ROGERS, C. J., concurring. I join with the majority opinion, but write separately to emphasize that, in my view, allowing the state the option of requesting the modification of the conviction of the defendant, Paolino Sanseverino, on the charge 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, is appropriate *only* because there was a significant change in this court's construction of the kidnapping statute after the defendant's conviction but before the resolution of his appeal. See *State* v. *Salamon*, 287 Conn. 509, 517–50, 949 A.2d 1092 (2008). I believe that, as a general rule, the modification of a conviction to reflect a lesser included offense is inappropriate unless the jury has received an instruction on the lesser included offense.

As the majority acknowledges, this court never has directly addressed the question of whether it may modify a conviction to reflect a lesser included offense in the absence of a jury instruction on the lesser included offense.[1] Several of our sister jurisdictions, however, 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." (Emphasis in original.) *State* v. *Sheppard*, 253 Mont. 118, 124, 832 P.2d 370 (1992); see also *Fair* v. *Warden*, 211 Conn. 398, 404, 559 A.2d 1094 ("[i]t may be sound trial strategy not to request a lesser included offense instruction, hoping that the jury will simply return a not guilty verdict"), cert. denied, 493 U.S. 981, 110 S. Ct. 512, 107 L. Ed. 2d 514 (1989). Although some courts have held that the trial court must, sua sponte, instruct the fact finder on lesser included offenses, I would conclude that, "[n]ot only does such a policy impinge on the advocate's role, but the result may be to unfairly surprise both the defense and the prosecution." *State* v. *Sheppard*, supra, 124. "[B]oth prosecution and defense counsel may have made a decision to force the jury to either convict or acquit of the offense charged without being given the opportunity to take the middle ground and convict of the lesser charge . . . ." Id. This is in accord with the "public policy of allowing trial counsel to conduct the case according to his or her own strategy . . . ." Id.; see also *Chao* v. *State*, 604 A.2d 1351, 1358 n.4 (Del. 1992), overruled on other grounds by *Williams* v. *State*, 818 A.2d 906 (Del. 2002); *Hagans* v. *State*, 316 Md. 429, 455, 559 A.2d 792 (1989) ("The better view . . . is that the trial court ordinarily should not give a jury an instruction on an uncharged lesser included offense where neither side requests or affirmatively agrees to such instruction. It is a matter of prosecution and defense strategy which is best left

to the parties. There is no requirement that the [fact finder] pass on each possible offense the defendant could have committed.").[2]

These concerns have even greater force when a reviewing court modifies a conviction to reflect a lesser included offense when the trial court did not instruct the jury on the lesser offense. See *State* v. *Brown*, 360 S.C. 581, 597, 602 S.E.2d 392 (2004) ("the [s]tate would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an 'all or nothing' approach at trial, but then on appeal, perhaps recognizing the evidence will not support a conviction on the greater offense, is allowed to abandon its trial position and essentially concede the lesser included offense should have been submitted to the jury"); *State* v. *Myers*, 158 Wis. 2d 356, 368, 461 N.W.2d 777 (1990) (allowing appellate court to modify judgment in absence of jury instruction on lesser included offense would allow state to "have all the benefits and none of the risks of its trial strategy, while the accused would have all the risks and none of the protections"). Moreover, when a reviewing court modifies a conviction to reflect a lesser included offense in the absence of a jury instruction, the court is giving effect to a verdict that the prosecutor did not ask for and the original jury could not have rendered. Thus, the court effectively—and, in my view, improperly—is taking on the role both of the prosecutor and of a second jury.[3] See *State* v. *Brown*, supra, 594–97, and cases cited therein. Accordingly, I believe 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.[4]

As the majority in the present case suggests, however, when there has been a significant change in the governing law after a defendant has been convicted, the argument that the state should be held to its strategic decision to forgo an instruction on a lesser included offense has much less force because, for reasons that the state could not have foreseen, the rules have been changed mid-game. In such cases, the unfairness to the defendant of convicting him of charges on which the original jury could not have convicted him is outweighed by the unfairness to the state of holding it to its strategic choice when there has been an unanticipated change in the rules. Moreover, there is no claim in the present case that the state failed to prove beyond a reasonable doubt each element of kidnapping under the standard in effect at the time of the trial, on which the jury was properly instructed. Thus, " 'it can be said with some degree of certainty that [the modification of the conviction to reflect the lesser included offense] is but effecting the will of the fact finder within the

limitations imposed by law' . . . ." Id., 596. Accordingly, I agree that, under these unique circumstances, the state should have the option of retrying the defendant or requesting a modification of the judgment to reflect the lesser included offense.

