ZARELLA, J., dissenting. The majority observes that its decision is compelled by *State* v. *Salamon*, 287 Conn. 509, A.2d (2008). Although I concurred in the result reached in *Salamon*, I disagreed with the majority's reasoning and its new construction of our state's kidnapping statutes. I maintain my position that the construction that this court adopted in *Salamon* is misguided.[1] I disagree with the majority's conclusion in the present case that the defendant, Paolino Sanseverino, is entitled to a judgment of acquittal rather than a new trial on the kidnapping charge. I conclude that, as a result of this court's "about-face" reversal of its prior interpretation of the crime of kidnapping and open questions in our jurisprudence as to the appropriate response to the defendant's appeal, the case should be remanded for a new trial or the parties should be allowed to file supplemental briefs. Additionally, I write to elaborate on the inconsistencies and unanswered questions concerning the law of kidnapping that *Salamon* and this case have created. Accordingly, I respectfully dissent.

I

To explain fully my concerns with the direction that this court has taken concerning our restraint-based crimes, I begin with a description of the seven *Salamon/Sanseverino* precepts on which the law of kidnapping is now based.

First, when a defendant is charged with the crime of kidnapping and another assault-type crime, that is, one that necessitates restraint of the victim, the state must prove beyond a reasonable doubt that the act of restraint on which the kidnapping is based is not merely incidental to the acts necessary for commission of the other crime. See id., 542.

Second, when a defendant is charged with the crime of kidnapping but not with an underlying assault-type crime, even though the factual circumstances suggest that he could have been charged with such a crime, he is entitled to a jury instruction on that noncharged crime, and the state must prove beyond a reasonable doubt that the act of restraint on which the kidnapping charge is based is not merely incidental to the acts necessary for commission of that noncharged crime. See id., 550 n.35.

Third, the question of whether the restraint on which a kidnapping charge is based is merely incidental to another crime is a factual question for the jury to determine. Id., 547–48.

Fourth, our well settled principle that the crime of kidnapping does not require any asportation of the victim or any minimum length or degree of confinement

remains unchanged. Id., 546.

Fifth, a defendant may be convicted of unlawful restraint when the restraint on which the charge is based is merely incidental to the commission of another assault-type crime. See id., 548.

Sixth, there exists an ambiguity in the language of the statutory scheme as to the requisite mental state required to commit an unlawful restraint and that required to commit a kidnapping. This ambiguity makes it difficult to ascertain at what point an unlawful restraint crosses the line to become a kidnapping. Id., 534.

Seventh, unlawful restraint and kidnapping are both specific intent crimes. Id., 542 n.28.

I first discuss the unintended "merger effect" that I perceive will result from the application of these principles. The majority opinion in *Salamon* did not employ the word "merger," and the majority in the present case merely likens the analysis it conducts to that used under the merger doctrine. Footnotes 9 and 10 of the majority opinion. I suggest, however, that the effect of the *Salamon* kidnapping construction is to take conduct that, by itself, would support a conviction for kidnapping and, in situations in which the defendant perpetrated another assault-type crime, *merge* the would be kidnapping offense into that other crime. The following hypothetical illustrates my concerns.

Assume that a defendant, intending to commit a sexual assault, abducts a victim by threatening to hurt her if she tries to leave the room in which she is restrained.[2] The defendant leaves the room to draw the shades in a front window. Upon returning to the room in which the victim had been restrained, the defendant discovers that the victim had managed to escape, thus thwarting the intended sexual assault. Under these facts, the *Salamon* "incidental" rule would not apply because there is no underlying assault against which to measure the incidental nature of the restraint.[3] Therefore, the defendant could be charged and convicted of kidnapping.[4] Under the facts of the present case, however, *Salamon* dictates that, because the defendant was not thwarted but *succeeded* in sexually assaulting his victim, the state is faced with the additional burden of demonstrating that the restraint had legal significance independent of the assault in order to obtain a kidnapping conviction. The majority concludes that the state could not possibly meet this burden, and, therefore, only a sexual assault and no kidnapping occurred. My hypothetical illustrates that, in light of this *Salamon/Sanseverino* approach, a defendant who successfully *sexually assaults and abducts* his victim may be convicted of sexual assault only, whereas a defendant who restrains a victim intending to sexually assault her but never accomplishes the sexual assault, faces conviction for kidnapping. In other words, the kidnapping, a more serious crime,

merges into the sexual assault, a less serious crime.

Neither the majority in *Salamon* nor the majority in *Sanseverino* expressly adopts by name a merger doctrine. Thus, I assume that they would argue that there is no merger effect because, unless the state proves that the restraint in connection with the kidnapping was not merely incidental to an assault, there are not two distinct crimes capable of being merged. I suggest, however, that this argument is illogical because it depends on acceptance of the premise that conduct that alone may constitute the crime of kidnapping is somehow no longer sufficient to prove that *same crime* under factual circumstances that may give rise to a conviction for another assault-type offense.[5] If the conduct is kidnapping in one circumstance and not kidnapping in another, I conclude that the only rational viewpoint is to recognize that the kidnapping has, in effect, been merged into the underlying crime.

