SCHALLER, J., dissenting in part. I respectfully disagree with the majority opinion insofar as it gives the state an option to request a modification of the conviction of the defendant, Paolino Sanseverino, of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A) to reflect the lesser included offense of unlawful restraint in the second degree in violation of General Statutes § 53a-96. Although I understand that this case presents a special set of circumstances, I remain convinced that modifying a conviction to reflect a lesser included offense is not appropriate unless the jury has received an instruction on the lesser included offense.

Although we have not addressed this question directly, Chief Justice Rogers points out in her concurring opinion that several of our sibling states have recognized that "a defendant not only has a right to lesser-included offense instructions on request, but also has a right to forego such instructions for strategic reasons." *State* v. *Sheppard*, 253 Mont. 118, 124, 832 P.2d 370 (1992). I agree with Chief Justice Rogers that "if the trial court has given no instruction on a lesser included offense, this court should not modify the judgment to reflect the lesser offense when the judgment on the greater offense has been overturned on appeal as the result of a legal error, and the sole remedy should be a retrial." I find the sound reasoning in *State* v. *Brown*, 360 S.C. 581, 594–97, 602 S.E.2d 392 (2004), very persuasive. In that case, the Supreme Court of South Carolina set forth a comprehensive statement of reasons why a jury instruction on the lesser included offense is a prerequisite to modifying the judgment.

Briefly paraphrasing the *Brown* rationale, the court determined that a remand for sentencing on a lesser included offense is appropriate only when a jury properly has been charged on that offense because: (1) appellate courts should avoid resolving cases in ways that involve fact finding or blur distinctions between appellate and trial court determinations; (2) requiring an instruction maintains the distinction between an appellate court's determination that the record evidence is sufficient to support a guilty verdict and a jury's determination that the state proved its case beyond a reasonable doubt; (3) when the jury has been instructed on the greater offense only, any attempt to assess what the jury would have determined with respect to the lesser offense is speculative; (4) only when the jury has been instructed on the lesser offense and could have explicitly returned a verdict, is the defendant undeniably aware of his potential liability for the lesser offense; (5) the practice of remanding for sentencing on lesser offenses that have not been submitted to the jury may

encourage the state to risk not seeking instructions; (6) the state gains an unfair strategic advantage if it *alone* can adopt an all or nothing approach at trial but, under some circumstances, change its position and argue that the lesser offense should have been submitted; and (7) the defendant may have forgone a particular defense or strategy due to the failure to instruct on a lesser included offense. Id.

I am not persuaded that the particular circumstances of this case justify departing from the standard supported by those reasons. The fact that there was a significant change in the interpretation of the kidnapping statute after the defendant's conviction but before the resolution of his appeal has no bearing on the soundness of the rationale expressed in *Brown*. I am not persuaded by the state's argument that the circumstances of this case justify not holding the state to its decision to forgo an instruction on a lesser included offense. I believe that the unfairness to a defendant by convicting him of a charge on which the original jury could *not* have convicted him outweighs whatever disadvantage the state may suffer from its tactical decision. If this rule is not enforced in this situation, this court is, in effect, resolving a case "in a manner which appears to place [an] appellate court in the jury box." Id., 594.

Although the majority adopts this modification procedure on a limited basis, I submit that the circumstances of this case do not justify an exception to the wise and sound principle that counsels otherwise. The state has not presented any reasons why it is entitled to benefit from the special advantage of optional courses of action to the disadvantage of the defendant. If, indeed, the defendant "has benefited from our holding in [*State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008)]," as the majority argues, the *unexpected* holding in *Salamon* can be said to have done no more than to remedy a deficiency in the law, a *benefit* to which the defendant doubtless was entitled.

For the foregoing reasons, I respectfully dissent from part II of the majority opinion.