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MARCUS GREGORY *v.* COMMISSIONER OF CORRECTION
(AC 44886)
(AC 44957)

Bright, C. J., and Elgo and Clark, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with a home burglary in Ansonia and, on pleas of nolo contendere, of various crimes in connection with two home burglaries in Bridgeport, sought a writ of habeas corpus, claiming, in the first count, that his conviction of kidnapping in the Ansonia case violated his rights to due process under the federal and state constitutions because the trial court did not provide the jury with an incidental restraint instruction pursuant to *State* v. *Salamon* (287 Conn. 509), which was decided approximately ten years after his conviction, in the second count, that his nolo contendere pleas in the Bridgeport cases were not knowing, voluntary, or intelligent in light of the subsequent change in the law announced in *Salamon*, and, in the third count, that his convictions in the Bridgeport cases were illegal due to the ineffective assistance of prior habeas counsel in failing to raise the *Salamon* claims asserted in the first and second counts of his habeas petition. The petitioner moved for summary judgment as to the first count and the respondent Commissioner of Correction moved for summary judgment as to the second count. After hearings on the motions, the habeas court granted the habeas petition as to the first count and vacated the petitioner's conviction of kidnapping and conspiracy to commit kidnapping in the Ansonia case, determining that he was entitled to a new trial under *Salamon* because a reasonable jury could have concluded that the restraint involved was incidental to the commission of the other offenses. The habeas court denied the habeas petition as to the second and third counts and granted the respondent's motion for summary judgment as to the second count, concluding that *Salamon* should not have been applied retroactively to the Bridgeport convictions. On the granting of certification, the petitioner and the respondent filed separate appeals with this court. *Held*:

1. The habeas court improperly granted summary judgment for the petitioner on the first count of his habeas petition because, on the basis of a review of the record and in consideration of the six *Salamon* factors, this court concluded that, given the expanse and duration of the petitioner's criminal conduct and the kidnapping statute (§ 53a-92 (a) (2) (B)) under which he was charged, the failure to provide an incidental restraint instruction was harmless, as a properly instructed, reasonable jury would have found the petitioner guilty of kidnapping and conspiracy to commit kidnapping beyond a reasonable doubt: the criminal conduct in the Ansonia case took place over the course of more than one and one-half hours, during which the petitioner and his two accomplices committed multiple crimes against the victims, F and his wife, R, and restrained them in multiple ways to a greater degree than was necessary to complete the other crimes; moreover, contrary to the petitioner's claim, his acts, and those of his accomplices, including transporting F from his house to a nearby bank, holding F's family, R and their two children, captive at the house to ensure that F provided them with the correct access code to his bank account, holding R at gunpoint for more than one hour, which restraint continued even after one of the perpetrators had sexually assaulted her, pointing a gun at the victims' infant daughter, and threatening to kill the victims' cat, were not just done within the confines of the other crimes, but constituted gratuitous restraints used to advance both the sexual assault of R and the subsequent robbery of the house in violation of § 53a-92 (a) (2) (B), and the restraints were not inherent in the other crimes committed; furthermore, although some of the restraints involved could have been interpreted as preventing resistance, many of them, including the continued restraint of F after he withdrew money from the bank and the continued restraint of R after the sexual assault was completed, were solely for the purpose of

avoiding detection and hindering the victims from summoning assistance; additionally, the intruders' conduct undoubtedly caused the victims to experience greater fear and psychological harm than that which they would have experienced during an ordinary robbery in which the perpetrator simply took the victims' property and left, as, after robbing F and R in their garage, the petitioner and his accomplices forced R at gunpoint into the house while suggesting that they intended to sexually assault her, removed F and R's daughter from her crib and threw her on the bed next to R, sexually assaulted R while her daughter lay awake on the bed beside her, threatened to kill the family's cat, and kept F and R isolated from one another throughout the duration of the incident.

