective assistance and caused prejudice, thus requiring a new trial."

In fact, none of these policy considerations has the slightest bearing on the issue of whether counsel knowingly and intelligently waived the defendant's right to a constitutionally adequate jury instruction. The fact that our rules of practice provide generally for participation by defense counsel in formulating and reviewing jury instructions provides no insight into whether counsel's participation in a particular case warrants the conclusion that a failure to object to a particular charge reflects counsel's intentional waiver of a known right. Of course, policy considerations that purportedly favor placing responsibility with the trial court and the parties' counsel to ensure that the jury charge is correct shed absolutely no light on whether counsel's failure to object was the product of a tactical decision or negligence. Moreover, the availability of a habeas remedy also has nothing to do with the fact-based waiver inquiry. Indeed, the real basis for the majority's conclusion appears to be its view that it is wise *policy* to deprive a defendant of *Golding* review in cases such as the present one, and not because an inference of waiver may fairly be drawn from the record.[12]

Indeed, it appears that, under the majority's holding, the remedy of a writ of habeas corpus predicated on a claim of ineffective assistance of counsel would not be available in certain cases when, as in the present case, counsel is deemed to have waived a constitutional claim. It is well established that, "to perform effectively, counsel need not recognize and raise every conceivable constitutional claim." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 460, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). "Moreover, numerous state and federal courts have concluded that counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance." Id., 461. "Nor is counsel required to change then-existing law to provide effective representation." (Internal quotation marks omitted.) Id., 462. Thus, a defendant whose attorney failed to raise a new or novel claim at trial—and who, under the majority's decision, is deemed to have waived that claim for *Golding* purposes and thus is barred from seeking review of that claim on appeal—also will be unable to obtain habeas relief because there is no basis for an ineffective assistance claim. Consequently, to the extent that the majority's decision is predicated on the availability of a habeas remedy, that reliance is misplaced because, in some cases, the defendant will have no opportunity to obtain such a remedy.[13]

Moreover, for any case in which counsel's failure to

object to a constitutionally deficient jury instruction gives rise to a claim of ineffective assistance of counsel and that claim is meritorious, the defendant will be required to await the successful outcome of his habeas claim before obtaining the new trial to which he is entitled. Moreover, the new trial will be further delayed by any appeal that the commissioner of correction elects to take from the adverse judgment of the habeas court. This delay is both unnecessary and unfortunate, especially for those defendants serving a sentence of incarceration. In addition, the majority's decision will make it more difficult to prevail on unpreserved claims of instructional impropriety. Before today's decision, a defendant who had established that his trial was tainted by a constitutionally defective jury charge would be entitled to a new trial unless, under the fourth prong of *Golding*; see footnote 1 of this opinion; the state established that the improper charge was harmless beyond a reasonable doubt. Hereafter, that same defendant bears the burden of establishing not only that his attorney's representation fell below the range of competence displayed by attorneys with ordinary skill and training in the criminal law, but also that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 835, 970 A.2d 721 (2009). For the reasons previously set forth in this opinion, and in the absence of evidence that counsel's decision to forgo an objection to the defective charge was tactical, there is no justification for placing this burden on a defendant.

The fact that the majority opinion is driven by the various policy considerations identified by the majority and not by principles of waiver is reflected in the majority's insistence that, in accordance with well established rules pertaining to waiver, the determination of whether counsel has waived the defendant's right to a constitutionally adequate jury charge "must be based on a close examination of the record and the particular facts and circumstances of each case." Of course, this is the rule applicable to proving waiver generally; see, e.g., *State* v. *Woods*, supra, 297 Conn. 583; and so the majority asserts that it also is applicable in the present case. In reality, under the approach that the majority adopts, the reviewing court's "close examination of the record" and careful consideration of "the particular facts and circumstances of the case" require nothing more than a determination of whether counsel, having been afforded a reasonable, advance opportunity to review and comment on the court's charge, raised no objection to the charge. If so, the reviewing court is bound to treat *any* constitutional challenge to *any* aspect of the jury instructions as having been waived by counsel.[14]

The majority also insists that it is not adopting a "less stringent standard" for purposes of determining

whether counsel has knowingly and intelligently waived a defendant's right to challenge a constitutionally deficient jury charge. Contrary to the majority's assertion, that is exactly what the majority is doing. Although purporting to apply the requirement of a knowing and intelligent waiver, the majority then concludes that it reasonably may be inferred that counsel intended such a waiver even though there is nothing in the record even to suggest that counsel was aware of the right at issue, which, so far as the record will reflect, is buried somewhere in the court's lengthy set of jury instructions. For that reason, the majority employs a standard that is much less demanding than the standard required under our well established waiver jurisprudence.[15]

I therefore would conclude that the waiver doctrine does not preclude the defendant from *Golding* review of his unpreserved claim of instructional impropriety. For the reasons set forth by Justice Katz in her concurrence, however, I also would conclude that the defendant cannot prevail on the merits of that claim. Accordingly, I concur in the result.