My concern about this probable result is exacerbated by the fact that we repeatedly and expressly have rejected the merger doctrine in the context of kidnapping. *State* v. *Amarillo*, 198 Conn. 285, 304, 503 A.2d 146 (1986); see *State* v. *Chetcuti*, 173 Conn. 165, 170, 377 A.2d 263 (1977). "[W]here the elements of two or more distinct offenses are combined in the same act, prosecution for one will not bar prosecution for the other. . . . Where the *intent* required to constitute kidnapping in the first degree is present, the fact that the perpetrator's underlying motive for the detention is the consummation of [sexual assault] . . . does not preclude a conviction for kidnapping." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Amarillo*, supra, 305. Furthermore, the potential "merging" that *Salamon* permits of an otherwise technical act of kidnapping—conduct that the statutory definition of the crime would encompass—into a less serious offense is inconsistent with our jurisdiction's adoption of merger in other contexts. We have adopted merger in cases involving conduct that gives rise to criminal liability for both a greater offense and a lesser included offense. In such situations, however, we have held that the lesser offense merges into the greater offense, not vice versa. See, e.g., *State* v. *Gould*, 241 Conn. 1, 24, 695 A.2d 1022 (1997).

I acknowledge that the present case and *Salamon* address only the situation in which a defendant is charged with kidnapping and the facts support a charge for another underlying crime. This court has not yet encountered a case post-*Salamon* like my hypothetical, which presents only a kidnapping conviction for our review. I expect that such a case will illustrate that my concerns about this unintended "merger" effect are justified and may result in differing criminal liability for the same or similar conduct. See F. Parker, "Aspects of Merger in the Law of Kidnapping," 55 Cornell L.

Rev. 527, 530 (1970) (comparing New York cases that sustained kidnapping conviction when single crime charged with cases in which kidnapping conviction was reversed because restraint was merely incidental to another crime, and concluding that "the only time the kidnapping charge will be subjected to severe judicial scrutiny is when another felony is also committed"). I consider such a result in conflict with our existing jurisprudence and likely to result in injustice to defendants and victims.

A further question raised by this *Salamon/Sanseverino* paradigm is whether the crime of *attempted* kidnapping is still a viable offense under certain circumstances. General Statutes § 53a-49 (a) defines criminal attempt and provides in relevant part that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." I suggest that the incidental rule announced in *Salamon* may effectively make it impossible for a defendant to be guilty of an attempted kidnapping when the attempt is accomplished through a physical assault and the victim manages to thwart the defendant's plan. *Salamon* overruled, in situations in which an assault-type crime accompanied the restraint of a victim, our long-standing precedent that the proper focus for a jury is on whether a defendant possessed the necessary *intent* for kidnapping and dictates, instead, that a jury must determine whether the act of restraint is incidental to the commission of the assault-type crime. Our existing interpretation of attempt crimes, however, would dictate that if the defendant acted with the intent for kidnapping, then the assault could be viewed as a "substantial step" toward commission of the crime.[6]

Lastly, I note that both *Salamon* and the majority's decision in the present case describe a perceived "ambiguity" in the different intent requirements for kidnapping and unlawful restraint that makes it difficult to determine "how the intent to prevent [a victim's] liberation . . . that is, the intent necessary to establish an abduction, differs from the intent to interfere substantially with [a victim's] liberty . . . ." (Internal quotation marks omitted.) Majority opinion, p. 622, quoting *State* v. *Salamon*, supra, 287 Conn. 534. While I continue to disagree with the description of these intent elements; see *State* v. *Salamon*, supra, 576 (*Zarella, J.*, concurring in part and dissenting in part); more relevant at present is my observation that neither *Salamon* nor the present case offers any resolution of this ambiguity. Rather, *Salamon* relied on this ambiguity to reinterpret the kidnapping statutes, but the court's analysis in that case focused solely on the relationship between kidnapping

and *another nonrestraint based offense*, e.g., sexual assault, assault or robbery. The majority in the present case reiterates the presence of this perceived ambiguity, also offers no resolution and even suggests that the analysis in *Salamon* "resolve[d] this ambiguity . . . ." Thus, this court now has asserted multiple times that the line between an unlawful restraint and a kidnapping is difficult to draw while remaining silent as to what the appropriate distinction might be. The court in *Salamon* rejected the manner in which I distinguished these two crimes but offered no resolution of its own. The majority's reference to this ambiguity in the present case only further emphasizes this court's failure to provide any guidance to future defendants, prosecutors or trial courts with respect to the application of our restraint based offenses. I am greatly troubled by the willingness of the majority in the present case and in *Salamon* to reject long-standing precedent in favor of a new paradigm that leaves so many issues unresolved and that creates a likelihood that our kidnapping statutes will be inconsistently and unjustly applied.