2. The habeas court properly rendered summary judgment for the respondent on the second count of the habeas petition: the traditional rationales for the writ of habeas corpus did not favor applying *Salamon* retroactively to undo the petitioner's negotiated plea agreement because the state relied to its detriment on our Supreme Court's pre-*Salamon* interpretation of the kidnapping statutes when it negotiated the petitioner's pleas, and, had the state anticipated *Salamon*, it could have selected one or more of the nonkidnapping offenses to which the petitioner did not plead nolo contendere to achieve the desired sentence, which would have made *Salamon* irrelevant; moreover, assuming arguendo that the petitioner's pleas were involuntary, the entire plea agreement, and not just the kidnapping convictions, would have to be vacated, which would constitute an undeserved windfall for the petitioner because it was questionable whether the state would be able to prosecute the Bridgeport crimes, more than twenty-five years after they were committed, as the victims had been in their sixties and seventies when the crimes were perpetrated.

Argued November 8, 2022—officially released April 11, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Bhatt*, *J.*, granted the motions for summary judgment filed by the petitioner and the respondent; thereafter, the court, *Bhatt*, *J.*, rendered judgment granting in part and denying in part the habeas petition, from which, on the granting of certification, the petitioner and the respondent filed separate appeals with this court. *Reversed in part*; *further proceedings.*

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellant in Docket No. AC 44886 (respondent).

Shanna P. Hugle, deputy assistant public defender, with whom was *Pamela S. Nagy*, assistant public defender, for the appellant in Docket No. AC 44957 and the appellee in Docket No. AC 44886 (petitioner).

Sarah Hanna, former senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Melissa E. Patterson* and *Jo Anne Sulik*, senior assistant state's attorneys, for the appellee in Docket No. AC 44957 (respondent).

Opinion

BRIGHT, C. J. In these certified appeals, the petitioner, Marcus Gregory, and the respondent, the Commissioner of Correction, appeal from the judgment of the habeas court granting in part and denying in part the petitioner's amended petition for a writ of habeas corpus. In Docket No. AC 44886, the respondent claims that the court improperly rendered summary judgment for the petitioner on the first count of his petition alleging that his kidnapping conviction violated the state and federal constitutions because the trial court failed to instruct the jury pursuant to *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), that, to find him guilty of kidnapping, the jury was required to find that he restrained the victims to a greater extent than necessary to complete other crimes. In Docket No. AC 44957, the petitioner claims that the habeas court improperly rendered summary judgment for the respondent on the second count of his petition alleging that his nolo contendere pleas in two separate cases to kidnapping and other offenses were not made knowingly, intelligently, and voluntarily because *Salamon* was decided more than ten years after he entered his pleas. We agree with the respondent's claim but disagree with the petitioner's claim. Accordingly, we reverse in part the judgment of the court.

The record reveals the following undisputed facts and procedural history. For his role in a 1997 home invasion in Ansonia,[1] the petitioner was charged with various offenses in two separate informations, which were joined for trial (Ansonia cases). After a jury trial, the petitioner was convicted of "conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-48, kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (B) and 53a-8, conspiracy to commit burglary in the first degree in violation of General Statutes [Rev. to 1997 §] 53a-101 (a) (2)[2] and [§] 53a-48, burglary in the first degree in violation of . . . §§ 53a-101 (a) (2) and 53a-8, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (4) and 53a-48, aiding robbery in the first degree in violation of . . . §§ 53a-134 (a) (4) and 53a-8, and larceny in the third degree in violation of General Statutes [Rev. to 1997] § 53a-124 (a) (1) as a lesser included offense of larceny in the second degree under General Statutes [Rev. to 1997] § 53a-123 (a) (1)." (Footnote added.) *State* v. *Gregory*, 56 Conn. App. 47, 48–49, 741 A.2d 986 (1999), cert. denied, 252 Conn. 929, 746 A.2d 790 (2000). In March, 1998, the court, *Thompson*, *J.*, imposed a total effective sentence of ninety years of imprisonment, and this court affirmed the judgments of conviction.[3] Id., 54.

