PETER LUURTSEMA *v.* COMMISSIONER OF CORRECTION
(SC 18383)

Rogers, C. J., and Katz, Palmer, McLachlan, Eveleigh and Vertefeuille, Js.

*Argued September 21, 2010—officially released January 5, 2011**

*Adele V. Patterson*, senior assistant public defender,

with whom was *Jennifer L. Bourn*, assistant public defender, for the appellant (petitioner).

*Jo Anne Sulik*, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Dennis J. O'Connor*, senior assistant state's attorney, for the appellee (respondent).

*Jamie L. Mills*, *Sarah LeClair*, *Susanna Cowen* and *Margaret Garvin* filed a brief for the National Crime Victim Law Institute et al. as amici curiae.

*Opinion*

ROGERS, C. J. The primary issue in this matter is whether this court's decisions in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), and *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008), overruled in part by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45, superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009),[1] apply retroactively to collateral attacks on final judgments. In those cases, we concluded that General Statutes § 53a-92 (a) (2) (A)[2] does not impose liability for the crime of kidnapping where the restraint used is merely incidental to the commission of another offense. The petitioner, Peter Luurtsema, subsequently filed a petition for a writ of habeas corpus in the Superior Court, challenging, inter alia, the legality of his 2000 conviction under a prior interpretation of § 53a-92 (a) (2) (A). On the joint stipulation of the petitioner and the respondent, the commissioner of correction (state), the habeas court reserved[3] the questions: (1) whether *Salamon* and *Sanseverino* apply retroactively in habeas corpus proceedings; and (2) whether those cases apply in the petitioner's case in particular. We answer both questions in the affirmative.[4]

The following relevant facts and procedural history are set forth in our decision on the petitioner's direct appeal from his conviction. See *State* v. *Luurtsema*, 262 Conn. 179, 811 A.2d 223 (2002). On February 17, 2000, the petitioner was convicted, after a jury trial, of attempted sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-70 (a) (1), kidnapping in the first degree in violation of § 53a-92 (a) (2) (A), assault in the second degree in violation of General Statutes § 53a-60 (a) (1), and, following a plea of nolo contendere, of being a persistent dangerous felony offender under General Statutes (Rev. to 1997) § 53a-40 (a). Id., 181–82. The trial court imposed a total effective sentence of forty-five years imprisonment, comprising concurrent prison terms of twenty years for attempted sexual assault in the first degree and forty years for kidnapping in the first degree as a persistent dangerous felony offender, with a consecutive prison term of five years for assault in the second degree. The enhanced kidnapping sentence thus increased the petitioner's effective sentence from twenty-five to forty-five years.[5] Id., 182 and n.7.

On direct appeal to this court, the petitioner argued, inter alia, that the evidence presented at trial was insufficient to convict him of kidnapping. We noted that the jury reasonably could have found the following facts: "On the evening of April 21, 1998, the [petitioner] visited the victim at her apartment in Manchester. During the course of the night, the [petitioner] and the victim consumed several beers and smoked crack cocaine. At some point prior to midnight, the victim consented to

oral sex from the [petitioner]. At approximately 1 a.m., Larry Brown, a neighbor, visited the victim in her apartment while the [petitioner] was still there. Outside the presence of the victim, the [petitioner] asked Brown to leave because he wanted to be alone with the victim. Brown complied with the [petitioner's] request. At the time Brown left, he did not observe any marks on the victim's face.

"Shortly after Brown's departure, the [petitioner] and the victim were seated next to each other on the couch. The [petitioner] proceeded to pull the victim to the floor and remove her pants and underpants. While they were on the floor, the [petitioner] forced the victim's legs apart in an extremely harsh manner and began manually choking her to the point where she could no longer breathe. The [petitioner] then got up and moved toward the bathroom, at which time the victim ran screaming from her apartment, naked from the waist down, to a convenience store across the street where the police were summoned." Id., 183–84.

The petitioner argued on direct appeal that these facts were insufficient to support the jury's verdict of guilty of kidnapping under § 53a-92 (a) (2) (A) because the movement of the victim—from couch to floor—fell short of what is required for " 'abduction.' "[6] Id., 200. He further argued that, as a matter of law, the statute does not create additional criminal liability where restraint of a victim is merely incidental to a sexual assault. In rejecting this claim, we reiterated our long-standing interpretation that "all that is required under the [kidnapping] statute is that the defendant have abducted the victim and restrained her with the requisite intent. See *State* v. *Niemeyer*, [258 Conn. 510, 520, 782 A.2d 658 (2001)]. Under the aforementioned definitions, the abduction requirement is satisfied when the defendant restrains the victim with the intent to prevent her liberation through the use of physical force. . . . Nowhere in this language is there a requirement of movement on the part of the victim. Rather, we read the language of the statute as allowing the restriction of movement alone to serve as the basis for kidnapping. . . .

"[O]ur legislature has not seen fit to merge the offense of kidnapping with other felonies, nor impose any time requirements for restraint, nor distance requirements for asportation, to the crime of kidnapping. . . . Furthermore, any argument that attempts to reject the propriety of a kidnapping charge on the basis of the fact that the underlying conduct was integral or incidental to the crime of sexual assault also must fail. *State* v. *Vass*, 191 Conn. 604, 614, 469 A.2d 767 (1983). The defendant's interpretation of the kidnapping statute is simply not the law in this state." (Citations omitted; internal quotation marks omitted.) *State* v. *Luurtsema*, supra, 262 Conn. 201–202.

Six years later, however, in *State* v. *Salamon*, supra, 287 Conn. 513, we had cause to revisit our interpretation of the kidnapping statutes, General Statutes § 53a-91 et seq. Although we acknowledged that our interpretation of the kidnapping statutes in *Luurtsema* traced its origins as far back as *State* v. *Chetcuti*, 173 Conn. 165, 377 A.2d 263 (1977),[7] we nonetheless recognized that "this court never has undertaken an extensive analysis of whether our kidnapping statutes warrant the broad construction that we have given them." *State* v. *Salamon*, supra, 524.

Examining the legislative history and general historical backdrop of the statute more closely than we had in the past, we concluded that "our construction of this state's kidnapping statutes has been overly broad, thereby resulting in kidnapping convictions for conduct that the legislature did not contemplate would provide the basis for such convictions." Id., 517. Specifically, we held that "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. *Salamon* thus expressly overruled *Luurtsema*, noting that, in "*Luurtsema*, we rejected a claim identical in all material respects to the claim that the defendant [raised in *Salamon*] . . . ." Id., 513 n.6. Additionally, we observed in *Salamon* that the prior interpretation of the kidnapping statutes had permitted—if not outright encouraged—prosecutors "to include a kidnapping charge in any case involving a sexual assault or robbery," contrary to the likely intent of the legislature. Id., 544.

In *State* v. *Sanseverino*, supra, 287 Conn. 608, a companion case released on the same day as *Salamon*, we took up a second challenge by a defendant convicted under § 53a-92 (a) (2) (A), this time for conduct incidental to a series of sexual assaults. The defendant in *Sanseverino* attacked his conviction on constitutional grounds, arguing that § 53a-92 (a) (2) (A) was unconstitutionally vague as applied to his conduct. Id., 618. Avoiding that constitutional question; id., 620; this court instead applied retroactively the rule announced in *Salamon*,[8] holding that the state had not presented sufficient evidence at trial to convict the defendant of kidnapping, properly construed. Id., 624–26.

Following the release of *Salamon* and *Sanseverino*, the petitioner in the present case, proceeding pro se, filed a petition for a writ of habeas corpus, asking that his kidnapping conviction and the concomitant persistent felony offender enhancement be vacated. He contended that he should receive the benefit of this court's new interpretation of the kidnapping statutes, and that, under that interpretation: (1) § 53a-92 (a) (2) (A) was unconstitutionally vague as applied in his case; and (2) the trial court had improperly denied his request to

instruct the jury that he could not be convicted of kidnapping if the jury found that the restraint used was merely incidental to the underlying assault.