II

I now turn to my disagreement with the majority's decision in the present case to direct a judgment of acquittal without providing the parties an opportunity to alter or supplement their arguments in light of *Salamon*. See *Franc* v. *Bethel Holding Co.*, 73 Conn. App. 114, 150, 807 A.2d 519 (*Schaller*, *J.*, dissenting) (disagreeing with majority opinion and noting that parties at least should be allowed to file supplemental briefs), cert. granted, 262 Conn. 923, 812 A.2d 864 (2002) (appeal withdrawn October 21, 2003). In *Salamon*, the court concluded that "when the evidence reasonably supports a finding that the restraint was *not* merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury." (Emphasis in original.) *State* v. *Salamon*, supra, 287 Conn. 547–48. The majority in the present case reiterates that "the question of whether kidnapping may stand as a separate offense *is one for the jury* . . . ." (Emphasis added.) After this observation, however, the majority, sua sponte, applies a sufficiency of the evidence test to the facts in the record to determine whether, under the new statutory construction announced in *Salamon*, the state could have proven beyond a reasonable doubt that the restraint at issue had legal significance independent of the restraint necessary to perpetrate the sexual assault. The majority then concludes that "no reasonable jury could have found the defendant guilty of kidnapping in the first degree on the basis of the evidence that the state proffered at trial." The majority reaches this conclusion without any arguments or briefing from the parties on this issue.

I disagree with this approach, first, because I consider

the more appropriate characterization of the defendant's claim, post-*Salamon*, to be that the jury was improperly instructed on the elements of kidnapping.[7] As I previously noted, *Salamon* overruled this court's prior interpretation of the kidnapping statutes, pursuant to which we consistently had rejected the claim that a defendant could not be convicted of kidnapping if his restraint of the victim was merely incidental to the restraint necessary to commit another crime. Thus, *Salamon* introduced a new element to the crime of kidnapping. In the present case, the trial court did not instruct the jury on that element. Moreover, no objection to the trial court's instructions was likely even contemplated because the court, the state and the defendant reasonably believed that the court's instructions were legally correct. Indeed, the trial court's instructions were in keeping with this court's well settled, pre-*Salamon* interpretation of the kidnapping statutes. It is clear, therefore, that, in light of *Salamon*, the trial court's instructions prejudiced the defendant because, in the absence of an instruction in accordance with this court's decision in *Salamon*, it was easier for the jury to find the defendant guilty of kidnapping. The proper remedy for a harmful instructional error, including one involving the failure to charge on an essential element of a criminal offense, is a new trial, not a judgment of acquittal.[8] See, e.g., *State* v. *Desimone*, 241 Conn. 439, 459 n.27, 696 A.2d 1235 (1997); see also *State* v. *Salamon*, supra, 287 Conn. 514 & n.7 (remanding case for new trial in light of newly announced interpretation of kidnapping statutes).

The majority's election to treat the defendant's challenge to his kidnapping conviction as a claim for "insufficiency of evidence," rather than "instructional error," and its conclusion that the evidence is insufficient, requires a judgment of acquittal, however, because double jeopardy principles preclude the retrial of the defendant when his conviction is reversed due to insufficiency of the evidence.[9] E.g., *Burks* v. *United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State* v. *Padua*, 273 Conn. 138, 178, 869 A.2d 192 (2005). Nevertheless, assuming that the majority's election to characterize the defendant's claim as one challenging the sufficiency of the evidence is proper, I am not convinced that the majority has undertaken this analysis correctly. To explain fully my concerns with the majority's approach and my reasons for concluding that, in the absence of an order remanding the defendant's case for a new trial on the kidnapping charge, supplemental briefs are necessary, a brief explanation of *Burks* and a line of cases that followed is useful.

In *Burks*, the United States Supreme Court recognized an exception to the general rule that the proper remedy for an error at trial is to grant the defendant a new trial. See *Burks* v. *United States*, supra, 437 U.S. 15–16. The court in *Burks* observed: "Various rationales

have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that . . . [i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. . . . In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . *Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect*, [e.g., incorrect jury instructions]. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for [e]nsuring that the guilty are punished. . . .

"*The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.*" (Citations omitted; emphasis added; internal quotation marks omitted.) Id. In *Burks*, the court dealt only with a sufficiency of evidence claim.

