KATZ, J., with whom, ZARELLA, J., joins, dissenting. I disagree with the majority's determination that the defendant, Gregory B. Winot, is not entitled to a judgment reversing his conviction of kidnapping in the second degree and remanding the case for a new trial on that charge because, in the majority's view, the new rule for kidnapping offenses adopted in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008),[1] and the attendant remedy for appeals pending prior to the adoption of that rule established in *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), and applied in *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009), are not "implicated by the facts of the present appeal."[2] Accordingly, I respectfully dissent.

As the majority recognizes in footnote 7 of its opinion, in *State* v. *Salamon*, supra, 287 Conn. 542, we determined that, in defining kidnapping, "the legislature meant to exclude from its scope an intent to confine or move a victim that is wholly incidental to the commission of another crime which, by its nature, necessitates some restraint of the victim." The majority further acknowledges that we expressly stated in *Salamon* that "[w]hether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case"; id., 547; and that because the evidence reasonably supported a finding that the restraint was *not* merely incidental to the commission of some other, separate crime in that case, the state was entitled to have the ultimate factual determination of whether the defendant intended to prevent the victim's liberation made by the jury. Id., 547–48. Indeed, in *State* v. *DeJesus*, supra, 288 Conn. 418, despite the fact that there was little doubt that the defendant's restraint of the victim was merely incidental to his assault of the victim, we nevertheless refused to engage in speculation, to conduct a sufficiency of the evidence analysis, or even to examine in detail the specific evidence adduced at trial, deciding instead that whether there was a separate restraint was a question better left to a properly instructed jury. See id., 438–39.

Notably, following our decision in *DeJesus*, we granted a motion for reconsideration of our decision in *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), in which, after deciding that the facts of *Sanseverino* implicated the rule announced in *Salamon*, we had concluded that the defendant was entitled to a judgment of acquittal rather than a new trial on the kidnapping charge because it seemed so apparent that the defendant's restraint had been wholly incidental to his commission of a sexual assault. See *State* v. *Sanseverino*, supra, 291 Conn. 578. Upon reconsideration,

however, the court changed its approach, concluding instead that the proper remedy was to remand the case to afford the state the opportunity to retry the defendant on the kidnapping charge at which trial the jury properly would be instructed as to the rule of *Salamon* and the state would have the opportunity to present evidence and argue that the restraint involved was not entirely incidental to the defendant's commission of sexual assault. Id., 589–90.

Despite this case law, in the present case, the majority concludes that the remedy established by *DeJesus* is not implicated because, inter alia, there was "no evidence presented at trial suggesting that the defendant, when he grabbed the victim's arm, was in the process of committing another crime against her to which the restraint was incidental." I disagree. The evidence did indeed disclose conduct that could constitute another crime, i.e., assault in the third degree, breach of the peace, creating a public disturbance or disorderly conduct, to which a jury reasonably could find the restraint was wholly incidental. [3] Therefore, I believe the incidental rule does apply and that it would be necessary for the trial court, on remand, to submit the issue to a properly instructed jury in accordance with our newly established kidnapping jurisprudence.[4] In short, because there is evidence of another crime and because the evidence reasonably would support a finding that the restraint was merely incidental to the commission of that other, separate crime, the ultimate factual determination regarding the defendant's intent ultimately must be made by the jury on remand.[5]

Accordingly, I respectfully dissent.

[1] In *State* v. *Salamon*, supra, 287 Conn. 528–48, we reconsidered our longstanding interpretation of our kidnapping statutes, General Statutes §§ 53a-91 through 53a-94a, encompassing even restraints that merely were incidental to and necessary for the commission of another substantive offense, such as robbery or sexual assault. We ultimately concluded that "[o]ur legislature . . . intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id., 542.

[2] In light of this conclusion, I do not address the majority's determination that the Appellate Court improperly concluded that the kidnapping in the second degree statute, General Statutes § 53a-94 (a), was unconstitutionally vague as applied to the defendant's conduct. See *Carrano* v. *Yale-New Haven Hospital*, 279 Conn. 622, 635 n.15, 904 A.2d 149 (2006) ("[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case" [internal quotation marks omitted]); *Moore* v. *McNamara*, 201 Conn. 16, 20, 513 A.2d 660 (1986) (same); see also *State* v. *Cofield*, 220 Conn. 38, 49–50, 595 A.2d 1349 (1991) (citing same principle).

[3] General Statutes § 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . ."

General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof,

such person . . . (2) assaults or strikes another . . . ."

General Statutes § 53a-181a (a) provides in relevant part: "A person is guilty of creating a public disturbance when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he (1) engages in fighting or in violent, tumultuous or threatening behavior . . . ."

General Statutes § 53a-182 (a) provides in relevant part: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior . . . ."

[4] I note that the decision to charge the defendant with any of these offenses would be solely within the state's discretion. See *State* v. *Kinchen*, 243 Conn. 690, 699, 707 A.2d 1255 (1998) ("There can be no doubt that [t]he doctrine of separation of powers requires judicial respect for the independence of the prosecutor. . . . Prosecutors, therefore, have a wide latitude and broad discretion in determining when, who, why and whether to prosecute for violations of the criminal law. . . . This broad discretion, which necessarily includes deciding which citizens should be prosecuted and for what charges they are to be held accountable . . . rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." [Citations omitted; internal quotation marks omitted.]).

Whether the state decides to charge the defendant with these other offenses, however, is irrelevant to the analysis of the question before this court. "Applying [the pertinent] standard to the facts in *Salamon*, we concluded that, although the defendant had not been charged with assault, the judgment of conviction of kidnapping in the second degree had to be reversed and the case remanded for a new trial because the defendant was entitled to a jury instruction explaining that a kidnapping conviction could not lie if the restraint was merely incidental to the assault." *State* v. *Sanseverino*, supra, 287 Conn. 624.

[5] Certainly, this evidence is no more clear-cut than the evidence in *Salamon* that we concluded required a remand. See *State* v. *Salamon*, supra, 287 Conn. 549–50 (citing evidence that defendant grabbed victim by neck, causing her to fall, punched her and shoved his fingers down her throat while holding her down by her hair).