The habeas court, pursuant to General Statutes § 52-470 (a), scheduled a hearing "at which time the [state] must show cause why the petition for a writ of habeas corpus should not be granted, the petitioner's conviction for kidnapping in the first degree be vacated, and the matter restored to the criminal docket for further proceedings consistent with [*Salamon* and *Sanseverino*]." In response, the state argued that full retroactive application of those opinions[9] is barred by principles of res judicata and the law of the case.

Pursuant to the joint stipulation of the parties, the habeas court ordered the reservation of two questions: "(1) Do the cases of [*Salamon* and *Sanseverino*] apply in habeas corpus proceedings?" and "(2) Do the cases of [*Salamon* and *Sanseverino*] apply in [the petitioner's] habeas corpus case?" The parties agree that the answers to these questions will assist the habeas court in reaching a prompt determination of the lawfulness of the petitioner's confinement. We answer the reserved questions in the affirmative.

I

Whether individuals whose kidnapping convictions became final prior to our reconsideration of § 53a-92 (a) (2) (A) in *Salamon* may challenge the legality of their convictions based on the interpretation that we adopted in that case is a question of first impression for this court. The petitioner contends that inmates should be permitted to challenge their convictions in a habeas proceeding under either of two theories. First, the petitioner contends that the interpretation of § 53a-92 (a) (2) (A) in *Salamon* may be construed as a mere clarification of what the kidnapping statute always has meant. In that case, he argues that his conviction violated the due process clause of the federal constitution,[10] as interpreted in *Fiore* v. *White*, 531 U.S. 225, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001),[11] and its progeny, because he was convicted under an incorrect interpretation of the law. Alternately, the petitioner contends that if *Salamon* is construed more properly as having *changed* Connecticut's kidnapping law, this court has the discretion to apply the new interpretation retroactively in habeas corpus proceedings, and, under the circumstances of the present case, this court should do so. If we do opt to resolve the question as a matter of state retroactivity common law, the petitioner further urges us to adopt a per se rule that, when this court reinterprets a statute so as to narrow the potential scope of criminal liability, the new interpretation should be afforded fully retroactive effect. Alternately, if we decline to adopt a per se rule in his favor, the petitioner suggests that his case is an especially attractive candidate for retroactively applying *Salamon*.

The state, by contrast, argues that *Fiore* does not control the result here because *Salamon* cannot reasonably be read as a mere clarification of what the law on kidnapping has always been. The state thus concludes that we are not compelled to provide relief as a matter of federal due process. The state also contends that retroactive relief is not warranted under state common law. It calls upon this court to adopt a per se rule *against* full retroactivity and, alternately, posits that the petitioner's particular claim should fail under a balancing test.[12]

For the reasons that follow, we agree with the petitioner that, as a matter of state common law, *Salamon* should be afforded fully retroactive effect in his particular case. We therefore do not reach the constitutional due process challenge and need not resolve the thorny question of whether that opinion represented the sort of clarification of the law for which the federal constitution *requires* collateral relief under *Fiore*.[13] See *In re Shanaira C.*, 297 Conn. 737, 754, 1 A.3d 5 (2010) ("we must be mindful that [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]); *State* v. *Winot*, 294 Conn. 753, 782 n.2, 988 A.2d 188 (2010) (*Katz*, *J.*, dissenting) (same); accord *Thompson* v. *State*, 887 So. 2d 1260, 1262–64 (Fla. 2004) (reaching *Fiore* question only after first upholding District Court's conclusion that intervening decision, even if change in law, would not apply retroactively under state retroactivity jurisprudence); see also *Kleve* v. *Hill*, 243 F.3d 1149, 1151 (9th Cir. 2001) (declining to resolve whether intervening decision represented clarification of or change in law, because in either event habeas petitioner would not have been entitled to retroactive relief).

We begin our analysis with a review of the legal principles governing the retroactive application of judicial decisions in habeas proceedings. The threshold question is whether the rule of law under which the petitioner seeks relief is procedural or substantive in nature. See *Bousley* v. *United States*, 523 U.S. 614, 620, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); see also *Schriro* v. *Summerlin*, 542 U.S. 348, 352–53, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Here, the parties do not dispute that the court in *Salamon* made a substantive determination when it defined the elements of kidnapping under § 53a-92 (a) (2) (A).[14] See *Schriro* v. *Summerlin*, supra, 353 (distinguishing substantive criminal rules, which alter "the range of conduct or the class of persons that the law punishes," from procedural ones, which regulate "the manner of determining the defendant's culpability").

As a matter of federal constitutional law, each jurisdiction is free to decide whether, and under what circumstances, it will afford habeas petitioners the

retroactive benefit of new judicial interpretations of the substantive criminal law issued after their convictions became final.[15] *Wainwright* v. *Stone*, 414 U.S. 21, 24, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973); *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 77 L. Ed. 360 (1932) ("the federal constitution has no voice upon the subject [of refusal to make new statutory interpretation retroactive]"); *Denardo* v. *Bergamo*, 272 Conn. 500, 509, 863 A.2d 686 (2005) (states are free to determine extent to which new decisions have retroactive effect).

Because this is a question of first impression in Connecticut, we begin by canvassing the approach to the issue taken by our sister states and the federal courts. See *Simmons* v. *Simmons*, 244 Conn. 158, 162, 164, 708 A.2d 949 (1998). It is clear that the majority of jurisdictions that have considered the question under the auspices of retroactivity common law, rather than as a question of federal due process, have opted to afford full retroactivity to new judicial interpretations of criminal statutes. We agree with the petitioner's assessment that, in the federal system, the United States Supreme Court has adopted a per se rule that, when federal courts reinterpret congressional legislation, new interpretations of substantive criminal statutes must be applied retroactively on collateral review. *Schriro* v. *Summerlin*, supra, 542 U.S. 351–52.[16]

In addition, although cases of this ilk arise relatively infrequently, of the states that have confronted the issue, a majority follows the federal courts in adopting a per se rule in favor of full retroactivity. See, e.g., *State* v. *Towery*, 204 Ariz. 386, 389–90, 64 P.3d 828 (2003); *In re Moore*, 133 Cal. App. 4th 68, 74–75, 34 Cal. Rptr. 3d 605 (2005); *People* v. *Wenzinger*, 155 P.3d 415, 419 (Colo. App. 2006), cert. denied, 551 U.S. 1106, 127 S. Ct. 2919, 168 L. Ed. 2d 249 (2007); *Chao* v. *State*, 931 A.2d 1000, 1002 (Del. 2007); *Luke* v. *Battle*, 275 Ga. 370, 371–73, 565 S.E.2d 816 (2002); *People* v. *Edgeston*, 396 Ill. App. 3d 514, 519, 920 N.E.2d 467 (2009); *Jacobs* v. *State*, 835 N.E.2d 485, 488–91 (Ind. 2005); *State* v. *Whitehorn*, 309 Mont. 63, 72–74, 50 P.3d 121 (2002); *Commonwealth* v. *Spotz*, 587 Pa. 1, 88–90, 896 A.2d 1191 (2006); *Kelson* v. *Commonwealth*, 44 Va. App. 170, 176, 604 S.E.2d 98 (2004); *State* v. *White*, 182 Vt. 510, 516, 944 A.2d 203 (2007); *State* v. *Lagundoye*, 268 Wis. 2d 77, 88–92, 674 N.W.2d 526 (2004).