Ten years later, the United States Supreme Court confronted the issue of whether the double jeopardy clause similarly bars retrial of a defendant "when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction . . . ." *Lockhart* v. *Nelson*, 488 U.S. 33, 40, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988). In *Lockhart*, the court concluded that a retrial was not barred by the constitution. See id. "It appears . . . to be beyond dispute that this is a situation described in *Burks* as reversal for 'trial error'—the trial court erred in admitting a particular piece of evidence, and without it there was insufficient evidence to support a judgment of conviction. But clearly *with* that evidence, there was enough to support the sentence . . . ." (Emphasis in original.) Id. The appropriate analysis, according to *Lockhart*, for reviewing a claim of insufficiency of evidence when it arises in conjunction with a claim that evidence improperly was admitted is to "consider all of the evidence admitted by the trial court in deciding whether retrial is permissible . . . ." Id., 41; see also *State* v. *Gray*, 200 Conn. 523, 538, 512 A.2d 217 (adopting same approach pre-*Lockhart*), cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986). The United States Supreme Court explained that "[p]ermitting retrial in this instance is not the sort of governmental oppression at which the [d]ouble [j]eopardy [c]lause is aimed; rather, it serves the interest of the defendant by affording him an opportunity to obtai[n] a

fair readjudication of his guilt free from error. . . . [The court's] holding today thus merely *recreates the situation that would have been obtained if the trial court* had [not committed error] . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Lockhart* v. *Nelson*, supra, 42.

In *Gray*, this court observed the rationale underlying the approach that the United States Supreme Court subsequently adopted in *Lockhart*. We quoted the Supreme Court of Missouri with approval: "When the trial court erroneously admits evidence resulting in reversal . . . the [s]tate should not be precluded from retrial even though when such evidence is discounted there may be evidentiary insufficiency. *The prosecution in proving its case is entitled to rely upon the rulings of the court and proceed accordingly*. . . . [T]he [s]tate is not obligated to go further and adduce additional evidence that would be . . . cumulative. Were it otherwise, the [s]tate, to be secure, would have to assume every ruling by the trial court on the evidence to be erroneous and marshall and offer every bit of relevant and competent evidence. The practical consequences of this would adversely affect the administration of justice . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Gray*, supra, 200 Conn. 538, quoting *State* v. *Wood*, 596 S.W.2d 394, 398–99 (Mo.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980). We further observed that, if the analysis did not involve review of *all* the evidence that the jury had considered, "unfairness to the state might result because the state might have produced other evidence at the trial if the evidence held inadmissible upon appellate review had been excluded at the trial." *State* v. *Gray*, supra, 539–40; see also *Moff* v. *State*, 131 S.W.3d 485, 490 (Tex. Crim. App. 2004) ("This rule rests in large part [on] what is perceived as *the unfairness of barring further prosecution where the* [*s*]*tate has not had a fair opportunity to prove guilt*. A trial judge's commission of trial error may lull the [s]tate into a false sense of security that may cause it to limit its presentation of evidence." [Emphasis added.]).

In the present case, the majority analyzes the sufficiency of the evidence against the law as it was announced in *Salamon* after the defendant's trial. In concluding that the evidence was insufficient to sustain the defendant's kidnapping conviction, the majority presumes that the jury properly was instructed on the law when it determined the defendant's guilt. The majority may be correct that, on the basis of the facts presented at the defendant's trial, the state did not demonstrate that the defendant perpetrated a restraint of the victim that has legal significance independent of the sexual assault. The state, however, had no knowledge when presenting its case to the jury that it was necessary to make such a showing. Our law consistently has rejected such a construction of the crime of kidnapping. Argua-

bly, the majority's approach is inconsistent with the *Gray* and *Lockhart* line of cases. These cases recognize that the state reasonably may rely on the rulings of the trial court in presenting its case. Under the law existing at the time of trial, the evidence clearly was sufficient for a reasonable jury to find the defendant guilty of kidnapping. See, e.g., *State* v. *Luurtsema*, 262 Conn. 179, 202–203, 811 A.2d 223 (2002). I suggest that, because the court in *Salamon* adopted an interpretation of our kidnapping statutes that this court previously and repeatedly had considered and rejected, the state may not have had its "one fair opportunity" to present its case. *Burks* v. *United States*, supra, 437 U.S. 16. An alternative approach, and one that appears to be supported by our case law, is to ask whether the evidence introduced was sufficient to convict on the law that was in effect at the time the jury was instructed on it at trial. Cf. *State* v. *Gray*, supra, 200 Conn. 538–40. If the reviewing court determines that the evidence was sufficient, then that court must consider any claim of instructional impropriety that may warrant a new trial.