Following his arrest in connection with the Ansonia cases, the police linked the petitioner to two burglaries

in Bridgeport, and the state charged him with various offenses in connection therewith (Bridgeport cases). See *State* v. *Gregory*, 74 Conn. App. 248, 254–55, 812 A.2d 102 (2002), cert. denied, 262 Conn. 948, 817 A.2d 108 (2003). In September, 1999, the petitioner entered conditional pleas of nolo contendere to two counts of kidnapping in the first degree in violation of § 53a-92 (a) (2), one count of burglary in the first degree in violation of § 53a-101 (a) (2), one count of sexual assault in the first degree in violation of General Statutes (Rev. to 1997) § 53a-70 (a) (1), and one count of burglary in the second degree with a firearm in violation of General Statutes § 53a-102a (a). Pursuant to an agreement with the state, the sentences imposed in the Bridgeport cases would run concurrently with the sentences the petitioner had received in the Ansonia cases, and the petitioner reserved the right to appeal from the denial of his motion to suppress. The court, *Thim*, *J.*, accepted the pleas and imposed a combined total effective sentence of 100 years to run concurrently with the sentences imposed in the Ansonia cases. On appeal, this court affirmed the judgments. *State* v. *Gregory*, supra, 74 Conn. App. 264.

Approximately ten years after the petitioner's trial in the Ansonia cases, and nearly nine years after he entered his nolo contendere pleas in the Bridgeport cases, our Supreme Court reinterpreted the intent element of our kidnapping statutes in *State* v. *Salamon*, supra, 287 Conn. 541–42. The court 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. In 2011, the court adopted a general presumption that the rule announced in *Salamon* applies retroactively in habeas cases. See *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 764, 12 A.3d 817 (2011).

In 2016, following several prior unsuccessful habeas petitions,[4] the petitioner filed the underlying habeas petition as a self-represented party. The court appointed counsel to represent the petitioner, and counsel filed an amended petition on January 27, 2020. In the amended petition, the petitioner alleged that (1) his convictions for kidnapping and conspiracy to commit kidnapping in the Ansonia cases violated his rights to due process under the federal and state constitutions because the court did not provide the jury with an incidental restraint instruction pursuant to *State* v. *Salamon*, supra, 287 Conn. 509 (first count), (2) his nolo contendere pleas in the Bridgeport cases were not knowing, voluntary, or intelligent in light of the subsequent change in the law announced in *Salamon* (second count), and (3) his convictions in the Bridgeport cases are illegal due to the ineffective assistance of his prior habeas counsel in failing to raise the *Salamon* claims

asserted in the first and second counts (third count).

In August, 2020, the petitioner moved for summary judgment on the first count of the petition and filed an amended memorandum of law in support of the motion on January 25, 2021. In connection with his motion, the petitioner submitted several exhibits, which included excerpts from transcripts of the trial in the Ansonia cases. The petitioner claimed that a *Salamon* instruction was required in the Ansonia cases and that the failure to provide one was not harmless error. On January 25, 2021, the respondent filed an objection to the motion for summary judgment and a supporting memorandum of law, claiming that the *Salamon* error was harmless.

The court held a hearing on the motion for summary judgment on January 26, 2021. After hearing from both sides, the court took the matter under advisement and asked the petitioner's counsel how much time he would need for a trial on the remaining two counts of the petition. At that point, counsel for the respondent indicated that she intended to file a motion for summary judgment as to the second count of the petition. After a brief discussion, the parties agreed that, on March 26, 2021, the court would hear the respondent's motion for summary judgment on the second count of the petition and would allow the petitioner to present evidence in support of the third count alleging ineffective assistance of prior habeas counsel.

On March 3, 2021, the respondent moved for summary judgment as to the second count of the petition. In his memorandum of law in support of the motion, the respondent claimed that the petitioner is not entitled to the retroactive application of *Salamon* to his conditional nolo contendere pleas. The respondent submitted transcripts of the petitioner's plea and sentencing hearings in the Bridgeport cases as exhibits in support of the motion. The petitioner filed an objection to the motion and an accompanying memorandum of law on March 25, 2021. On March 26, 2021, the parties appeared before the court. The court began by allowing the petitioner to testify in support of the petition before hearing argument on the respondent's motion for summary judgment. The petitioner was the only witness to testify. After the petitioner rested, the court heard argument on the respondent's motion for summary judgment and took the matter under advisement.