By contrast, we are not aware of any jurisdiction that has adopted the per se rule against full retroactivity sought by the state.[17] At best, the state points to a handful of jurisdictions that employ some sort of balancing test to make a case-by-case determination of whether a particular habeas petitioner is entitled to benefit from a new interpretation of a criminal statute. See *Bunkley* v. *State*, 833 So. 2d 739, 743–44 (Fla. 2002); *Powell* v. *State*, 574 N.E.2d 331, 334 (Ind. App. 1991);

*Clem* v. *State*, 119 Nev. 615, 626–28, 81 P.3d 521 (2003); *State* v. *J.A.*, 398 N.J. Super. 511, 519, 942 A.2d 149 (2008); *Santillanes* v. *State*, 115 N.M. 215, 223–24, 849 P.2d 358 (1993); *Policano* v. *Herbert*, 7 N.Y.3d 588, 603, 859 N.E.2d 484, 825 N.Y.S.2d 678 (2006). Since 2005, however, two of those states appear to have changed course and adopted the per se federal rule in favor of full retroactivity. First, we assume that *Powell* no longer remains good law in the face of the Indiana Supreme Court's 2005 decision in *Jacobs* v. *State*, supra, 835 N.E.2d 488–91. Second, in *Kersey* v. *Hatch*, N.M. , , 237 P.3d 683, 690–91 (2010), the New Mexico Supreme Court expressly disclaimed the *Linkletter* balancing test; see footnote 12 of this opinion; that it had employed in *Santillanes*, and, in citing *Schriro* v. *Summerlin*, supra, 542 U.S. 348, in dicta, also appeared to adopt the federal rule.[18] Moreover, as we discuss subsequently in this opinion, although New York and New Jersey do purport to use a multifactor balancing test, in fact both states place a heavy finger on the scale in favor of retroactivity in cases such as this. Accordingly, we conclude that no state has adopted unequivocally a per se rule against retroactivity, and only a small minority of jurisdictions follow the balancing test approach advocated by the state.

In evaluating the rationales that other jurisdictions have proffered for and against giving full retroactive effect to new interpretations of criminal statutes, we deem it axiomatic that the policies governing the availability of habeas relief should reflect the purposes for which the remedy was established. See P. Mishkin, "Forward: The High Court, the Great Writ, and the Due Process of Time and Law," 79 Harv. L. Rev. 56, 79–80 (1965). The "great writ" traces its origins to "[c]hapter [t]hirty-nine of Magna Charta [which] reads: 'No Freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers and by the law of the land.' " L. Ottenberg, "Magna Charta Documents: The Story Behind the Great Charter," 43 A.B.A. J. 495, 569 (1957); see also P. Halliday, Habeas Corpus: From England to Empire, (Harvard University Press 2010) c. 1, p. 15. The United States Supreme Court has made clear that the "great object" of the writ "is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 28 U.S. (3 Peters) 193, 202, 7 L. Ed. 650 (1830). Because the writ is intended to safeguard "individual freedom against arbitrary and lawless state action," it must be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris* v. *Nelson*, 394 U.S. 286, 290–91, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969). This court has taken the same view: "The principal purpose of the writ of habeas corpus is to serve as a bulwark against convictions that violate fundamental fairness. . . . To mount a successful collateral attack on his conviction, a pris-

oner must demonstrate . . . a fundamental unfairness or miscarriage of justice . . . .'' (Citations omitted; internal quotation marks omitted.) *Summerville* v. *Warden*, 229 Conn. 397, 419, 641 A.2d 1356 (1994). The question presented is, therefore, whether and, if so, when a reinterpretation of a criminal statute renders final convictions obtained under a prior interpretation so arbitrary and unjust that the remedy of habeas is warranted.

We begin our analysis of the question by restating the well established principle that, when we interpret, or reinterpret, a statute, our ''fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.'' (Internal quotation marks omitted.) *Southern New England Telephone Co.* v. *Cashman*, 283 Conn. 644, 650, 931 A.2d 142 (2007).

It follows from this premise that, regardless of whether one reads *Salamon* to be a change or clarification of the law, the court in *Salamon* saw itself as discerning the original legislative meaning of § 53a-92 (a) (2) (A). *State* v. *Salamon*, supra, 287 Conn. 520 (' 'our only responsibility is to determine what the legislature, within constitutional limits, intended to do' '). If the legislature never intended an assault to constitute kidnapping, without evidence of the perpetrator's independent intent to restrain the victim, then the petitioner in the present case stands convicted of a crime that he arguably did not commit. This conclusion raises serious due process concerns. It is well settled that ''due process requires the state to prove every element of the offense charged beyond a reasonable doubt.'' *State* v. *Coltherst*, 263 Conn. 478, 494, 820 A.2d 1024 (2003). Indeed, even states such as New York and New Jersey, which have resolved similar cases according to a balancing test rather than a per se rule favoring full retroactivity, have made clear that where a new interpretation of a statute raises '' 'serious questions about the accuracy of guilty verdicts in past trials,' '' the balance will inevitably tip in favor of the petitioner. *State* v. *J.A.*, supra, 398 N.J. Super. 521; see also *Guzman* v. *Greene*, 425 F. Sup. 2d 298, 315 (E.D.N.Y. 2006). Under our system of justice, considerations of finality simply cannot justify the continued incarceration of someone who did not commit the crime of which he stands convicted.

We recognize that the petitioner did commit serious crimes, for which he was appropriately sentenced. Indeed, in many, if not most, of the cases where courts have confronted the retroactivity issue, the question was not whether an innocent person had been wrongly incarcerated, but rather, as here, whether a petitioner had been penalized for two crimes where the legislature

intended only one. See, e.g., *People* v. *Mutch*, 4 Cal. 3d 389, 393–94, 482 P.2d 633, 93 Cal. Rptr. 721 (1971) (kidnapping and robbery); *Luke* v. *Battle*, supra, 275 Ga. 370, 373 (aggravated sodomy and child molestation); *People* v. *Edgeston*, supra, 396 Ill. App. 3d 515–16, 521 (felony murder and residential burglary); *Jacobs* v. *State*, supra, 835 N.E.2d 486, 490 (general habitual offender and illegal handgun possession); *State* v. *Howard*, 211 Wis. 2d 269, 272–73, 564 N.W.2d 753 (1997) (firearm possession enhancement for drug conviction). Even in those cases, to provide collateral relief has been the rule rather than the exception. Courts have reasoned that to penalize a defendant twice, under two different labels, for conduct that the legislature deemed to constitute a single crime, would be unjust to the defendant and would amount to a judicial usurpation of the legislature's authority to define the scope of criminal statutes. See, e.g., *People* v. *Rodriguez*, 355 Ill. App. 3d 290, 295–97, 823 N.E.2d 224 (2005) (sentence void where new interpretation of controlled substance statute indicated that legislature did not intend, and court was thus not authorized, to impose enhanced penalty); *State* v. *Whitehorn*, supra, 309 Mont. 69 (double sentencing not authorized by reinterpreted statute violates double jeopardy provisions of state constitution). We agree and, therefore, conclude that, when an appellate court provides a new interpretation of a substantive criminal statute, an inmate convicted under a prior, more expansive reading of the statute presumptively will be entitled to the benefit of the new interpretation on collateral attack.

We decline, however, the petitioner's invitation to adopt a per se rule in favor of full retroactivity. We do so because a review of the diverse contexts in which such challenges have arisen persuades us that there are various situations in which to deny retroactive relief may be neither arbitrary nor unjust. The most notable case on point is *Policano* v. *Herbert*, supra, 7 N.Y.3d 590–91, in which the petitioner, David Policano, approached the victim, who had struck him with a metal pipe the week before, and shot the victim four times, at close range. The state charged Policano with two counts of homicide—depraved indifference murder and intentional murder. Id., 592. Under N.Y. Penal Law § 125.25 (McKinney 2009), both charges constitute second degree murder and carry the same penalties. See *Policano* v. *Herbert*, 430 F.3d 82, 87 (2d Cir. 2005). Under the prevailing interpretation of the statute at the time of trial in 1998, depraved indifference murder was distinguished from intentional murder primarily by the objective degree of risk created by a defendant's conduct. *Policano* v. *Herbert*, supra, 7 N.Y.3d 597, 602–603. Some homicides in which a perpetrator's actions were virtually certain to result in the victim's death could thus reasonably be characterized as either intentional or depraved indifference murders. Id., 601. The trial

court instructed the jury that if it found Policano guilty on the depraved indifference murder charge, it should not reach the intentional murder charge. Id., 592. The jury, following this instruction, convicted Policano of depraved indifference murder. Id.