In support of drawing this analogy between the *Gray* and *Lockhart* line of cases and the present case, I note that the court in *Burks* included instructional error in its examples of "trial error" that may warrant a new trial. *Burks* v. *United States*, supra, 437 U.S. 15. Furthermore, I find it persuasive that one of the rationales in *Gray* for permitting retrial is that the state reasonably may rely on a court's rulings and, if they are later deemed to be erroneous, the state would be prejudiced by any judgment of acquittal because it had been deprived of its "one fair opportunity" to convict. Id., 16; see *State* v. *Gray*, supra, 200 Conn. 538. Similarly, in the present case, the state's charging decisions and its presentation of evidence were made in reasonable reliance on our well settled interpretation of our kidnapping statutes.[10] See *Losey* v. *Frank*, 268 F. Sup. 2d 1066, 1071 (E.D. Wis. 2003). "[I]f the prosecution did not have a full, fair and complete opportunity to establish the defendant's culpability because the conviction was set aside as the result of a trial error, such as the trial court's erroneous exclusion or admission of evidence *or erroneous instruction to the jury*, the decision will not be treated as equivalent to a verdict of acquittal and reprosecution of the defendant will not be barred." (Emphasis added.) Id. Further, I suggest that we cannot know from the record before us whether there was additional evidence that the state could have proffered at trial to support a kidnapping charge under the new *Salamon* paradigm.

Not surprisingly, because of the extremely startling 180 degree reversal that this court performed in *Salamon*, my research has revealed no authority from Connecticut that addresses whether *Gray* and *Lockhart* should inform our review of a sufficiency of evidence claim when it arises in conjunction with a complete

reversal of well settled criminal law. For the foregoing reasons, I conclude that the parties should be given the opportunity to argue that the evidence introduced at trial was sufficient when considered against the trial court's instructions to the jury and that, because *Salamon* rendered those jury instructions improper, the defendant deserves a readjudication of his guilt, free from error, and the state deserves its "one fair opportunity" to prosecute the defendant. *Burks* v. *United States*, supra, 437 U.S. 16.

In addition to any argument that the state or defendant could advance with respect to whether the defendant should be entitled to a judgment of acquittal on the kidnapping charge or whether the case should be remanded for a new trial, my review of our case law and relevant case law in other jurisdictions strongly suggests that, if given the opportunity to file a supplemental brief, the state could request that this court modify the judgment by directing the trial court to convict the defendant of a lesser included offense. The state, in the present case, charged the defendant with kidnapping in the first degree, and the defendant was convicted on that charge. In light of *Salamon*, as the majority in the present case has concluded, there is some doubt as to whether the evidence was sufficient to sustain a conviction of kidnapping in the first degree. We nevertheless have concluded previously that kidnapping in the second degree and unlawful restraint in the second degree are always lesser included offenses of kidnapping in the first degree. See General Statutes §§ 53a-92, 53a-94 and 53a-96; see also *State* v. *Dahlgren*, 200 Conn. 586, 587–88, 512 A.2d 906 (1986) (second degree kidnapping is lesser included offense of first degree kidnapping); cf. *State* v. *Boyd*, 178 Conn. 600, 601, 424 A.2d 279 (1979) (second degree unlawful restraint is lesser included offense of second degree kidnapping). Although the record reveals that neither the defendant nor the state requested an instruction on these lesser included offenses, and that the trial court did not instruct the jury on them, the case law on the modification of judgments indicates that whether there are any circumstances under which we would approve the modification of a judgment when the jury has not been expressly instructed on any lesser included offenses is an open question in our jurisprudence.

The weight of our prior cases modifying a judgment for the purpose of convicting a defendant of a lesser included offense indicates that, to so modify the judgment, a jury must have been properly instructed on that lesser included offense, and, when a conviction of the greater offense is reversed due to insufficient evidence, the jury must have found that the state proved the elements constituting the lesser offense beyond a reasonable doubt. See *State* v. *Grant*, 177 Conn. 140, 147–49, 411 A.2d 917 (1979); see also *State* v. *Saracino*, 178 Conn. 416, 421, 423 A.2d 102 (1979) ("[s]ince the jury

could have explicitly returned . . . a verdict [of guilty of the lesser included offense of fourth degree larceny], the defendant was aware of her potential liability for this crime and would not now be prejudiced by modification of the judgment"). "In [*Grant*] . . . and [*Saracino*], we held that even though the trial evidence did not support the defendant's conviction of the offense charged, we were free to modify the judgment to reflect a conviction of a lesser crime. We came to this conclusion because the evidence was sufficient to support a conviction of a lesser included offense on which the jury properly had been charged and the jury's verdict necessarily included a finding that the defendant was guilty of that lesser offense." *State* v. *Desimone*, supra, 241 Conn. 460 n.28. I note, however, that my research has revealed two of our cases that suggest that, although these prerequisites generally may be necessary, their absence may not absolutely bar this court from modifying a judgment in *all* circumstances.