On July 26, 2021, the habeas court issued a memorandum of decision granting the petition as to the first count and denying the petition as to the second and third counts. The court determined that the petitioner was entitled to a new trial in the Ansonia cases under *Salamon* because a reasonable jury could conclude that the restraint involved was incidental to the commission of the other offenses. Accordingly, the court vacated the petitioner's kidnapping convictions in the Ansonia

cases.[5] The court next granted the respondent's motion for summary judgment as to the second count of the petition, concluding that "the traditional rationales underlying the writ of habeas corpus do not favor applying *Salamon* retroactively to the Bridgeport convictions." Finally, because the third count alleged ineffective assistance of prior habeas counsel for failing to assert the *Salamon* claims brought in counts one and two of the petition, the court held that any alleged ineffectiveness either was moot or unproven on the basis of its rulings on the parties' motions for summary judgment.[6] The court subsequently granted the parties' petitions for certification to appeal, and these appeals from the summary judgment rulings followed.[7] Additional facts will be set forth as necessary.

As a preliminary matter, we set forth the standard of review applicable to both appeals. "On review from the granting of a motion for summary judgment, our task is to determine whether the court correctly determined that the moving party was entitled, as a matter of law, to summary judgment on the basis of the absence of any genuine issues of material fact requiring a trial. Because this inquiry requires a legal determination, our review is plenary." (Internal quotation marks omitted.) *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 422, 154 A.3d 1054 (2017). Likewise, "[t]he applicability of *Salamon* and whether the court's failure to give a *Salamon* instruction was harmless error are issues of law over which our review is plenary." (Internal quotation marks omitted.) *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 489, 264 A.3d 1080 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

I

AC 44886

The respondent claims that the court improperly concluded that the absence of a *Salamon* instruction harmed the petitioner as to his kidnapping convictions in the Ansonia cases.[8] We agree.

The following additional facts, which the jury reasonably could have found, are relevant to the respondent's claim. On the night of January 9, 1997, the male victim, F, was taking care of his two children, a four year old son and an eight month old daughter, while his wife, R, was at work. F put the children to bed around 9 or 10 p.m. and proceeded to watch television in the living room on the first floor of the house, which was directly above the garage. Around midnight, F heard R arrive home and pull her car inside the garage. When R exited her vehicle to manually close the garage door, the petitioner suddenly appeared and prevented her from doing so, causing R to scream. At that point, a second male intruder appeared and assisted the petitioner in forcing R inside the garage and onto the floor. R felt two guns on her back after the two intruders forced her to the

ground.

After hearing R scream, F ran downstairs and, when he opened the interior door to the garage, he saw the petitioner standing over his wife and pointing a gun at him. F initially jumped back into the house but complied when one of the men ordered him to get onto the garage floor. At this point, a third male intruder appeared, forced F to the ground and pointed a gun at his back. The intruders then "hogtied" F, tying his hands behind his back and his feet to his hands, leaving him lying facedown in the doorway between the cellar and garage.

While he was being restrained, F removed his wedding ring and gave it to one of the intruders after they attempted to take it off his finger. When prompted by the intruders, F stated that the only other people in the house were his children who were asleep upstairs and told them where they could find his wallet and the family's jewelry. Both F and R told the men that they could have anything but pleaded for them to not hurt their children. F testified: "When [the intruders] asked where . . . the bank card was . . . and the credit cards, again I said, 'Don't hurt the kids' and then, I'm not exactly sure [what] the terminology was, but they indicated they were going to take my kids and, if everything went okay, they would bring them back. And I said, 'The hell you are, I'll go to the bank with you [because] I know the code.' "

After hogtying F, two of the intruders picked R up and searched her pockets. They removed her rings, flipped through her wallet, and took her checkbook. One of the intruders grabbed R by the hair on the back of her head and forced her head into her chest as he and another man walked her into the cellar and upstairs to the first floor of the house. As they were bringing R upstairs, F overheard one of the men say to the other that "[t]hey were going to go upstairs and get some cream" in reference to F's wife. One man stayed in the cellar with F, who was hogtied on the cellar floor for "[q]uite a while." During that time, F heard the other two men rummaging around upstairs, unplugging electronics and removing items from various rooms.

