KATZ, J., dissenting. With their decision, the majority continues its attack on what was once a foundation of this court's jurisprudence: review of unpreserved constitutional errors pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[1] In doing so, it widens the fissure cleft by *State* v. *Kitchens*, 299 Conn. 447, A.3d (2011), in this court's ability to rectify violations of criminal defendants' constitutional rights. And so, I go "[o]nce more unto the breach, dear friends, once more . . . ."[2]

I would conclude that the defendant, Nazra Mungroo, did not waive review of her constitutional claim pursuant to *Golding*. It is apparent from the record that counsel for the defendant believed that the state's case alleging fraudulent receipt of workers' compensation benefits turned on whether the state had proven that the defendant had misrepresented or omitted a material fact and was aware of the proper definition of the term "material fact." At the conclusion of the evidentiary portion of the trial, defense counsel filed a motion for a judgment of acquittal, for which the only stated basis was the defendant's claim that "the [s]tate [had] presented no evidence of which material fact or facts the defendant intentionally misrepresented, or intentionally failed to disclose, when making a claim for benefits. There is therefore no evidence for the jury to find an essential element of this charge: that she made an intentional misrepresentation or omission affecting her claim to benefits." At the hearing concerning that motion, defense counsel had argued that there was "no way that the jury can evaluate whether [the defendant] made a misrepresentation or an omission of a material fact." Later, defense counsel further argued: "[T]he state has to prove that [the defendant] said A, B, and C, but left out D, E, and F. And that had D, E, and F been disclosed, *then the situation would have been different.* In other words, they're material." (Emphasis added.) Defense counsel nonetheless acquiesced to a set of jury instructions under which, in contravention of the well settled definition of "material fact,"[3] that term was defined only as "an important or essential fact . . . ."

Having based much of his case on contending that the defendant had not omitted any *material* fact, it defies logic to presume that defense counsel wanted the jury to have a *less* stringent definition of material fact before them as they deliberated. We are therefore left with two possible explanations for why defense counsel failed to object to the improper definition of material fact included in the jury charge: (1) gamesmanship, specifically, a desire to create a ground for appeal by building error into the trial; or (2) mere inadvertence. As I previously stated in *State* v. *Kitchens*, supra, 299

Conn. 522 (*Katz*, *J.*, concurring), any defense attorney who made such a choice out of gamesmanship would be both incompetent and unethical—incompetent because appellate court reversals of convictions based on *Golding* review of instructional errors are extremely rare,[4] and unethical because, considering that low reversal rate and the fact that defendants may have to wait years to obtain appellate review, such a strategy would in no way serve the defendant's interests.

Because this court is bound to presume that, in the absence of clear evidence to the contrary, attorneys act both ethically and competently; see id., 520 (*Katz*, *J.*, concurring); *State* v. *Cator*, 256 Conn. 785, 794, 781 A.2d 285 (2001); I am compelled to conclude that defense counsel's failure to challenge the definition of materiality was merely inadvertent. Moreover, considering the in-depth discussion of the material fact element and the well established definition of a material fact, I would conclude that the trial court's failure to provide that definition similarly was inadvertent. Pursuant to the majority's decision, however, the defendant *alone* bears the consequence of a mistake that eluded both defense counsel and the trial court. Because *Golding* review was intended to provide an avenue for the review and correction of precisely the type of unintended mistake evident in this case, I cannot join the majority in foreclosing access to that review through a finding of waiver.[5]

Accordingly, I dissent.

[1] Until the majority's recent evisceration of this doctrine, 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] W. Shakespeare, Henry V, act 3, sc. 1.

[3] See *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002) ("[a] material fact has been defined adequately and simply as a fact which will make a difference in the result of the case" [internal quotation marks omitted]).

[4] "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." *State* v. *Kitchens*, supra, 299 Conn. 522 n.17 (*Katz*, *J.*, concurring).

[5] The sole certified question on appeal is: "Did the Appellate Court properly determine that the defendant had waived her claim of error regarding a jury instruction?" *State* v. *Mungroo*, 291 Conn. 907, 969 A.2d 172 (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 question certified 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.