In *State* v. *McGann*, 199 Conn. 163, 506 A.2d 109 (1986), we modified a judgment of conviction from capital felony to murder; id., 179; because the latter crime was a lesser included offense and "the defendant could not have committed 'murder for hire' without also committing intentional murder . . . ." Id., 178. We modified the judgment of conviction because we concluded that "[t]he failure of the state to prove the additional element of a hiring to commit the murder leaves standing the finding . . . that the defendant did murder [the victim]." Id. I note, however, that, because that case involved a bench trial, there were no jury instructions that might have given the defendant notice of his criminal liability on the lesser included offense. Nor is it clear from our decision in *McGann* whether the state requested this court to modify the judgment. We noted only that "[o]ur conclusion that the judgment of the trial court was erroneous in convicting the defendant of a capital felony does not require a remand [for] a new trial." Id.

Our modification of the judgment of conviction in *State* v. *Greene*, 274 Conn. 134, 874 A.2d 750 (2005), cert. denied, U.S. , 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006), further calls into question the necessity that a jury be instructed on the lesser offense of which a reviewing court directs a modified judgment of conviction. In that case, the defendant was charged with, inter alia, murder as an accessory, and the trial court granted the state's request to instruct the jury on what it considered to be the lesser included offense of manslaughter in the first degree with a firearm as an accessory. Id., 154. On appeal, we concluded that such an instruction was improper because manslaughter in the first degree with a firearm is not a lesser included offense of murder. Id., 159–60. We rejected the defendant's contention that the appropriate remedy for this constitutional violation of instructional error was a judgment of acquittal and

determined that we could modify the judgment of conviction. Id., 160–62. In doing so, we recognized that "[t]his court has modified a judgment of conviction after reversal, if the record establishes that the jury necessarily found, beyond a reasonable doubt, all of the essential elements required to convict the defendant of a lesser included offense." Id., 160. We determined that, "[b]efore the jury could find the defendant guilty of manslaughter in the first degree with a firearm, the jury necessarily must have found the defendant guilty of manslaughter in the first degree. . . . Therefore, the trial court's improper instruction could not have affected the jury's finding that the defendant was guilty, beyond a reasonable doubt, of the essential elements of manslaughter in the first degree . . . ." (Citations omitted.) Id., 161. Significantly, however, in *Greene*, the trial court never had instructed the jury that it could find the defendant guilty of manslaughter in the first degree. See id., 155. Rather, the trial court's instruction on the lesser included offense was that the jury could find the defendant guilty of manslaughter in the first degree *with a firearm*. See id. Nevertheless, we did not conclude that the the jury's inability to return explicitly a verdict of guilty of manslaughter in the first degree precluded us from modifying the judgment by directing the trial court to convict the defendant of that crime. But cf. *State* v. *Saracino*, supra, 178 Conn. 421.

As in *Greene*, in which we observed that the jury's verdict of guilty of manslaughter in the first degree with a firearm required the jury first to find beyond a reasonable doubt that all the elements of manslaughter in the first degree had been proven, in the present case, the jury found the defendant guilty of kidnapping in the first degree, an abduction crime that is predicated on a finding *first* that the defendant had committed an unlawful restraint. Thus, *Greene* arguably suggests that this court, even in the absence of an *express* jury instruction on unlawful restraint in the second degree,[11] could modify the judgment by directing the trial court to convict the defendant of that lesser included offense.

Additionally, I note that the circumstances under which an appellate court may modify a judgment vary among different jurisdictions and never have been expressly decided by this court. Compare *United States* v. *Hunt*, 129 F.3d 739, 745–46 (5th Cir. 1997) (instruction not required but should be considered in determining whether modification of judgment unduly prejudicial to defendant), *United States* v. *Smith*, 13 F.3d 380, 383 (10th Cir. 1993) (no undue prejudice due to modification of judgment because possibility of instruction on lesser included offense existed throughout trial, and all elements were proven beyond reasonable doubt), and *Shields* v. *State*, 722 So. 2d 584, 587 (Miss. 1998) ("lesser included offense need not be before the jury in order to apply the direct remand rule"), with *United States* v. *Dhinsa*, 243 F.3d 635, 676 (2d Cir.) (because there was

no jury instruction, court could not grant government's request to modify judgment of conviction), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed. 2d 156 (2001), *United States* v. *Dinkane*, 17 F.3d 1192, 1198 (9th Cir. 1994) (requiring jury instruction on lesser included offense to modify judgment), and *State* v. *Brown*, 360 S.C. 581, 594, 602 S.E.2d 392 (2004) (jury must be instructed on lesser included offense in order to remand for sentencing on that crime). Furthermore, the United States Supreme Court has noted its approval of the four-pronged test announced by the District of Columbia Circuit Court of Appeals in *Allison* v. *United States*, 409 F.2d 445 (D.C. Cir. 1969). *Rutledge* v. *United States*, 517 U.S. 292, 305 n.15, 306, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). This approach does not require the jury to be instructed on the lesser included offense. Rather, the test provides that a judgment can be modified only if it can be shown "(1) that the evidence adduced at trial fails to support one or more elements of the crime of which [the accused] was convicted, (2) that such evidence sufficiently sustains all the elements of another offense, (3) that the latter is a lesser included offense of the former, and (4) that no undue prejudice will result to the accused." *Allison* v. *United States*, supra, 450–51.