The two men brought R to her bedroom on the first floor and threw her facedown on the bed. One of the men put his legs across the back of R's legs. As this was happening, R heard her daughter crying in the bedroom on the second floor and pleaded for the men not to hurt the children. One of the men brought the baby from the second floor to R's bedroom and threw her onto the bed next to R. Both men told R to "shut [the baby] up" and proceeded to ransack the house, unplugging electronics and rummaging through dressers and closets. When they finished, they told R that they were taking F to the bank and that, if something went wrong, they would come back and "mess [her] up."

The two men returned to the cellar with pants and boots for F and told him to get dressed. Two of the men then forced F into his wife's car, a red Subaru, and told him to keep his head down and not to look at them. F obeyed their commands because he was afraid that they would shoot him, his wife, or his children. The two men brought F to the bank, which was located a few miles from F's house, with one of the men driving the car while the other sat in the backseat next to F. After approximately five minutes in the car, they arrived at the bank and all three went inside to the automated teller machine (ATM). The two men forced F to withdraw a total of $600 in three separate transactions. The receipts of those transactions showed that the first withdrawal occurred at 1:09 a.m. on January 10, 1997, and that the last withdrawal occurred two minutes later at 1:11 a.m. The two men forced F back into the car and returned to the house.

While his accomplices were transporting F to and from the bank, the third intruder remained with R in her bedroom. R was lying facedown on the bed with her infant daughter, and the intruder had his leg across her legs and a gun at her back. The victims' cat came into the bedroom and sat on the bed next to R's head and the baby; when the cat hissed at the intruder, he put his gun on the cat and threatened to shoot it. The cat quieted down and stayed next to the baby girl, who also quieted down. At some point, the intruder took R's pants and underwear off and squeezed her breasts so hard that it was painful. In order to deter the man from sexually assaulting her, R falsely told him that she had contracted AIDS while working at a hospital. After a failed search for condoms, the intruder forced R to perform oral sex on him. During the sexual assault, R's daughter was awake, lying on the bed next to R. After the man ejaculated, he smoked a cigarette in the hallway between the bedroom and the kitchen.

Around 1:15 or 1:20 a.m., the two intruders returned with F in R's car, at which point the third intruder hurried back into the bedroom with R and the baby, put his leg on top of R's legs, and pointed his gun at her back. When the other two intruders came upstairs with F, they told him to lie down in the hallway outside the bedroom and hogtied him again, "only tighter." F called out to R and asked if she was okay; R responded, "Yes." At some point, R heard the intruder who had sexually assaulted her tell the other two men to "leave [her] alone because [she] had the bug."

After hogtying F, the intruders emptied R's wallet on her back, asking her if any of the various cards they found would allow them to obtain cash, and rummaged through some closets and a spare room before loading items into R's car. For approximately fifteen minutes, one of the intruders stayed upstairs with F and R while the other two men went downstairs and loaded the

victims' possessions into R's car. The intruders left the house between 1:30 and 1:45 a.m. Before leaving the house, one of the intruders pressed his gun into F's back and said, "Thank God for your kids." After F heard the garage door close, he waited approximately ten minutes before telling R to untie him; R had to use a knife to cut the ropes. Once freed, F ran upstairs and grabbed his son, who was still asleep in his bed, and the whole family got in F's truck and drove to the Ansonia Police Department, arriving there around 2 a.m.

The petitioner was arrested in Bridgeport in the early morning hours of January 10, 1997, after he was observed driving R's red Subaru with the headlights off; the victims' possessions were inside the car, and, when the police searched the petitioner, they found F's ring and his beeper. See *State* v. *Gregory*, supra, 56 Conn. App. 49–51.

At the petitioner's criminal trial, the court instructed the jury in relevant part: "As you can see, in the first, third and fifth counts, [the petitioner] is charged with the crime of conspiracy. In counts two, four and six . . . the [petitioner] is charged with the substantive crimes, which are referred to in the conspiracy counts. Therefore, I will instruct you as to those substantive crimes first, and thereafter will instruct you as to the crime of conspiracy. As to each of those substantive [crimes], [the petitioner] is charged as an accessory, and I will also explain that term to you.