[1] In *State* v. *Greene*, 274 Conn. 134, 174, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006), this court modified the judgment to reflect a conviction of a lesser included offense on which the jury had not been instructed. We did not directly address the question, however, of whether such a modification was proper in the absence of an instruction on the lesser included offense.

[2] I recognize that this court has held that, when certain conditions are met, "an instruction on a homicide of a lesser degree than that charged is appropriate, whether requested by the state or the defendant, or given by the court sua sponte." *State* v. *Rodriguez*, 180 Conn. 382, 408, 429 A.2d 919 (1980); see also *State* v. *Prutting*, 40 Conn. App. 151, 165, 669 A.2d 1228 ("the trial court did not deprive the defendant of his right to notice by instructing the jury, even absent a request by either party, on the lesser included offense of manslaughter in the first degree"), cert. denied, 236 Conn. 922, 674 A.2d 1328 (1996). Both of those cases, however, involved General Statutes § 53a-45 (c). *State* v. *Rodriguez*, supra, 399; *State* v. *Prutting*, supra, 164. Section 53a-45 (c) expressly provides that "[t]he court or jury before which any person indicted for murder or held to answer for murder . . . may find such person guilty of homicide in a lesser degree than that charged." Thus, it is arguable that the holdings of *Rodriguez* and *Prutting* apply only to cases in which the defendant has been charged with murder. Moreover, it is unclear whether the trial court in *Rodriguez*, on which the court in *Prutting* relied; *State* v. *Prutting*, supra, 164–65; had given the instruction on the lesser included offense sua sponte. Accordingly, our statement that doing so would be appropriate may have been dictum. Finally, the arguments that the parties should be held to their strategic decisions during trial and that this court should not usurp the role of the prosecutor and the jury were not addressed in either *Rodriguez* or *Prutting*.

In *State* v. *Horne*, 19 Conn. App. 111, 145–46, 562 A.2d 43 (1989), rev'd on other grounds, 215 Conn. 538, 577 A.2d 694 (1990), the Appellate Court modified a judgment of conviction of sexual assault in the first degree with a deadly weapon to reflect a conviction of sexual assault in the first degree even though the jury had not been instructed on the lesser offense. See also *State* v. *Ortiz*, 71 Conn. App. 865, 879, 804 A.2d 937 (modifying conviction of robbery in first degree to reflect lesser included offense of robbery in second degree, even though trial court had not instructed jury on lesser included offense), cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002). In support of its holding in *Horne*, the Appellate Court stated that, "[e]ven in the absence of . . . a request . . . the trial court may, sua sponte, properly submit a lesser included offense to the jury." *State* v. *Horne*, supra, 145; see also *State* v. *Haywood*, 109 Conn. App. 460, 466, 952 A.2d 84, cert. denied, 289 Conn. 928, 958 A.2d 161 (2008). In *Horne*, the Appellate Court relied on *Rodriguez*; see *State* v. *Horne*, supra, 145; in *Ortiz*, the court relied on *Horne*; see *State* v. *Ortiz*, supra, 878; and in *Haywood*, the court relied on *Ortiz*. See *State* v. *Haywood*, supra, 466–67 n.3. As I have indicated, however, I do not believe that *Rodriguez* supports the broad principle that a trial court always may instruct a jury on a lesser included offense sua sponte.

In any event, I would not decide in this case whether it is appropriate for the trial court to give an instruction on a lesser included offense because, even if it is appropriate, I am aware of no authority for the proposition that the trial court is authorized to modify a conviction to reflect a lesser included offense *after* a guilty verdict if no instruction on the lesser included offense was given. For this reason, and for the other reasons stated in this concurring opinion, I disagree with the Appellate Court's conclusion that, "[a]lthough in most of the cases that we have reviewed in which this court or our Supreme Court has modified a judgment to reflect a conviction of a lesser included offense, the jury was instructed on the lesser included offense, we do not believe this factor is critical." *State* v. *Haywood*, supra, 109 Conn. App. 466 n.3.