Finally, I make no assertion, at this point, as to the rule that this court should or would adopt; rather, I maintain that the parties in this case deserve an opportunity to argue the merits of each position as it relates to the appropriate course of action that this court should take in light of *Salamon*. The majority's only response to this point is that the state did not ask this court to modify the judgment of conviction. Perhaps, if the state were omniscient and, thus, capable of predicting the overruling of years of settled precedent, the majority's approach would be procedurally correct. I believe, however, that the better course would be to request supplemental briefs and then consider and decide the issue. Requiring the state to file a motion for reconsideration—a motion which could be denied—is hardly a solution to this court's deciding an issue in a legal vacuum. See footnote 16 of the majority opinion.

At best, I would renounce the problematic construction of our kidnapping statutes that this court adopted in *Salamon*. Absent that, I maintain that the correct application of this new construction dictates, at a minimum, that the parties in the present appeal be given an opportunity to consider its impact and advocate for the most lawful course of action to follow.

[1] The majority observes that "[w]e may apply the rule announced in *Salamon* to the present case because this court long has stated that a rule enunciated in a case presumptively applies retroactively to pending cases." Footnote 11 of the majority opinion. I agree with the majority that retroactive application of *Salamon* to this case is appropriate but would elaborate on the majority's statement by noting that we have recognized that judicial construction of a statute can operate like an ex post facto law and thus violate a criminal defendant's due process right to fair warning as to what conduct is prohibited. See, e.g., *State* v. *James G.*, 268 Conn. 382, 409, 844

A.2d 810 (2004); *State* v. *Cobb*, 251 Conn. 285, 436, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). Because our decision in *Salamon* purports to narrow the potential conduct encompassed by our kidnapping statutes in situations in which a defendant restrains a victim solely to commit another crime, this new construction does not operate to "disadvantage the offender affected by it . . . by altering the definition of criminal conduct . . . ." (Internal quotation marks omitted.) *State* v. *James G.*, supra, 409. Therefore, retroactive application of this court's new construction of the crime of kidnapping is not constitutionally barred.

[2] General Statutes § 53a-91 (2) defines "abduct" in relevant part: "[T]o restrain a person with intent to prevent his liberation by . . . (B) *using or threatening to use physical force or intimidation*." (Emphasis added.)

[3] See second *Salamon/Sanseverino* precept in the text of this opinion.

[4] The majority opinion in this case and *Salamon* reaffirmed our longstanding principle that the crime of kidnapping does not require asportation of a victim or a restraint for any minimum length of time. See fourth *Salamon/Sanseverino* precept in the text of this opinion.

[5] See second *Salamon/Sanseverino* precept in the text of this opinion.

[6] See *State* v. *Carroll*, 20 Conn. App. 437, 437–39, 567 A.2d 1258 (1990) (conviction of attempted kidnapping in second degree and assault in first degree arising out of single factual circumstance affirmed on appeal). "[T]he defendant [in *Carroll*] forced the victim into his car and displayed a handgun in response to repeated resistance by both the victim and her family. . . . [T]he evidence, when considered in the light most favorable to sustaining the jury's verdict, supports a finding that the defendant had taken a substantial step toward preventing the victim's rescue by third parties. Consequently . . . [the defendant's] conviction for attempted kidnapping must stand." Id., 439.

[7] It is axiomatic that criminal defendants have a constitutional right to a trial by a properly instructed jury. See, e.g., *State* v. *Padua*, 273 Conn. 138, 166, 869 A.2d 192 (2005).

[8] I note that, on retrial, the defendant would be entitled to an instruction consistent with the narrower construction of the kidnapping statutes announced in *Salamon*, and if the majority's assessment that there is insufficient evidence is correct, then the state simply may elect to stop pursuing prosecution for the kidnapping charge.

[9] I acknowledge that, if the parties were given, as I urge, an opportunity to file supplemental briefs, and the defendant raised an actual sufficiency of the evidence claim, it is well settled that we would resolve that claim prior to addressing any claims of trial error, including instructional impropriety, to avoid any double jeopardy issues. See *State* v. *Padua*, 273 Conn. 138, 178, 869 A.2d 192 (2005). Nevertheless, for the reasons that I set forth in the text of this opinion, regardless of the order in which we would address these claims, I am not convinced that the majority's approach to the sufficiency of evidence analysis is correct or consistent with our approach to similar claims.