In a series of decisions issued after Policano's conviction became final, the New York Court of Appeals subsequently adopted what was arguably a new interpretation of N.Y. Penal Law § 125.25: an essential element of depraved indifference murder is that the perpetrator kill with a reckless, rather than intentional, mens rea. See *People* v. *Feingold*, 7 N.Y.3d 288, 294, 852 N.E.2d 1163, 819 N.Y.S.2d 691 (2006); *People* v. *Payne*, 3 N.Y.3d 266, 271–72, 819 N.E.2d 634, 786 N.Y.S.2d 116 (2004); *People* v. *Gonzalez*, 1 N.Y.3d 464, 467, 807 N.E.2d 273, 775 N.Y.S.2d 224 (2004). Under this interpretation, " 'a one-on-one shooting or knifing . . . can almost never qualify as depraved indifference murder' "; *Policano* v. *Herbert*, supra, 7 N.Y.3d 601; because such attacks typically evince a clear intent to kill.

Policano then filed a petition for a writ of habeas corpus in federal court, claiming that "the evidence produced at trial indicated that if [he] committed the homicide at all, he committed it with the conscious objective of killing the victim . . . ." Id., 595. Under the new interpretation of the statute, he reasoned, the jury could not reasonably have found him guilty of depraved indifference murder. Id. The District Court granted the petition; *Policano* v. *Herbert*, United States District Court, Docket No. 02-CV-1462 (JG), 2004 U.S. Dist. LEXIS 17785 (E.D.N.Y. September 7, 2009); and the state appealed to the United States Court of Appeals for the Second Circuit, which initially affirmed the District Court's decision; *Policano* v. *Herbert*, supra, 430 F.3d 93; but later certified to the New York Court of Appeals the question whether decisions such as *Payne* and *Feingold* represented a change in New York's depraved indifference murder law, and, if so, whether the new interpretation should be applied retroactively. *Policano* v. *Herbert*, 453 F.3d 75, 76 (2d Cir. 2006). The New York Court of Appeals responded that the law had in fact changed; *Policano* v. *Herbert*, supra, 7 N.Y.3d 602–603; but it declined to afford the new interpretation full retroactivity. Id., 603. "[D]efendants who commit . . . vicious crimes but who may have been charged and convicted under the wrong section of the statute," the court concluded, "are not attractive candidates for collateral relief . . . ." (Internal quotation marks omitted.) Id., 604.[19] It would have been perverse to allow obviously dangerous criminals to "[get] away with murder . . . not because the evidence of [their] culpability is too weak, but because it is too strong." *Policano* v. *Herbert*, supra, 453 F.3d 80 (Raggi, J., dissenting from denial of rehearing en banc); see also id., 82 (deeming poor candidates for habeas relief petitioners who "are too guilty of murder . . . because they really intended

to kill their victims . . . to be guilty of murder . . . on a theory of depraved indifference"); *Guzman* v. *Greene*, supra, 425 F. Sup. 2d 315 ("[c]learly, the purpose of the new rule was not to let murderers go free because they were 'convicted under the wrong section of the statute' ").

Similar rationales led the Indiana Court of Appeals to deny retroactive relief in *Powell* v. *State*, supra, 574 N.E.2d 332, in which the petitioner caused two deaths while operating a motor vehicle while intoxicated. The petitioner was convicted of two counts of operating a motor vehicle while intoxicated resulting in death, a class C felony, under the then accepted interpretation of the statute allowing multiple deaths arising from a single collision to be charged separately. Id. The Indiana Supreme Court subsequently determined that when a single accident by an intoxicated driver results in multiple deaths, "such results do not increase the number of crimes, only the severity of the penalty." *Kelly* v. *State*, 539 N.E.2d 25, 26 (Ind. 1989). In denying the petitioner's motion to vacate the second conviction, the court reasoned, inter alia, that the state had relied heavily on the pre-*Kelly* interpretation of the statute. *Powell* v. *State*, supra, 334 and n.4. Had *Kelly* been the law at the time of trial, the court explained, the state could have obtained two comparable convictions for the deaths as reckless homicides, and the results would have been the same. Id., 334 n.4.[20]

Accordingly, we adopt a general presumption in favor of full retroactivity for judicial decisions that narrow the scope of liability of a criminal statute. That presumption, however, would not necessarily require that relief be granted in cases where continued incarceration would not represent a gross miscarriage of justice, such as where it is clear that the legislature did intend to criminalize the conduct at issue, if perhaps not under the precise label charged. In situations where the criminal justice system has relied on a prior interpretation of the law so that providing retroactive relief would give the petitioner an undeserved windfall, the traditional rationales underling the writ of habeas corpus may not favor full retroactivity. See *Guzman* v. *Greene*, supra, 425 F. Sup. 2d 315 ("it is certainly not unjust, let alone manifestly unjust, to keep a murderer in jail").[21]

We emphasize that in the *Salamon* context in particular, any exceptions to the general presumption in favor of full retroactivity are likely to be few and far between. As the California Supreme Court noted in providing full retroactive effect to a similar[22] reinterpretation of that state's kidnapping statutes, "it would indeed be an unusual circumstance in which a prosecutor might charge [kidnapping] but not the underlying robbery as well, or, if both were charged, could convict the defendant of [kidnapping] but not robbery. And since [kidnapping] is the more serious offense, it is highly unlikely

that a defendant would make a bargain to plead guilty to [kidnapping] in exchange for dismissal of the robbery charge; invariably, the converse occurs." *People* v. *Mutch*, supra, 4 Cal. 3d 398 n.7. The same may be said of the relationship between kidnapping and assault under Connecticut law.[23]

The state offers five rationales either for adopting a per se rule against retroactive relief or for denying relief in the present case: (1) the fact that law enforcement relied on the old interpretation of the kidnapping statutes while trying the petitioner; (2) the fact that the retroactive application of *Salamon* has no deterrent value or remedial purpose; (3) the fear that our courts will be "flooded" with habeas petitions from other inmates convicted under § 53a-92 (a) (2) (A); (4) the difficulty of retrying such cases where significant time has elapsed since conviction; and, perhaps most importantly (5) the concern that victims will be retraumatized by again having to testify and endure another round of judicial proceedings.

We are not unsympathetic to the legitimate concerns raised by the state, and by the amici, relating to the general importance of preserving the finality of criminal convictions. For the reasons that follow, however, we are convinced that the federal courts, as well as the majority of our sister states that have considered the question, have reached the proper conclusion: in cases such as this, the interests of finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch.

We begin by reiterating that the majority approach in the United States is to provide even broader retroactive relief to habeas petitioners than is provided under the rule we announce today. Those jurisdictions that have adopted a per se rule in favor of full retroactivity have clearly determined that the concerns raised by the state, although legitimate, do not justify the denial of relief to petitioners convicted of conduct the legislature did not intend to criminalize. We are aware of no evidence that the repercussions have been significant enough to cause our sister states, or the federal courts, to regret adopting such a rule. To the contrary, as discussed previously in this opinion, over the past several years some states appear to have changed position and adopted the majority approach.

Moreover, many of the concerns raised by the state in the habeas context apply with equal force to direct appeals, in which it is undisputed that appellants receive the benefit of retroactive application of judicial decisions that narrow the scope of liability under a criminal statute. *State* v. *Sanseverino*, supra, 287 Conn. 620 n.11. *Sanseverino* provides an instructive case in point. The crimes charged in that case commenced in June or July of 1998; id., 613; a mere two to three months after the incident for which the petitioner in the present

case was convicted. Whereas the petitioner's conviction became final in 2003, however, *Sanseverino* was still under review when we decided *Salamon* in 2008. Any concerns regarding prosecutorial reliance and the burdens associated with retrying a ten year old crime apply to *Sanseverino* no less than to the present case.[24] The same may be said of cases such as *Fiore*, wherein the due process clause compels the states to provide retroactive relief to certain habeas petitioners.

