KATZ, J., concurring. To paraphrase William Shakespeare, I write to bury *State* v. *Golding*, 231 Conn. 233, 567 A.2d 823 (1989), not to praise it.[1] That is because, on the basis of this court's recent decision in *State* v. *Kitchens*, 299 Conn. 447, A.3d (2011), the majority determines that the defendant, Randall Brown, waived his right to *Golding* review of an allegedly improper intent instruction despite the fact that we do not know what transpired between the court and the parties in the charging conference that was held off the record.[2] I continue to believe that, because constitutional claims implicate fundamental rights, we should not bar a defendant from raising a meritorious constitutional claim solely because the defendant failed to identify the violation at trial and that review of unpreserved instructional errors pursuant to *Golding* should be foreclosed *only* when the record reflects that the defendant, through defense counsel, knowingly and intentionally relinquished his objection to the error.

Unfortunately, the majority of my colleagues are satisfied to conclude that, if a trial court follows the bare outline of the procedures set forth in the Practice Book concerning jury instructions, a defendant *automatically and categorically* will be denied access to *Golding* review. I believe the majority's approach represents an unwarranted expansion of the holding in *Kitchens* because it fails to acknowledge that the present case rests on a significantly different record than was available in *Kitchens*. In doing so, the majority once more revises our waiver standard, predicating it this time on the merest technical compliance with our rules of practice. In contrast to *Kitchens*, there is *no record* before this court of what occurred at the charging conference in the present case. We thus have no way to determine whether, as *Kitchens* requires, there was a "meaningful opportunity" for the defendant to participate in shaping the instructions.[3] See id., 482–83. Indeed, the majority in the present case seems to recognize this when it states: "Under these circumstances, we cannot determine from the record whether the copy of the final instructions given to defense counsel included the correct charge or the charge as actually given."

Rather than acknowledge the difference between the records in this case and *Kitchens*, the majority distinguishes the present case from *Kitchens* only to the extent that, in the present case, the prosecution submitted a request to charge that contained the proper instructional language, at least as to the jury instruction applying *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). In response to the inconsistency between the request to charge and the charge as given, the majority assumes, based largely

on the fact that the elements of *Pinkerton* liability are well established, that the trial court's omission of the missing element was inadvertent. From that assumption, the majority then concludes that the defendant should not be deemed to have waived *Golding* review of his *Pinkerton* claim. Although the correct definition of specific intent is equally well established; see *State* v. *Shine*, 193 Conn. 632, 638, 479 A.2d 218 (1984); *State* v. *Biting*, 162 Conn. 1, 5, 291 A.2d 240 (1971); see also *State* v. *Hampton*, 293 Conn. 435, 457 n.15, 978 A.2d 1089 (2009); *State* v. *Salamon*, 287 Conn. 509, 573–74, 949 A.2d 1092 (2008); the majority refuses to apply the same generous presumption to the trial court's failure to provide that instruction, and, accordingly, concludes that the defendant has waived *Golding* review of his claim regarding specific intent. I agree with the majority that the discrepancy between the state's request to charge and the charge as given is significant. I conclude, however, that the uncertainty concerning the fate of the prosecution's request to charge is but an *illustration* of the fact that, without an on-the-record charging conference or a copy of the draft instructions, we cannot make any conclusive determinations or presumptions[4] regarding the accuracy, meaningfulness or true effect of the process by which the trial court developed the jury instructions.

As a result of the decisions in *Kitchens* and the present case, we have gone from one of the more forgiving jurisdictions to one of the least tolerant when it comes to human error, at least defense counsel's error.[5] I am deeply troubled by this turn of events. "Bear with me; My heart is in the coffin there with [*Golding*], And I must pause till it comes back to me." W. Shakespeare, Julius Caesar, act 3, sc. 2.

Because I would conclude that the defendant did not waive *Golding* review of his claim regarding the intent instruction, I turn to the merits of that claim. The defendant claims that, when it instructed the jury concerning the specific intent crimes of robbery and attempted robbery as predicate offenses to felony murder, murder, robbery in the first degree, attempted robbery in the first degree and conspiracy to commit robbery in the first degree, the trial court improperly provided a definition of intent that encompassed both general and specific intent. The state concedes that the first two prongs of *Golding* are satisfied and that the defendant's claims are therefore reviewable, but contends that the defendant is not entitled to relief under *Golding* because he cannot establish that the challenged instructions constituted a constitutional violation that clearly deprived him of a fair trial. I agree with the state that the defendant cannot prevail under *Golding*.