[1] Under *Golding*, "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." (Emphasis in original.) *State* v. *Golding*, supra, 213 Conn. 239–40.

[2] I do agree with the majority that the present case provides an appropriate opportunity for this court to reexamine and clarify the law on implied waiver as it applies to claims of instructional impropriety under *Golding*, in view of the fact that our previous pronouncements on the subject have hardly been a model of clarity. Although I believe that our decision in *State* v. *Ebron*, 292 Conn. 656, 681–82, 975 A.2d 17 (2009), comes the closest to setting forth the correct legal principles, to my knowledge, this court has never engaged in a thorough analysis of the concept of implied waiver insofar as it pertains to unpreserved constitutional claims of instructional error. Indeed, to date, this court has not evaluated a claim of implied waiver with express reference to the standard applicable to the waiver of a constitutional right, that is, that, to be effective, such a waiver must reflect the intentional relinquishment of a known right. Consequently, our prior cases in this area are not particularly helpful in resolving the question posed by the present appeal.

[3] There also is no dispute that the right to a constitutionally adequate jury instruction is a fundamental right. Indeed, this court routinely has concluded that such claims satisfy the second prong of *Golding*, pursuant to which an unpreserved claim is reviewable only if it "is of constitutional magnitude alleging the violation of a fundamental right . . . ." *State* v. *Golding*, supra, 213 Conn. 239–40. In fact, in the present case, the majority expressly has acknowledged that the defendant's claim is reviewable under the second *Golding* prong, stating that "the claim of instructional error on an element of the crime is of constitutional magnitude because it implicates the due process rights of the defendant."

[4] This court also has defined waiver as the "voluntary relinquishment or abandonment—express or implied—of a legal right or notice." (Internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 449, 978 A.2d 1089 (2009); accord *State* v. *Fabricatore*, supra, 281 Conn. 482 n.18. There is no material distinction between these two characterizations of the waiver principle.

[5] The reason for requiring a knowing and intelligent waiver in such circumstances is obvious. As the United States Supreme Court has explained, this "strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible

opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the [c]onstitution were not provided. . . . The [c]onstitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the [f]ramers thought indispensable to a fair trial." (Citation omitted.) *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241–42, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Of course, a constitutionally adequate jury instruction is a necessary prerequisite to a fair trial.

[6] I note that neither the state nor the majority has suggested that a less stringent standard of proof is applicable to the waiver issue presented by this appeal. In the absence of any such claim, I do not address the possible applicability of such a standard.

[7] I hereinafter refer generally to defense counsel's failure to raise a constitutional challenge to the court's jury instructions. In fact, in any given case, counsel may have raised one or more such challenges. Of course, each of those challenges represents a preserved constitutional claim, and, therefore, the defendant need not invoke *Golding* for purposes of obtaining appellate review of those claims. My references to counsel's failure to raise a claim of instructional impropriety are to any and all such claims that defense counsel did not raise, irrespective of whether counsel raised one or more other claims of instructional error. Of course, the fact that counsel may have raised one or more such claims has no bearing on the extent to which the defendant may or may not be deemed to have waived all other such claims that defense counsel did not raise.

[8] I note that the state claims, as an alternative to establishing waiver, that counsel may be deemed to have forfeited the defendant's right to raise a claim challenging the court's jury instructions on constitutional grounds when the court affords counsel a reasonable opportunity to review the charge and counsel indicates his acceptance of the charge. The majority rejects the state's contention, explaining that forfeiture, which is defined as "the failure to make the timely assertion of a right"; (internal quotation marks omitted); is not a bar to *Golding* review of an unpreserved claim of instructional impropriety. In fact, however, the majority effectively embraces the forfeiture doctrine while purporting to reject it. This is so because, as I have explained, counsel's conduct does not support an inference of waiver, and, consequently, the sole basis for barring the defendant's claim on appeal stems from counsel's failure to have timely asserted that claim at trial. Indeed, the fact that the majority's conclusion is predicated on forfeiture and not on waiver is demonstrated by the majority's reliance on policy considerations rather than the fact-intensive inquiry that is necessary to the determination of whether an implied waiver by conduct has occurred.