Turning to the state's specific arguments against providing retroactive relief, it first contends that "[f]or more than three decades prior to the decision in *Salamon*, prosecutors relied on *this* [*c*]*ourt's* interpretation of the kidnapping statutes in making their charging decisions." (Emphasis in original.) As we have discussed, one can conceive of circumstances in which prosecutors rely on a prior interpretation of a statute to such an extent that retroactive application of a different subsequent interpretation might not be warranted.[25] This is not such a case. Here, the petitioner was charged with every crime for which he might reasonably have been held liable:[26] attempt to commit sexual assault in the first degree; kidnapping in the first degree; attempt to commit murder; assault in the second degree; and being a persistent dangerous felony offender. See *State* v. *Luurtsema*, supra, 262 Conn. 179. He was convicted of—and received the maximum sentence for—the underlying offenses of both assault in the second degree and attempted sexual assault in the first degree. Id., 181–82. In sum, the record discloses no indication that the state would have charged the petitioner differently had it anticipated the subsequent interpretation of § 53a-92 (a) (2) (A) in *Salamon*.[27]

The state next argues, in essence, that the present case is unlike habeas cases where a petitioner alleges that evidence obtained in violation of his constitutional rights should have been excluded at trial. Here, unlike in exclusionary rule cases, providing collateral relief will not deter or call attention to any misconduct on the part of the state, because prosecutors and law enforcement acted on a good faith belief that our prior interpretation of § 53a-92 (a) (2) (A) was the governing law. The short answer to this argument is that the petitioner has not contended that we should grant him retroactive relief so as to deter official misconduct. He simply asks that he not be made to serve forty-five years in prison for conduct that the legislature only deemed to be a twenty-five year offense.

The state's third argument is that a "finding of retroactivity would flood the court system with habeas petitioners seeking to overturn kidnapping convictions . . . ." It further contends that many of these petitions will require new trials, magnifying the burdens on the judicial system. There is little doubt that some petitioners will come forward contending that they are serving

substantially longer sentences than are prescribed by the criminal code, as properly construed. In its brief, however, the state has identified only five such petitions that have been filed in the more than two years since we decided *Salamon* and *Sanseverino*. At oral argument before this court, the state declined to provide additional information as to the number of present inmates who might have a colorable claim under *Salamon*. Of the 1.5 percent of department of correction inmates incarcerated for kidnapping or unlawful restraint, one can reasonably assume that only a small subset will fall within the ambit of *Salamon*.[28] Of those, we expect that courts will be able to dispose summarily of many cases where it is sufficiently clear from the evidence presented at trial that the petitioner was guilty of kidnapping, as properly defined, that any error arising from a failure to instruct the jury in accordance with the rule in *Salamon* was harmless. See, e.g., *State* v. *Hampton*, 293 Conn. 435, 463–64, 978 A.2d 1089 (2009). Likewise, we doubt the state will expend the resources to retry cases where it is reasonably clear that a petitioner could not have been convicted of kidnapping under the correct interpretation of the statute.

The state's fourth argument against applying *Salamon* retroactively on collateral attack is that the passage of time or unavailability of witnesses may preclude the state from retrying some cases, leading to the release of dangerous criminals. We emphasize, however, that today's decision does not throw open the jailhouse doors. Inmates such as the petitioner, who have been convicted of kidnapping predicated on an assault, will continue to serve out the sentence for the underlying crime, as the legislature intended. If there are cases in which a petitioner was not convicted of the underlying assault, in reliance on a pre-*Salamon* interpretation of § 53a-92 (a) (2) (A), we have left open the possibility that retroactive relief may not be available.

We agree in this regard with the Georgia Supreme Court, which addressed a similar challenge in *Luke* v. *Battle*, supra, 275 Ga. 370. In *Luke*, the Georgia Supreme Court afforded full retroactive effect to *Brewer* v. *State*, 271 Ga. 605, 607, 523 S.E.2d 18 (1999), a case in which it had reinterpreted Georgia's aggravated sodomy statute to add a force requirement. Addressing the dissent's concerns that providing relief to habeas petitioners would "[open] the floodgate"; *Luke* v. *Battle*, supra, 378 (Carley, J., dissenting); the court explained: "As for the dissent's emotional assertion that our holding today might 'vacate the convictions of an untold number of child molesters,' there are two fair and just responses. One is that today's opinion does not vacate the child molestation conviction of any defendant also convicted of aggravated sodomy before our decision in *Brewer*. The other, more important, response is that the only defendants who will have their aggravated sodomy con-

victions overturned are those convicted of an act that the aggravated sodomy statute does not make criminal. Overturning the conviction of a person not guilty of the crime for which he was convicted goes to the heart of our habeas corpus system and our American system of justice." Id., 375; see also *People* v. *Mutch*, supra, 4 Cal. 3d 398 n.7 (noting likelihood that defendants whose kidnapping convictions would be affected by decision to provide full retroactive relief after reinterpretation of kidnapping statute also had been convicted of robbery and other felonies); *Chao* v. *State*, supra, 931 A.2d 1002–1003 (almost all prisoners affected by decision would continue to serve significant sentences because of convictions of other crimes in addition to felony murder).

We next address the state's contention that it is not unjust to uphold the petitioner's kidnapping sentence where: (1) his conduct was morally culpable; and (2) he had adequate notice that such conduct was deemed to constitute kidnapping under the then prevailing interpretation of the law. As to the first claim, culpable conduct alone is necessary, but not sufficient, for the legitimate exercise of the state's power to incarcerate. To constitute a crime, forbidden conduct must be accompanied by a clearly prescribed legal penalty. See generally *United States* v. *Evans*, 333 U.S. 483, 486, 68 S. Ct. 634, 92 L. Ed. 823 (1948); see also *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34, 3 L. Ed. 259 (1812); *Mossew* v. *United States*, 266 F. 18, 20 (2d Cir. 1920); W. LaFave & A. Scott, Criminal Law (1972) § 2, p. 8. The question, then, is whether there was a clearly prescribed legal penalty where this court put the petitioner on notice that he could be convicted of conduct that the legislature did not in fact criminalize. To ask the question is to answer it. The adoption of the comprehensive Penal Code in 1969 abrogated the common-law authority of Connecticut courts to impose criminal liability for conduct not proscribed by the legislature. *Valeriano* v. *Bronson*, 209 Conn. 75, 92, 546 A.2d 1380 (1988). As we explained in *State* v. *Breton*, 212 Conn. 258, 268–69, 562 A.2d 1060 (1989), "the power to define crimes and to designate the penalties therefor resides in the legislature. . . . Courts must avoid imposing criminal liability where the legislature has not expressly so intended. . . . Thus, we construe penal statutes strictly in favor of the accused." (Citations omitted.) See also *United States* v. *Loschiavo*, 531 F.2d 659, 667 (2d Cir. 1976) (rejecting similar argument made by state). A court cannot give notice of the illegality of conduct that it lacks the authority to prohibit.[29]

Finally, the state and amici raise the concern that victims and other witnesses will be forced to relive violent and degrading events, especially if they are called upon to testify again at a retrial.[30] We have deep compassion for those individuals who have already been made twice to endure the curse of crime, once as

victim and again as witness. We cannot, however, permit our sympathy for assault victims, and our desire to provide them with a sense of closure and to spare them further trauma, to obscure our duty to ensure that perpetrators are sentenced only for conduct that the legislature intended to criminalize, and only to the extent that the legislature intended. We have confidence that the state will take these concerns regarding victims into account when deciding whether to reprosecute cases. We also take to heart the words of our sister court in the state of Washington: "[W]e are aware that some of these cases involve horrifying conduct . . . . The cost in terms of human anguish is immeasurable. Judges are not immune to these horrors. Yet, to assure lawful and fair treatment of all persons convicted under a statute that did not criminalize their acts . . . these petitioners are entitled to relief. Our obligation is to see that the law is carried out uniformly and justly." *In re Hinton*, 152 Wn. 2d 853, 856, 100 P.3d 801 (2004).

II

We turn finally to the second reserved question, whether this court's interpretation of § 53a-92 (a) (2) (A) in *Salamon* should apply retroactively in the present case. Because the rationales underlying the general presumption in favor of full retroactivity apply here, we conclude that it should.

This is not a case like *Powell* v. *State*, supra, 574 N.E.2d 334 n.4, in which the state, in selecting the crimes with which to charge the petitioner, can plausibly be said to have relied to its detriment on the prior interpretation of the kidnapping statutes. The petitioner in the present case was charged with, and convicted of, the assault and attempted sexual assault of the victim. The maximum twenty-five year sentence that he received for those crimes remains undisturbed.

