KATZ, J., dissenting. By applying the newly established rule in *State* v. *Kitchens*, 299 Conn. 447, A.3d (2011), to determine that the defendant, Jason Shola Akande, waived review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[1] of a purported constitutional impropriety in a supplemental instruction requested by the jury[2] in his criminal trial, the majority has wrenched the holding in *Kitchens* away from its purported legal moorings and set it loose upon yet another area of our *Golding* jurisprudence. From this unwarranted extension of *Kitchens*, it appears that the battle to preserve *Golding* review of any instructional errors likely is lost, and although I recognize that "[w]hat's gone and what's past help [s]hould be past grief,"[3] I feel obliged to acknowledge how the majority's opinion in the present case undermines a foundational part of this court's role in protecting defendants' constitutional rights.

In concluding that a defendant may waive his right to a constitutional challenge to an improper jury instruction, the majority in *Kitchens* had relied on principles unique to the context of initial jury instructions: (1) a recognition that our rules of practice provide for substantial participation by counsel in formulating and reviewing jury instructions; (2) public policy that favors encouraging trial courts to hold charging conferences pursuant to Practice Book § 42-19;[4] and (3) public policy that favors encouraging defense counsel to "take advantage of the opportunities provided by the rules of practice, that is, to submit a request to charge, to seek an on-the-record charge conference and to raise objections whenever necessary . . . ." *State* v. *Kitchens*, supra, 299 Conn. 496. None of these principles support a finding of waiver in the wholly different context of supplemental instructions requested by the jury.

Specifically, in crafting its novel approach to waiver of *Golding* review, the majority in *Kitchens* had focused on the particular context in which the purported waiver arose, namely, following a charging conference regarding the initial jury charge conducted pursuant to Practice Book § 42-19. Id., 493–94. The majority in *Kitchens* had presumed that this procedure necessarily provided ample opportunity for the defendant's participation in and reflection upon the proposed charge. In contrast to the process of crafting and approving initial jury instructions, however, the rules of practice do not set forth a process by which defense counsel may participate in proposing and crafting supplemental instructions.[5] This difference likely reflects the fact that supplemental instructions requested or prompted by the jury, by their very nature, arise from unforeseen circumstances and often require prompt response to

avoid undue interruption in jury deliberations. Defense counsel is aware throughout an entire trial that the trial court will provide the jury with initial instructions; he or she is afforded no similar warning concerning supplemental instructions. Accordingly, the public policy concerns on which the *Kitchens* majority had relied simply are not implicated in cases, like the present one, concerning supplemental jury instructions, especially when such instructions are the result of questions by the jury. Considering these differences, I would not conclude that the analysis set forth in *Kitchens* applies to supplemental instructions requested by the jury.

Instead, I would continue to apply our well developed framework governing the waiver of *Golding* review of supplemental instructions, as set forth in *State* v. *Foster*, 293 Conn. 327, 340–41, 977 A.2d 199 (2009), and *State* v. *Whitford*, 260 Conn. 610, 631–32, 799 A.2d 1034 (2002). These cases, read together, stand for the proposition that a defendant waives *Golding* review of a claimed impropriety in a supplemental instruction only when he or she has *requested* a supplemental instruction and affirmatively acquiesces to the language of the instruction as given. See *State* v. *Foster*, supra, 340–41 (*Golding* review was deemed waived when defense counsel "requested that the trial court remind the jury of its obligation to determine that the defendant was at the crime scene before it could find the defendant guilty. The court proposed, and defense counsel offered no objection to, a supplemental instruction that essentially repeated a portion of its initial alibi instruction."); *State* v. *Whitford*, supra, 631–32 (*Golding* review waived when defense counsel raised concern about initial instruction, trial court proposed supplemental instruction and defense counsel agreed that proposed instruction would be adequate); see also *State* v. *Holness*, 289 Conn. 535, 541, 958 A.2d 754 (2008) (*Golding* review waived when defense counsel requested limiting instruction and affirmatively agreed to instruction given).

In the present case, the defendant did not request the supplemental instruction; it was given in response to a question from the jury. This distinction is significant. A defendant's request for an instruction indicates that the defendant is aware of a potential problem and, therefore, any acquiescence to a proposed solution to that problem may give rise to an inference that the defendant knowingly and intentionally has waived any constitutional challenge thereto. See *State* v. *Hafford*, 252 Conn. 274, 295, 746 A.2d 150 ("[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege . . . [which] must depend, in each case, upon the particular facts and circumstances surrounding that case" [internal quotation marks omitted]), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000). Moreover, in the present case, the trial court failed to provide a copy of the initial jury

instructions or to conduct a charging conference concerning those instructions, and there is no indication in the record that the defendant ever assented to those instructions. Cf. *State* v. *Foster*, supra, 293 Conn. 342 (noting that "[i]n fact, defense counsel in the present case not only failed to object to the court's supplemental instruction but also expressed his satisfaction with the trial court's initial instructions"). Indeed, in the present case, there is nothing in the record to indicate that defense counsel was aware of the alleged instructional improprieties. Therefore, consistent with this court's well established precedents, I would conclude that the defendant did not waive *Golding* review of his claim that the jury instructions were constitutionally deficient.[6]

Accordingly, I dissent.

[1] Until this court's recent evisceration of this doctrine in *Kitchens* and its progeny, pursuant to *Golding*, a defendant could prevail on an unpreserved claim if: "(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. The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Internal quotation marks omitted.) *State* v. *Tomas D.*, 296 Conn. 476, 503, 995 A.2d 583 (2010).

[2] It is clear from the majority opinion that waiver is being determined solely on the basis of the circumstances surrounding the supplemental instruction, not the allegedly deficient initial jury charge.

[3] W. Shakespeare, The Winter's Tale, act 3, sc. 2.

[4] Practice Book § 42-19 provides: "After the close of evidence but before arguments to the jury, the judicial authority shall, if requested, inform counsel out of the presence of the jury of the substance of its proposed instructions.

"The charge conference shall be on the record or summarized on the record."

[5] Unlike Practice Book § 42-19; see footnote 4 of this dissenting opinion; the two rules of practice governing supplemental instructions, Practice Book §§ 42-24 and 42-25, are directed exclusively at the trial court and make no mention of defense counsel.

Practice Book § 42-24 provides: "The judicial authority, after exceptions to the charge, or upon its own motion, may recall the jury to the courtroom and give it additional instructions in order to:

"(1) Correct or withdraw an erroneous instruction;

"(2) Clarify an ambiguous instruction; or

"(3) Instruct the jury on any matter which should have been covered in the original instructions."

Practice Book § 42-25 provides: "If the judicial authority gives additional instructions, it also may give or repeat other instructions in order to avoid undue emphasis on the additional instructions. Additional instructions shall be governed by the procedures set forth in Section 42-16 concerning exceptions."

[6] The sole certified question on appeal to this court is: "Did the Appellate Court properly determine that the defendant waived his claim that the jury instructions were constitutionally deficient?" *State* v. *Akande*, 290 Conn. 918, 919, 966 A.2d 237 (2009). Accordingly, I decline to review the state's alternate ground for affirmance that it was not reasonably possible that the jury was misled by the improper definition of material fact. See *State* v. *Hammond*, 257 Conn. 610, 614–15 n.9, 778 A.2d 108 (2001) (declining to review alternate ground for affirmance that was not certified question for appeal). Instead, I would reverse the judgment of the Appellate Court and remand the case to that court for consideration of the defendant's claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40.