PALMER, J., dissenting. In *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), this court held that a defendant will be deemed to have impliedly waived any and all claims challenging the constitutionality of the trial court's jury instructions if, after being provided with an advance written copy of the instructions and an adequate time to review them, defense counsel does not object to the instructions. See id., 482–83. For the reasons set forth in my concurring opinion in *Kitchens*, I do not believe that waiver may be implied in such circumstances, primarily because, in my view, those facts are insufficient to support the conclusion that defense counsel intentionally relinquished a known right, the strict standard that this court demands for purposes of establishing the waiver of a constitutional right. See id., 536–42 (*Palmer*, *J.*, concurring). In the present case, the majority applies this court's holding in *Kitchens* to a scenario in which defense counsel expressly objected to a particular jury instruction on one occasion but failed to do so on subsequent occasions. Although I am obligated to abide by this court's holding in *Kitchens*, I am not bound to agree to extend that holding to the facts of the present case, and I decline to do so. The present facts are insolubly ambiguous as to whether defense counsel's silence on the latter occasions represented a tactical decision to reverse course and to waive the claim that he previously had raised, or whether his failure to object merely was an oversight. Because of this factual ambiguity, *Kitchens* does not mandate a finding that defense counsel, with knowledge that the court's jury instructions were improper, intentionally waived the right of the defendant, Thomas W., to challenge the instructions.[1] I therefore would conclude that *Kitchens* does not bar the constitutional claim that the defendant has raised on appeal. Accordingly, I respectfully dissent.

[1] I note that, in its effort to apply *Kitchens*, the majority deems it appropriate, for purposes of resolving the state's claim of waiver, to draw inferences with respect to the state of mind of the trial judge and of defense counsel. I do not believe that it is appropriate for this court to engage in such fact finding. See, e.g., *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 222–23 n.58, 957 A.2d 407 (2008) (appellate courts lack authority to find facts, which is exclusive province of trial courts). Although this problem stems from our decision in *Kitchens*, it is highlighted by the majority's handling of the present case.