At the same time, the court's thorough review of the legislative history of § 53a-92 (a) (2) (A) in *Salamon* made clear that the legislature never intended that a single crime be subject to dual liability, both as assault and as kidnapping, without evidence that the petitioner intended to restrain the victim more than was necessary to effect the underlying assault. Although we discern no such evidence in the current record, if the petitioner prevails at his habeas trial the state is not foreclosed from retrying him for kidnapping under the proper standard. In *State* v. *DeJesus*, supra, 288 Conn. 434, we determined that the state should have the opportunity to retry such cases before a properly instructed jury, submitting any evidence it might have tending to prove that the petitioner intended to restrain the victim to a greater extent or for longer than was necessary to assault her. See also *State* v. *Sanseverino*, supra, 291 Conn. 588 ("[W]hen the state has presented evidence sufficient to support the defendant's conviction under the legal standard that existed at the time of trial, an

unforeseen change in that legal standard, although requiring reversal of the conviction, ordinarily does not also require a judgment of acquittal. . . . Rather, the state is entitled to retry the defendant under the new standard. . . .'' [Citation omitted; internal quotation marks omitted.]). We agree with the state that the same rationale applies here.

We reject the petitioner's contention that he, unlike the defendant in *DeJesus*, should not be subject to retrial because at trial he urged the court to adopt the definition of kidnapping that the court ultimately adopted in *Salamon*, and hence "put the [s]tate on notice" that it might have to prove him guilty under that stricter standard. To so hold would be to require the state to attempt to prove a defendant's guilt under any novel theory of the law that he might propose, lest an appellate court later embrace it. This would unduly burden the state and squander judicial resources.

The reserved questions are answered in the affirmative.

No costs will be taxed in this court to any party.

In this opinion EVELEIGH and VERTEFEUILLE, Js., concurred.

* January 5, 2011, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] Unless otherwise indicated, references to *Sanseverino* in this opinion are to *State* v. *Sanseverino*, supra, 287 Conn. 608.

[2] General Statutes § 53a-92 (a) provides: "A person is guilty of kidnapping in the first degree when he abducts another person and: (1) His intent is to compel a third person (A) to pay or deliver money or property as ransom or (B) to engage in other particular conduct or to refrain from engaging in particular conduct; or (2) he restrains the person abducted with intent to (A) inflict physical injury upon him or violate or abuse him sexually; or (B) accomplish or advance the commission of a felony; or (C) terrorize him or a third person; or (D) interfere with the performance of a government function."

[3] The court reserved the questions for the advice of the Appellate Court pursuant to Practice Book § 73-1, and we transferred the reservation to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] Due to the importance of the issue raised by this appeal, we granted the requests of the National Crime Victim Law Institute and Connecticut Sexual Assault Crisis Services, Inc., to appear as amicus curiae and to submit briefs in support of the position advocated by the state.

[5] Without the enhanced kidnapping charge, the petitioner would have been subject to a maximum sentence of twenty years for attempted sexual assault in the first degree, a class B felony; see General Statutes §§ 53a-49 (a) (2), 53a-70 (a) (1) and 53a-35a (6); and five additional years for assault in the second degree, a class D felony. See General Statutes §§ 53a-60 (a) (1) and 53a-35a (8). We note, however, that in addition to that twenty-five year sentence, had the petitioner not been convicted of kidnapping, he might have been subject to an additional sentence if the prosecution had sought and the jury had convicted him of the lesser included charge of unlawful restraint in the first degree, a class D felony that carried a five year maximum sentence; see General Statutes §§ 53a-95 and 53a-35a (8); or unlawful restraint in the second degree, a class A misdemeanor that carried a one year maximum sentence. See General Statutes §§ 53a-96 and 53a-36 (1).

[6] " 'Abduct' means to restrain a person with intent to prevent his liberation by either (A) secreting or holding him in a place where he is not likely to be found, or (B) using or threatening to use physical force or intimidation." General Statutes § 53a-91 (2). Abduction is an element of kidnapping. See footnote 2 of this opinion.

[7] We did recognize in previous cases, however, that "there are conceivable factual situations in which charging a defendant with kidnapping based [on]

the most minuscule [movement or duration of confinement] would result in an absurd and unconscionable result . . . .” (Internal quotation marks omitted.) *State* v. *Luurtsema*, supra, 262 Conn. 203–204; see also *State* v. *Jones*, 215 Conn. 173, 180, 575 A.2d 216 (1990).

[8] Because the direct appeal in *Sanseverino* was still pending when *Salamon* was decided, there was no question that the *Salamon* rule applied retroactively in that case. See *State* v. *Sanseverino*, supra, 287 Conn. 620 n.11 (noting well established principle that “a rule enunciated in a case presumptively applies retroactively to pending cases”).

[9] Throughout this opinion, the terms “full retroactivity” and “fully retroactive” refer to the retroactive application of a judicial opinion to cases that have already become final, as distinguished from the retroactive application of a decision to cases still pending on direct appeal.

[10] The due process clause of the fourteenth amendment to the United States constitution provides in relevant part: “[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .”

[11] *Fiore* addressed the constitutionality of a conviction for violating a state statute prohibiting the operation of a waste facility without a permit. *Fiore* v. *White*, supra, 531 U.S. 226. Although the defendant, William Fiore, did in fact possess a permit, the prosecution secured a conviction by arguing that his activities exceeded the scope of the permit. Id., 227. After Fiore’s conviction became final, the Pennsylvania Supreme Court, in *Commonwealth* v. *Scarpone*, 535 Pa. 273, 279, 634 A.2d 1109 (1993), reviewed the conviction of Fiore’s codefendant and, analyzing the applicable statute for the first time, held that it did not criminalize deviation from a permit. Based on that decision, Fiore collaterally challenged his conviction. See *Fiore* v. *White*, 528 U.S. 23, 24, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999). To resolve the case, the United States Supreme Court certified to the Pennsylvania Supreme Court the question of whether *Scarpone*, in which the court had interpreted the applicable statute for the first time, represented a new interpretation of the law or was rather “the correct interpretation of the law of Pennsylvania at the date Fiore’s conviction became final.” Id., 29; *Fiore* v. *White*, supra, 531 U.S. 228. The Pennsylvania Supreme Court replied that its ruling merely furnished a proper statement, or clarification, of the law at the time that Fiore was convicted. *Fiore* v. *White*, supra, 531 U.S. 228. Based on that answer, the United States Supreme Court held that Fiore’s conviction violated federal due process requirements because he had been convicted of a crime without proof beyond a reasonable doubt of each element of that crime. Id., 228–29.

Thus, under *Fiore*, the retroactivity analysis hinges on whether, when a state’s highest court issues a new interpretation of a substantive criminal statute, that new interpretation is a change in or a clarification of the law. Id., 228. If a state court deems its new interpretation to be a change, then the application of the statute to persons who were convicted prior to the adoption of the new rule would be decided as a matter of state retroactivity common law. Id., 226. By contrast, if the court deems the new interpretation to be a mere clarification of what the law always has meant, then there is no issue of retroactivity per se. Id. Rather, the issue becomes whether the state has violated the petitioner’s due process rights by convicting him under an incorrect interpretation of the law. Id., 228 (“the question is simply whether Pennsylvania can, consistently with the [f]ederal [d]ue [p]rocess [c]lause, convict Fiore for conduct that its criminal statute, as properly interpreted, does not prohibit”).

[12] The state urges us to adopt the three factor test established in *Linkletter* v. *Walker*, 381 U.S. 618, 636, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), which considers the purpose of the new rule, the state’s reliance on the old rule, and whether retroactive application of the new rule would adversely impact the administration of justice.

[13] To reach the petitioner’s constitutional challenge, this court would first have to answer an almost metaphysical question: When this court overturns its own prior interpretation of a statute, are we changing the law of the state or are we clarifying what the law in fact always meant? As legal scholars have noted, “this issue relates to one of the most profound debates in the history of legal philosophy. It concerns the very nature of law and judging.” T. O’Neill, “ ‘Making’ or ‘Discovering’ Law Makes Big Difference,” Chi. Daily L.B., July 11, 2003, p. 5.