[9] The majority disputes the logic of this analysis, asserting that, "an admission by counsel that he is unaware of a constitutional claim can mean only one of two things, namely, that competent counsel . . . has intentionally waived the right to raise a constitutional challenge on appeal or that counsel is ineffective because he fails to recognize the existence of a constitutional challenge." Footnote 25 of the majority opinion. This assertion is incorrect because the majority fails to recognize the vast majority of the claims that it deems waived by competent counsel's failure to raise the claim, namely, the infinitely large category of constitutional claims *that lack merit*. Just as the majority has no response to the fact that no competent counsel possibly could conceive of all such claims, the majority also has no response to the fact that, under its decision, counsel is irrebuttably presumed to have waived all constitutional claims that have not been raised, including claims that ultimately are determined to be without merit. Unfortunately, the majority fails to come to grips with this fundamental problem in its analysis.

Of course, in the rare case in which counsel actually intends to waive one or more claims relating to the court's jury instructions, counsel presumably would so advise the court. In doing so, counsel would be discharging his duty of candor to the court and, at the same time, avoiding an unwarranted inference of waiver, for *Golding* purposes, with respect to any other potential constitutional claims pertaining to the jury charge.

[10] The majority rejects this analysis, asserting, first, that there is "no legal support for a blanket preservation by trial counsel of all constitutional challenges to jury instruction merely on the basis of counsel's in-court statement that he or she is 'unaware' of a constitutional violation," second, that "such a ploy could open up a 'Pandora's box,' flooding Connecticut courts with cases alleging improper jury instructions on every conceivable

issue," third, that it would make "a mockery of the trial court's attempt to query and solicit counsel's input on the jury instructions," and, fourth, that it "would conflict directly with the mandate of rule 1.1 of the Rules of Professional Conduct that requires adequate preparation by counsel in representing a client, which presumably would include sufficient familiarity with the jury instructions to identify instructions that are constitutionally flawed." Footnote 25 of the majority opinion. These objections are lacking in merit, primarily because they have *nothing at all to do with the fact-based inquiry* that, as the majority itself acknowledges, is determinative of whether a constitutional right has been knowingly and intentionally waived by implication. See part II B of the majority opinion (whether reviewing court may find that defense counsel waived constitutional claim by implication depends on "a close examination of the record and the particular facts and circumstances of each case," including, most importantly, counsel's "course of conduct"). Indeed, the majority's four reasons simply highlight the fundamental problem with its analysis; each of those reasons is predicated on *policy concerns* that, the majority claims, stem from counsel's express disavowal of waiver and that have no bearing on the issue of whether, as a *factual* matter, it is reasonable to infer that counsel has knowingly and intentionally waived a constitutional claim or claims despite counsel's representation to the contrary.

Furthermore, even as a matter of policy, the four concerns expressed by the majority have no basis in fact or law. The majority's first point, namely, that there is "no legal support for a blanket preservation by trial counsel of all constitutional challenges to jury instructions merely on the basis of counsel's in-court statement that he or she is 'unaware' of a constitutional violation"; footnote 25 of the majority opinion; fails for at least two reasons. First, there is no controlling precedent to cite on the issue because the majority's approach is itself unprecedented; indeed, the majority cites nothing to support its opposing argument. Second, and more importantly, the majority misses the point in asserting that a statement by counsel informing the court that he or she is unaware of any potential constitutional claim constitutes a "blanket preservation . . . of all constitutional challenges" to the court's jury instructions. Id. In fact, such a statement by defense counsel does not serve to *preserve* any claim or claims; rather, the statement merely serves to ensure that, on appeal, the defendant will not be barred from bringing an *unpreserved* constitutional claim *that otherwise would be reviewable under Golding* merely because counsel was unaware of the claim and therefore failed to raise it at trial.

The majority's second concern also is completely unfounded. A forthright statement by counsel explaining why his or her failure to raise a constitutional challenge to the charge should not be construed as a waiver of any such challenge cannot, by any fair standard, be characterized as a "ploy . . . ." Id. In fact, the majority fails to provide any support for its dismissive and perjorative characterization of such a statement; rather, the majority simply asserts, without any basis for doing so, that the statement, although accurate, is merely a gambit or maneuver. More importantly, there is absolutely no reason to believe that a proper application of the waiver principle will lead to a flood of claims on appeal in which appellate counsel raises "every conceivable [jury instruction] issue . . . ." Id. Simply put, the majority's concern is both unsupported and unsupportable. The majority's concern is unsupported because the majority provides no evidence, anecdotal or otherwise, to substantiate its bald assertion that accepting defense counsel's representations on the issue of waiver would result in a flood of claims on appeal. The majority's concern is unsupportable because there is no reason to presume—again, the majority itself advances no such reason—that appellate counsel will flood this court and the Appellate Court with frivolous claims of constitutionally deficient jury instructions.