"Our standard of review for claims of instructional impropriety is well established. The principal function of a jury charge is to assist the jury in applying the

law correctly to the facts which they might find to be established . . . . When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety . . . and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party . . . . In this inquiry we focus on the substance of the charge rather than the form of what was said not only in light of the entire charge, but also within the context of the entire trial. . . . Moreover, as to unpreserved claims of constitutional error in jury instructions, we have stated that under the third prong of *Golding*, [a] defendant may prevail . . . only if . . . it is reasonably possible that the jury was misled . . . ." (Internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 179, 920 A.2d 236 (2007).

This court frequently has concluded that providing a definition of both general and specific intent is not necessarily constitutionally deficient when the court also provides a proper and thorough definition of intent. See *State* v. *Salamon*, supra, 287 Conn. 573; *State* v. *Austin*, 244 Conn. 226, 238, 710 A.2d 732 (1998); *State* v. *Prioleau*, 235 Conn. 274, 321–22, 664 A.2d 743 (1995). Although the instructions in the present case were not a paragon of clarity, my review of the record[6] indicates that the trial court took pains to provide a proper definition of intent when it set forth the elements of robbery. It then referred back to that definition of intent as it related to the other charges. Considering the instructions as a whole, therefore, and, in the absence of any evidence to the contrary, I would conclude that there is no reasonable possibility that the jury was misled.

Accordingly, I concur in the judgment.

[1] W. Shakespeare, Julius Caesar, act 3, sc. 2.

[2] Therefore, despite the majority's attempt to moderate the impact of its decision in *Kitchens* by assuring defendants that the court will find implied waiver only when there was a "meaningful opportunity to review" the trial court's instructions, this case demonstrates that this alleged safeguard was but an empty promise.

[3] I note that the analysis in accordance with basic principles of fundamental fairness in *Kitchens* also relied on the promotion of on-the-record charging conferences. See *State* v. *Kitchens*, supra, 299 Conn. 495.

[4] "To establish a presumption is to say that a finding of the predicate fact . . . produces a *required conclusion* in the absence of explanation . . . ." (Emphasis added; internal quotation marks omitted.) *Mele* v. *Hartford*, 270 Conn. 751, 769, 855 A.2d 196 (2004); see also *State* v. *Davis*, 286 Conn. 17, 45 n.5, 942 A.2d 373 (2008) (*Katz*, *J.*, concurring) ("A presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence." [Internal quotation marks omitted.]). Under the majority's approach, the predicate fact of compliance with our rules of practice compels the conclusion that the defendant waived *Golding* review.

[5] My research has revealed few other states that have foreclosed appellate review of unpreserved errors. See *Wicks* v. *State*, 270 Ark. 781, 787, 606 S.W.2d 366 (1980); *Earnest* v. *State*, 262 Ga. 494, 498, 422 S.E.2d 188 (1992); *State* v. *Sallis*, 262 N.W.2d 240, 248 (Iowa 1978); *Commonwealth* v. *Clair*, 458 Pa. 418, 421–22, 326 A.2d 272 (1974); *State* v. *Covert*, 368 S.C. 188, 189, 628 S.E.2d 482 (2006).

[6] The defendant's claim arises from court's instruction on robbery, which

is implicated in the other offenses at issue. The record reveals the following undisputed facts pertaining to that charge. The court stated: "The gist of the crime of robbery is the act of committing a larceny by force."

The court then elaborated on the elements of larceny, stating in regards to intent: "The state must prove beyond a reasonable doubt that at the time the defendant wrongfully took, obtained or withheld property from an owner he intended to deprive the owner or some other person of it.

" 'To intend to deprive another person of property' means to intend to withhold or keep or cause it to be withheld from another permanently or for so long a period or under such circumstances that the major portion or its value is lost to that person. In other words, the state must prove beyond a reasonable doubt that the defendant took the property for the purpose of keeping or using it permanently or virtually permanently or of disposing the property in a way that there was a permanent or virtually permanent loss of the property to the owner.

"Intent. Now, 'intent' relates to the condition of the mind of the person who commits the act; his purpose in doing it.

"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."

The court later clarified: "[W]ith respect to larceny, if someone took property honestly, although mistakenly believing that he had a right to do so, you cannot find that he had the required intent to prove this element of larceny. It is essential, therefore, that the state prove beyond a reasonable doubt that the defendant had an unlawful purpose or intention in his mind at the time he took the property."