Moreover, even assuming, for the sake of argument, that *Salamon* represented a clarification of what § 53a-92 (a) (2) (A) actually meant when the petitioner’s conviction became final in 2003, it is unclear to what extent such a clarification—overruling a prior determination by this court—would implicate the due process concerns expressed in *Fiore*. At first blush, *Fiore*

appears to stand for the broad principle that the due process clause bars conviction whenever a subsequent clarification of state law makes clear that the alleged behavior was not criminal when the conviction became final. See *Fiore* v. *White*, supra, 531 U.S. 228. The opinion itself stated the issue simply as "whether [a state] can, consistently with the [f]ederal [d]ue [p]rocess [c]lause, convict [a habeas petitioner] for conduct that its criminal statute, as properly interpreted, does not prohibit." Id.; see also *State* v. *Barnum*, 921 So. 2d 513, 519 (Fla. 2005) ("[*Fiore*] stands for the proposition that the due process guarantee requires the prosecution to prove each essential element of an offense beyond a reasonable doubt").

However, in both *Fiore* opinions—the opinion that certified the questions and the opinion that answered those questions—the court also emphasized the fact that *Commonwealth* v. *Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993), was a case of first impression for the Pennsylvania Supreme Court. See *Fiore* v. *White*, 528 U.S. 23, 28, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999) ("*Scarpone* marked the first time the Pennsylvania Supreme Court had interpreted the statute"); *Fiore* v. *White*, supra, 531 U.S. 226 ("[a]fter Fiore's conviction became final, the Pennsylvania Supreme Court interpreted the statute for the first time"). The United States Supreme Court likewise underscored the first impression aspect of *Fiore* in its subsequent opinion in *Bunkley* v. *Florida*, 538 U.S. 835, 839, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003), noting that *Fiore* "involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after . . . Fiore's conviction became final."

Some courts have thus taken *Fiore* to mean that the due process clause only compels retroactive application of a clarification of a substantive criminal law where a state high court has not previously spoken to the issue. See, e.g., *Henry* v. *Ricks*, 578 F.3d 134, 138 (2d Cir. 2009) (*Fiore* provides for collateral relief "[w]here a state's highest court *for the first time* interprets a criminal statute to require proof of a particular element and that interpretation does not create new law but merely clarifies what the law was at the time of a defendant's conviction" [emphasis added; internal quotation marks omitted]); *Dixon* v. *Miller*, 293 F.3d 74, 79 (2d Cir. 2002) (same); *Chapman* v. *LeMaster*, 302 F.3d 1189, 1197–98 n.4 (10th Cir. 2002) (distinguishing *Fiore* as case of first impression); *Bunkley* v. *State*, 882 So. 2d 890, 919 (Fla. 2004) (Pariente, J., dissenting) ("*Fiore* applies only if two stringent conditions are met: [1] the pronouncement by this [c]ourt is a *first-time* clarification of a criminal statute and [2] the statute as properly interpreted does not prohibit the conduct for which the defendant has been convicted" [emphasis added]). On that view, *Fiore* would not compel relief in the present case, even if we determined that *Salamon* represented a clarification of the law, rather than a change.

Other courts, by contrast, have adopted the view taken by Justice Katz' concurrence that *Fiore* compels relief whenever a state court clarifies a criminal statute, even if that clarification represents a reversal of the state's prior jurisprudence. See, e.g., *Graves* v. *Ault*, 614 F.3d 501, 511–12 (8th Cir. 2010) ("*Fiore* relied exclusively on the state [S]upreme [C]ourt's determination of what conduct the criminal statute prohibited at the time of the conviction" and "key fact in *Fiore* was that the defendant was convicted of a crime without proof beyond a reasonable doubt as to each element of the crime"); *Warren* v. *Kyler*, 422 F.3d 132, 137 (3d Cir. 2005) (nothing in *Fiore* constrains state, as matter of state law, from determining whether state judicial decision represents clarification or change in law for due process purposes); *Bunkley* v. *State*, supra, 882 So. 2d 902 (Wells, J., concurring) ("[t]he essential principle from *Fiore* is that a determination of what the law is at the time of a defendant's conviction is decided on the basis of state law"); *Clem* v. *State*, 119 Nev. 615, 625–26, 81 P.3d 521 (2003) ("where a state's highest court departs from its own previous interpretation of a statute, the new decision may also constitute either a change or a clarification of the law even though the statutory language was not changed"); *In re Hinton*, 152 Wn. 2d 853, 860–61, 100 P.3d 801 (2004) (finding that intervening interpretation of state's felony murder statute constituted clarification and granting collateral relief under *Fiore*, even though new interpretation reversed over three decades of court's precedents). Until the United States Supreme Court resolves this conflict, and consistent with our duty to avoid deciding a constitutional question if an alternative, nonconstitutional ground for decision is available, we believe the more prudent course is to decide this matter under state retroactivity common law.

[14] We agree with the petitioner that the rules governing the retroactive application of new procedural decisions, which derive from *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and its progeny, are inapposite here. See *Beard* v. *Banks*, 542 U.S. 406, 417 n.7, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004); *Schriro* v. *Summerlin*, supra, 542 U.S. 352 n.4. Under *Teague*, new rules of criminal procedure do not apply retroactively to already final judgments in federal habeas proceedings unless they fall

under one of several specified exceptions. *Teague* v. *Lane*, supra, 310. Although this court has in the past applied the *Teague* framework to state habeas proceedings as well; see, e.g., *Johnson* v. *Warden*, 218 Conn. 791, 797, 591 A.2d 407 (1991); the United States Supreme Court recently held in *Danforth* v. *Minnesota*, 552 U.S. 264, 282, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008), that the restrictions *Teague* imposes on the fully retroactive application of new procedural rules are not binding on the states.

We also note that an entirely different legal framework governs the retroactive application of new statutes. See *Walsh* v. *Jodoin*, 283 Conn. 187, 195–96, 925 A.2d 1086 (2007) (new procedural statutes, unlike substantive ones, generally apply retroactively).

[15] Throughout this opinion, we refer only to new statutory interpretations that *restrict* the potential scope of criminal liability. Different considerations govern the retroactive application of judicial decisions that expand the potential scope of a criminal statute.

[16] The state posits that two of the cases that appear to establish a per se federal rule, *Bousley* v. *United States*, supra, 523 U.S. 620, and *United States* v. *Davis*, 417 U.S. 333, 341–42, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974), predate *Fiore* and hence may not govern situations in which a court changes, rather than clarifies, its prior interpretation of a criminal statute. In *Schriro* v. *Summerlin*, supra, 542 U.S. 352, however, which was decided after *Fiore*, the United States Supreme Court cited both *Bousley* and *Davis* for the proposition that decisions that result in new substantive rules "generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms . . . . Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." (Citations omitted; internal quotation marks omitted.) See also *United States* v. *Johnson*, 457 U.S. 537, 550, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982) (court has "recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place").

[17] The state cites *Easterwood* v. *State*, 273 Kan. 361, 383, 44 P.3d 1209, cert. denied, 537 U.S. 951, 123 S. Ct. 416, 154 L. Ed. 2d 297 (2002), for such a rule. We read *Easterwood* differently. In that case, the court held only that a defendant who obtains a favorable plea agreement cannot later attack the resulting conviction based on a subsequent change in the law. Id.

The state also cites to *Goosman* v. *State*, 764 N.W.2d 539, 544 (Iowa 2009). In that case, the Iowa Supreme Court rejected the claim that due process concerns required the retroactive application of the court's prior decision in *State* v. *Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), which had decided, without analysis, that a new interpretation of the state's felony murder rule would only apply prospectively. Id., 540, 545. We do not read *Goosman* and *Heemstra* as expressing a per se rule against full retroactivity.