[10] Significantly, I note that, if this case were remanded for a new trial, as I maintain is the proper action, the state would have an opportunity to consider the relevant facts in light of the incidental restraint rule adopted in *Salamon*, as well as the new principle that *Salamon* adopts with respect to the crimes of unlawful restraint and kidnapping. In *Salamon*, the court noted that it did not "retreat from the general principle that an accused may be charged with and convicted of more than one crime arising out of the same act or acts, as long as all of the elements of each crime are proven. Indeed, because the confinement or movement of a victim that occurs simultaneously with or incidental to the commission of another crime ordinarily will constitute a substantial interference with that victim's liberty, such restraints still may be prosecuted under the unlawful restraint statutes." *State* v. *Salamon*, supra, 287 Conn. 548. Our case law suggests that the state, on remand, may file a substitute information charging a defendant with unlawful restraint in lieu of or in addition to kidnapping. See, e.g., *State* v. *Almeda*, 211 Conn. 441, 443–44, 560 A.2d 389 (1989); *State* v. *Vinal*, 205 Conn. 507, 508, 534 A.2d 613 (1987). In *Almeda*, which was the appeal from the defendant's retrial; see *State* v. *Almeda*, supra, 442–44; we observed that, in our opinion regarding the defendant's first appeal, we had "explicitly indicated that on a second trial the defendant could be prosecuted on the charge of assault in the first degree," even though he had not been prosecuted for that crime in his first trial, because the defendant would not be "called upon . . . to answer for any activities that he had not been required to

defend against in his first trial on the original information." Id., 447. The same is true in the present case.

Furthermore, I conclude that, under the facts elicited at the defendant's trial in the present case, not only would a charge of unlawful restraint be proper, but a charge of kidnapping in the second degree also may be supported. The majority correctly notes that the defendant was convicted of kidnapping in the first degree pursuant to General Statutes § 53a-92 (a) (2) (A). To be guilty of this crime, the state had to prove that the defendant restrained the victim not only with the intent to prevent her liberation but also with the intent to "inflict physical injury upon [her] or violate or abuse [her] sexually . . . ." General Statutes § 53a-92 (a) (2) (A). In light of *Salamon*'s dictate that the restraint to support the kidnapping charge be more than merely incidental to the sexual assault and the lack of evidence that the defendant maintained an intent to abuse the victim sexually after the assault ended, I acknowledge that the state may not be able to meet its burden of proving that the defendant is guilty of kidnapping in the first degree. Kidnapping in the second degree, however, a lesser included offense, does not require the additional intent element. See General Statutes § 53a-94; see also *State* v. *Dahlgren*, 200 Conn. 586, 587–88, 606, 512 A.2d 906 (1986) (second degree kidnapping is lesser included offense of first degree kidnapping and does not require that defendant have intent to abuse victim sexually). Admittedly, a charge of kidnapping in the second degree still would require the state to demonstrate that the restraint perpetrated had legal significance independent of that necessary to commit the sexual assault. I suggest that the record contains facts that may support such a finding.

The majority's conclusion that no reasonable jury could find a restraint of independent significance to support a conviction of kidnapping in the first degree appears to be premised on the notion that the restraint began and ended with the defendant's physical hold on G, one of the victims. According to the majority, the restraint and the sexual assault ended when the defendant released his hold on G. Our statutory scheme governing restraint, however, is broader than the majority's analysis might suggest. A victim may be abducted not only by the imposition of physical force but also by the threat of physical force or intimidation. General Statutes § 53a-91 (2). In the present case, G testified that, after the sexual assault, the defendant released her arms, and she locked herself in the store bathroom until someone else entered the bakery, which is when she "knew she'd be safe." Furthermore, G testified that the defendant had threatened to hurt her and her family if she told anyone about the sexual assault. The majority concludes that *Salamon* dictates a finding that no reasonable jury could find the defendant guilty of kidnapping because the restraint clearly was incidental to the sexual assault. I am inclined, however, to consider the fact that G locked herself in the bathroom after the sexual assault because she may have been threatened by the defendant and afraid of further physical assault, especially in light of the jury's clear determination that the defendant possessed the requisite intent to prevent G's liberation. On this basis, I would suggest that the matter is worthy of further exploration as to when the restraint of G actually ended. See, e.g., *State* v. *Montgomery*, 254 Conn. 694, 732 n.43, 759 A.2d 995 (2000) ("[b]ecause kidnapping involves interfering with the victim's liberty, *it continues until that liberty is restored*" [emphasis added]). Thus, G's self-confinement in the bathroom may have constituted a continuation of the interference with her liberty that had begun with the sexual assault.

[11] We note that, even though the trial court in the present case did not expressly instruct the jury on the lesser included offense of unlawful restraint in the second degree, because that crime is a lesser included offense of kidnapping in the first degree and because the trial court instructed the jury on the elements of kidnapping in the first degree, it implicitly instructed the jury on the lesser offense inasmuch as the trial court necessarily instructed the jury on all of the elements comprising the crime of unlawful restraint in the second degree.