[3] In her dissenting and concurring opinion, Justice Katz states that, "[b]ecause there is no question in the present case that the defendant had a fair trial and that the jury properly was instructed on the element of restraint, there is no undue prejudice to the defendant if we reduce his conviction to the lesser offense." In support of this argument she relies on

this court's statement in *State* v. *Saracino*, 178 Conn. 416, 421, 423 A.2d 102 (1979), that, "[s]ince the jury could have explicitly returned . . . a verdict [of guilty of the lesser included offense of larceny in the fourth degree], the defendant was aware of her potential liability for this crime and would not now be prejudiced by modification of the judgment . . . ." In *Saracino*, however, our statement that the jury could have explicitly returned a guilty verdict on the lesser offense was premised on the fact that the trial court had instructed the jury on that offense at the defendant's request. See id. In my view, this court used the word "explicitly" in *Saracino* to distinguish that case from cases in which the jury could return only an implicit verdict of guilty on the lesser included offense by returning a verdict of guilty on the greater offense. In the present case, the jury could not have returned an explicit verdict of guilty of the lesser included offense of unlawful restraint in the second degree because the trial court did not instruct the jury on that offense. In this regard, I believe that the cases in which this court has stated that a charge on a greater offense is constitutionally adequate notice to the defendant that he may be charged with lesser included offenses merely stand for the proposition that the trial court properly may grant a request by the state to instruct the jury on a lesser offense, not that the defendant is on notice that he may be convicted of the lesser offense *in the absence of such an instruction*. See, e.g., *State* v. *Greene*, 274 Conn. 134, 155, 874 A.2d 750 (2005) ("[t]he constitutionality of *instructing* on lesser included offenses is grounded on the premise that whe[n] one or more offenses are lesser than and included within the crime charged, notice of the crime charged includes notice of all lesser included offenses" [emphasis added; internal quotation marks omitted]), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006).

[4] If a conviction is overturned because the evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt, retrial on that offense and any lesser included offenses would be barred by the double jeopardy clause of the United States constitution. See *Stephens* v. *State*, 806 S.W.2d 812, 819 (Tex. Crim. App. 1990) ("when a defendant has obtained a reversal of a conviction for a greater offense solely on the ground that there was insufficient evidence to prove the aggravating element of that offense, the [d]ouble [j]eopardy [c]lause bars a subsequent prosecution for a lesser included offense"), cert. denied, 502 U.S. 929, 112 S. Ct. 350, 116 L. Ed. 2d 289 (1991); see also *Burks* v. *United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) ("the [d]ouble [j]eopardy [c]lause precludes a second trial once the reviewing court has found the evidence legally insufficient [and] the only 'just' remedy available for that court is the direction of a judgment of acquittal," not retrial); *In re Nielsen*, 131 U.S. 176, 189, 9 S. Ct. 672, 33 L. Ed. 118 (1889) (stating in dicta that "a conviction or an acquittal of a greater crime is a bar to a subsequent prosecution for a lesser one"); *United States* v. *Gooday*, 714 F.2d 80, 82 (9th Cir. 1983) (if no instructions are given on lesser included offense, "an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge"), cert. denied, 468 U.S. 1217, 104 S. Ct. 3587, 82 L. Ed. 2d 884 (1984); *Andrade* v. *Superior Court*, 183 Ariz. 113, 115, 901 P.2d 461 (1995) ("[d]ouble jeopardy . . . shields [a defendant who has been acquitted of an offense] from subsequent prosecutions for lesser included offenses if the jury has not been instructed on the lesser included offenses"); *People* v. *Biggs*, 1 N.Y.3d 225, 231, 803 N.E.2d 370, 771 N.Y.S.2d 49 (2003) (since defendant "was acquitted of the intentional murder charges at his first trial, and manslaughter in the first degree is the same offense as murder in the second degree under *Blockburger* [v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)], the [double jeopardy clause of the federal constitution] precluded defendant's subsequent indictment and prosecution for first degree manslaughter"); but see *State* v. *Malufau*, 80 Haw. 126, 136, 906 P.2d 612 (1995) (when it was not clear whether jury had been instructed on lesser included offense, court held that "remanding a case for retrial on lesser included offenses following an appellate determination that insufficient evidence to support a conviction of a greater offense was presented at trial does not offend the double jeopardy clause"). I believe that, in such cases, it would be fundamentally unfair and highly prejudicial to the defendant to modify the judgment to reflect a lesser included offense in the absence of a jury instruction because the original jury could not have rendered a conviction on the lesser offense and the defendant cannot be retried. See *Ex parte Roberts*, 662 So. 2d 229, 232 (Ala. 1995) (where defendant's conviction was overturned for insufficient evidence and jury had not been instructed on lesser included offense, court declined to modify conviction to

reflect lesser offense). I see no reason why a defendant who was improperly convicted on insufficient evidence should be in a worse position after a successful appeal than if he had received a fair verdict of acquittal in the first instance.