[18] Nevada also has appeared to waver in its approach to the retroactivity question. Compare *Nika* v. *State*, Nev. , 198 P.3d 839 (2008) (denying retroactive application to new interpretations of substantive criminal statutes), cert. denied, U.S. , 130 S. Ct. 414, 175 L. Ed. 2d 284 (2009), with *Bejarano* v. *State*, 122 Nev. 1066, 1076, 146 P.3d 265 (2006) ("[b]ecause nonretroactivity is the general requirement only for new rules of criminal procedure, a new substantive rule is more properly viewed not as an exception to that requirement, but as a rule that will generally apply retroactively"), *Clem* v. *State*, supra, 119 Nev. 626–28 (applying balancing test).

[19] This was especially true because a statute prohibiting successive prosecutions as double jeopardy barred the state from retrying Policano for intentional murder, notwithstanding that the jury, as instructed, never returned a verdict on that charge. *Policano* v. *Herbert*, supra, 453 F.3d 80–81 (Raggi, J., dissenting from denial of rehearing en banc).

[20] A third such case is *Kleve* v. *Hill*, 185 F.3d 1009, 1010 (9th Cir. 1999), in which the petitioner was convicted of conspiracy to commit second degree murder but acquitted of conspiracy to commit first degree murder. An intervening judicial decision subsequently determined that there is no crime of conspiracy to commit second degree murder under California law. *People* v. *Cortez*, 18 Cal. 4th 1223, 1237–38, 960 P.2d 537 (1998). In *Kleve*, the Ninth Circuit Court of Appeals denied habeas relief, however, finding that the petitioner's prior conviction of that crime necessarily implied that he was guilty of conspiracy to commit first degree murder. *Kleve* v. *Hill*, supra, 1013–14. The court did not believe that "mislabeling [the] petitioner's crime and punishing him with underserved leniency provide a basis for invalidating his conviction altogether." Id., 1014.

Justice Katz suggests that *Kleve* does not represent an exception to the per se rule in favor of full retroactivity, because she believes that a per se rule would not compel relief under the unique procedural posture of that case. We need not resolve that question here. For present purposes, the important point is that the court in *Kleve* permitted the petitioner's conviction of conspiracy to commit second degree murder to stand, despite having found that there is no such crime, because it determined that that charge could be seen as the "functional equivalent" of the first degree conspiracy charge of which he had been acquitted. Id.

[21] In his concurrence, Justice Palmer contends that the federal due process clause may "require full retroactivity in all cases," which, he further suggests, implies that "rejecting a per se rule for purposes of our common law [might be] contrary to constitutional requirements . . . ." As we have explained, however, the United States Supreme Court has made clear that where a state court changes its interpretation of a statute, the constitution does *not* require retroactivity. Our common-law analysis assumes, arguendo, that *Salamon* did represent a change, rather than clarification, of the law.

[22] In *People* v. *Daniels*, 71 Cal. 2d 1119, 1139–40, 459 P.2d 225, 80 Cal. Rptr. 897 (1969), after a full review of the legislative history of California's kidnapping statutes, the California Supreme Court concluded that its prior statutory interpretation—allowing a conviction for kidnapping where the defendant restrained or moved a victim for the sole purpose of committing a robbery—was erroneous. In *People* v. *Mutch*, supra, 4 Cal. 3d 399, the court granted a habeas petitioner full retroactive relief under *Daniels*.

[23] In her concurrence, Justice Katz argues that the particular legal issues that arose in *Policano* are unlikely to arise under Connecticut law, so that it is unnecessary to depart from a per se rule in favor of full retroactivity. We agree with her premise, but not her conclusion. As we have explained, *Policano* is merely one example of a situation in which the rationales underlying the writ of habeas corpus may not justify relief, notwithstanding that a petitioner stands convicted of a crime that, as properly defined, he did not commit. We have pointed to several other examples as well. Such cases tend to arise out of the idiosyncrasies of state law, and it is impossible to predict when, and how, one might appear in Connecticut. Although we agree that such cases come up relatively infrequently, that in itself is no reason to adopt a rule that would compel relief should a situation arise where relief is clearly unwarranted.

Nor do we feel compelled to define here the precise circumstances under which full retroactivity would not be warranted. The important questions that Justice Katz asks in her concurring opinion should be answered in the context of a case in which they are actually implicated.

[24] We do not mean to imply that there are no relevant distinctions between direct appeals and collateral attacks on final judgments sufficient to justify retroactivity in the former context where it might not be appropriate for the latter. We merely note that one necessary cost accompanying a precedential judicial system such as ours, which "has a built-in presumption of retroactivity"; *Solem* v. *Stumes*, 465 U.S. 638, 642, 104 S. Ct. 1338, 79 L. Ed. 2d 579 (1984); is that there will be times when courts will be forced to disturb the settled soils of justice.

[25] Indeed, one of our primary concerns about Justice Katz' analysis is that she appears to undervalue the importance of the state's reliance interest in cases such as *Policano* v. *Herbert*, supra, 7 N.Y.3d 588, *Powell* v. *State*, supra, 574 N.E.2d 331, and *Kleve* v. *Hill*, 185 F.3d 1009 (9th Cir. 1999). At several points in her concurrence, Justice Katz suggests that where the law has changed so that a petitioner was not formally guilty of the crime of which he was convicted, but could instead have been convicted of a comparable crime, the proper remedy is retrial by jury. However, where a prior conviction leaves no doubt that the jury would have convicted a petitioner of a comparable—or more serious—crime if charged under a proper interpretation of the law, we see no reason to require the state, and the victims, to go through the formality of a new trial. See, e.g., *Kleve* v. *Hill*, supra, 1013–14 (conviction of conspiracy to commit second degree murder was "functional equivalent" of finding petitioner guilty of conspiracy to commit first degree murder); *Powell* v. *State*, supra, 332 (conviction of operating motor vehicle while intoxicated resulting in death implies petitioner also could have been convicted of reckless homicide).

[26] We do not foreclose the possibility that, should the petitioner prevail in his habeas proceeding, the state may charge him with the lesser included crime of unlawful restraint, in addition to or in lieu of kidnapping. See *State* v. *Sanseverino*, supra, 291 Conn. 579.

[27] At oral argument, the state offered no suggestion that it relied at trial on the prior interpretation of § 53a-92 (a) (2) (A), such as by failing to present evidence of the petitioner's intent to restrain the victim for some purpose other than to assault her. If such evidence does exist, the state will have the opportunity to present it at a retrial.

[28] See Office of Legislative Research, Research Report No. 2008-R-0589, "Breakdown of Prison Population by Offense Categories" (October 22, 2008), available at http://www.cga.ct.gov/2008/rpt/2008-R-0589.htm (last visited January 5, 2011) (copy contained in file of this case in Supreme Court clerk's office) (providing data on sentenced and unsentenced department of correction inmates, by most serious offense, as of October 21, 2008); accord *Sheff* v. *O'Neill*, 238 Conn. 1, 38 n.42, 678 A.2d 1267 (1996) (taking judicial notice of statistics compiled by Hartford board of education); 29 Am. Jur. 2d 134, Evidence § 109 (2008) ("Courts take judicial notice of statistical facts of general and common knowledge. Federal records and statistics are recognized as public records of which courts may take judicial notice."); 29 Am. Jur. 2d, supra, § 157 (judicial notice taken of official public records of state department of correction). Of those inmates incarcerated for kidnapping and related crimes, some have yet to be sentenced, or to have completed their direct appeal, and others were convicted of unlawful restraint rather than kidnapping. Even among those inmates whose kidnapping convictions have become final, many exhibited a clear intent to abduct their victims, and so are not in a position to benefit from *Salamon*.

[29] The state also argues that to make *Salamon* fully retroactive would violate the principles of res judicata and collateral estoppel. The sole case that the state cites for that proposition, however, is *Marone* v. *Waterbury*, 244 Conn. 1, 11 n.10, 707 A.2d 725 (1998). Because *Marone* was a civil action, in which considerations of finality differ substantially from the habeas context, it is inapposite.

[30] In its brief, the state argues that making *Salamon* retroactive in habeas cases would be unjust and traumatic for victims. The amici further contend that to do so would violate article first, § 8 (b), of the constitution of Connecticut. Because the parties themselves have not raised the constitutional challenges at trial or on appeal, we do not address them. See *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 416 n.3, 3 A.3d 919 (2010).