The majority also asserts that a statement by counsel disavowing a knowing and intentional waiver of potential constitutional claims would make "a mockery of the trial court's attempt to query and solicit counsel's input on the jury instructions" and "would conflict directly with the mandate of rule 1.1 of the Rules of Professional Conduct that requires adequate preparation by counsel in representing a client, which presumably would include sufficient familiarity with the jury instructions to identify instructions that are constitutionally flawed." Id. This assertion is devoid of merit, as well. Contrary to the view of the majority, it must be presumed that defense counsel seek to represent their clients conscientiously and effectively and, further, that counsel will comply with their professional obligation to attend to matters concerning the court's jury instructions with diligence and due

care. Moreover, there is no basis for the majority's suggestion that an attorney who fails to identify a constitutionally flawed jury instruction would be violating rule 1.1 of the Rules of Professional Conduct; although it may be that, in some cases, such an oversight would support a claim of ineffective assistance of counsel, there is no legal or factual support for the majority's assertion that the oversight also implicates *ethical* concerns. Finally, the majority demonstrates its misunderstanding of the issue presented when it asserts that adequate preparation by counsel "presumably would include sufficient familiarity with the jury instructions to identify instructions that are *constitutionally flawed*." (Emphasis added.) Id. In fact, under the approach that the majority adopts, defense counsel will be deemed to have waived both meritorious *and unmeritorious* claims challenging the constitutional adequacy of the jury instructions. Since counsel cannot possibly be expected to anticipate all potential unmeritorious claims that may be raised on appeal, no matter how well prepared counsel might be, there is absolutely no reason to think that rule 1.1 of the Rules of Professional Conduct somehow will be undermined by counsel's explanation disavowing waiver.

In sum, it is clear that the majority disapproves of the consequences that it perceives will flow from counsel's disavowal of a knowing and intentional waiver of any instructional impropriety. Putting aside the fact that the majority's concerns are unfounded, I submit that those concerns do not stem from any logical flaw in my assertion that, under the fact-driven law of waiver, counsel can avoid a finding of implied waiver by expressly disavowing an intent to waive any claim of instructional error. Rather, the majority's concerns flow from considerations wholly unrelated to principles of waiver, namely, policy considerations that the majority believes militate in favor of denying *Golding* review in cases such as the present one. As I have explained, however; see footnote 8 of this opinion; the majority seeks to give voice to those policy considerations through a misapplication of the waiver doctrine; in reality, the majority's decision rests on the forfeiture doctrine, pursuant to which defense counsel's failure to make a claim in a timely manner, that is, at trial, bars the defendant from raising the claim on appeal. Simply put, it is self-evident that a defense attorney who, in his capacity as an officer of the court, represents to the court that he is aware of no constitutional infirmity in the jury charge, cannot possibly be deemed to have knowingly and intentionally waived any and all future claims challenging the constitutionality of that charge.

[11] I note that the majority's decision cannot be squared with the approach that this court has taken with respect to unpreserved claims of prosecutorial impropriety during closing argument. Specifically, we have stated that a defendant is entitled to appellate review of an alleged due process violation stemming from improper prosecutorial argument even though defense counsel sat through that argument and raised no objection. See, e.g., *State* v. *Stevenson*, 269 Conn. 563, 575–77, 849 A.2d 626 (2004). If ever there was a case in which defense counsel might be presumed to have waived a constitutional claim, that is it; indeed, we expressly have recognized the role that tactical considerations are likely to have played in such a scenario. See id., 576 ("defense counsel may elect not to object to arguments that he or she deems marginally objectionable for tactical reasons, namely, because he or she does not want to draw the jury's attention to it or because he or she wants to later refute that argument" [internal quotation marks omitted]). This court having opted not to bar appellate review of such unpreserved claims, there is far less reason to bar appellate review of claims such as those raised in the present case, claims that, in stark contrast to claims concerning a prosecutor's allegedly inflammatory closing argument, frequently implicate complex and subtle issues embedded in a lengthy jury charge.

[12] Although the majority does not say so, the result it achieves seems to be responsive generally to the concerns expressed by the Appellate Court in *State* v. *Reynolds*, 118 Conn. App. 278, 305–306 n.7, 983 A.2d 874 (2009), cert. denied, 294 Conn. 933, 987 A.2d 1029 (2010), with respect to our waiver analysis in *State* v. *Ebron*, 292 Conn. 656, 679–82, 975 A.2d 17 (2009). Characterizing *Ebron* as "narrowly defining waiver"; *State* v. *Reynolds*, supra, 305 n.7; and relying on policy concerns relating to the import and efficacy of charge conferences, the court in *Reynolds* encouraged this court to reconsider its holding in *Ebron* with respect to the availability of *Golding* review notwithstanding defense counsel's acquiescence in a jury charge following a charge conference and an adequate opportunity to review and consider that charge. See id., 305–306 n.7 ("Mindful of the purpose of a charge conference, we are concerned that *Ebron* could have the effect of

rendering the charge conference an inconclusive and less than meaningful exercise during which there may be decreased incentive for counsel to clearly articulate a proposed charge in a difficult area when counsel may determine [that] it is more advantageous to leave the door ajar for another day. Such a tactic could place an arduous, unnecessary burden on the trial court in its effort to compose a fair, accurate and legally appropriate jury charge and could result in unnecessary relitigation of criminal matters. Although we follow *Ebron*, *as we must*, and afford review to the defendant's claim under the particular circumstances we face, we express our concerns regarding the practical implications of its holding for the trial bench with the hope that, perhaps, this issue of waiver by acquiescence or concurrence has not seen its last day." [Emphasis in original.]). In expressly overruling *Ebron*, the majority relies on similar policy considerations pertaining to the use and value of charge conferences. As I have explained, these considerations cannot properly be used to decide the waiver issue presented by this case because *they have nothing to do with waiver*. In any event, even if it were appropriate to eschew a waiver analysis in favor of a policy analysis, I agree with Justice Katz that, for the reasons set forth in her concurrence, the benefits of *Golding* review substantially outweigh the policy considerations that the majority has identified. Indeed, because the waiver doctrine is such an important part of our jurisprudence, it is difficult to see how *any* policy consideration or set of considerations could trump the requirement that, to be effective, the waiver of a constitutional right must be knowing and intelligent.

[13] Apparently, the majority has carved out an exception for *Golding* claims alleging the existence of an entirely new constitutional right. Of course, such cases are extremely rare and comprise only a small subset of cases in which defense counsel will not be deemed to have waived a constitutional challenge to the court's jury instructions. In all other cases, the defendant runs the risk that this court will deem his claim to have been waived and that the habeas court will reject the defendant's claim of ineffective assistance of counsel.

[14] In fact, contrary to the majority's conclusion, principles of fundamental fairness and judicial economy militate strongly against the majority's approach. There are two possibilities when a defendant raises a claim of instructional impropriety under *Golding*: either the claim will entitle the defendant to a new trial or it will not. The significant majority of cases are likely to fall into the second category, either because the defendant cannot establish the alleged constitutional violation or because any such violation was harmless. With respect to that category of cases, the interests of justice clearly are served if the appellate tribunal entertains and rejects the claim in accordance with *Golding* rather than avoiding the claim by treating it as having been waived by implication; in that event, both the defendant and the state know at the earliest possible time that the claim does not entitle the defendant to a new trial, and, moreover, there will be no basis for raising the issue in a petition for a writ of habeas corpus.

The second category of cases, which contains only a very small minority of cases involving *Golding* claims alleging an instructional impropriety of constitutional magnitude, includes only those cases in which the defendant can establish entitlement to a new trial because of a constitutional violation that was not harmless. As I have explained, in the rare case in which the defendant can prevail on such a claim under *Golding*, it is unfair to deprive the defendant of a new trial pending the filing and final resolution of a habeas petition. To conclude otherwise, as the majority does, accomplishes nothing and denies the defendant of the opportunity for a retrial in a timely manner.

[15] The majority asserts that, "[a]lthough it might be the better practice for the trial court to read the proposed instructions line by line and ask after each instruction whether defense counsel agrees, we fail to see a meaningful distinction between repeatedly asking counsel if he or she has any issues with the proposed charge and requesting comments from counsel after the court reads each section of the charge." Again, the majority misses the point. For purposes of ascertaining whether counsel's conduct constituted a waiver, it makes no difference whether the court takes counsel through the charge line by line or merely asks counsel if he or she has any objection to the charge; in neither case does the record support an inference of waiver. As I previously explained, waiver cannot be found from a record that does not demonstrate counsel's actual awareness of the existence of a potential claim or claims. When, as in the present case, the record is silent on that issue, it is impossible to tell whether counsel was aware of the claim and

intentionally abandoned it, or whether counsel simply did not read the charge as containing any such claim.