"A person is criminally liable for a criminal act if he directly commits it or if he is an accessory in the criminal act of another. This basic principle is stated in § 53-8 . . . which provides as follows: A person, acting with the mental state required for the commission of an offense, who intentionally aids another person to engage in conduct which constituted an offense—or constitutes an offense—shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender. If the [petitioner] did any one of these things—did these things as specified in the statute, he is guilty of the crime charged as though he had directly committed it or participated in its commission. . . .

"Thus, you must find that the state has proven beyond a reasonable doubt that the [petitioner] assisted another person to commit the crime charged in the information. You must also find beyond a reasonable doubt that the [petitioner] had the intent to commit the crime charged and did intentionally aid another in the commission of the crime charged in the information to find the [petitioner] guilty as an accessory.

"Now, in the second count of the information, the state charges the [petitioner] with aiding kidnapping in the first degree. Specifically, that in Ansonia, during

the late evening hours of January 9, 1997, and the early morning hours of January 10, 1997, in the area of 177 1/2 Wakelee Avenue, that [the petitioner] did aid in the abduction and restraint of the person abducted with the intent to accomplish—or advance—the commission of a felony in violation of . . . §§ 53a-92 (a) [2] (B) and 53-8. [Section] 53a-92 (a) . . . provides as follows: A person is guilty of kidnapping in the first degree when he abducts another person and he restrains the person abducted with intent to accomplish or advance the commission of a felony.

"For you to find the [petitioner] guilty of this charge, the state must prove the following beyond a reasonable doubt. First, that the [petitioner] aided in the abduction of the victim. Two, that the [petitioner] aided in the unlawful restraint of the person that was abducted. And, three, that he did so with the intent to accomplish or advance the commission of a felony.

"The term 'abduct' means to restrain a person with intent to prevent his liberation by using or threatening to use physical force or intimidation. Abduction need not be proven by establishing the use of . . . force if the proof establishes that the [petitioner] threatened its use in such a manner that the victim reasonably believed force would be applied to him if he sought to escape or to thwart the abductor's intention.

"The term 'restrain' means to restrict the person's movement intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. . . . The state charges that the [petitioner] aided in the abduction and restraint of [F and R] with intent to accomplish or advance the commission of the felonies of robbery and sexual assault.

* * *

"A person is guilty of conspiracy . . . when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such a conduct and anyone of them commits an overt act in pursuance of such conspiracy. . . . [T]he state must prove the following elements beyond a reasonable doubt: One, that there was an agreement between two or more persons to engage in conduct constituting a crime. Second, that there was an overt act in furtherance of the subject of the agreement and, third, that there was an intent on the part of the [petitioner] that conduct constituting a crime be performed.

* * *

"Now, as to the first count, the state charges [that] the [petitioner], acting with the intent that the crime of kidnapping in the first degree be performed, did agree

with Shaun Smith and another coconspirator to abduct another person and that one or more of the coconspirators did restrain that person abducted with the intent to accomplish or advance the commission of a felony. . . . As to this first count, the overt act which [the] state charges is that, in furtherance of the conspiracy, three coconspirators entered the victims' home and tied up one of the victims." The jury found the petitioner guilty as charged in the six count information and, with respect to the separate, single count information, guilty of larceny in the third degree as a lesser included offense of larceny in the second degree.

More than ten years after the petitioner's conviction in the Ansonia cases, "our Supreme Court [in *State* v. *Salamon*, supra, 287 Conn. 509] reconsidered [its] longstanding interpretation of our kidnapping statutes, General Statutes §§ 53a-91 through 53a-94a. . . . [T]he defendant [in *Salamon*] had assaulted the victim at a train station late at night . . . and ultimately was charged with kidnapping in the second degree in violation of . . . § 53a-94, unlawful restraint in the first degree, and risk of injury to a child. . . . At trial, [the defendant] requested a jury instruction that, if the jury found that the restraint had been incidental to the assault, then the jury must [find him not guilty] of the charge of kidnapping. . . . [Consistent with established precedent of our Supreme Court] [t]he trial court declined to give that instruction [and the defendant was convicted of kidnapping in the second degree in addition to the two other crimes]. . . .

"[The Supreme Court] . . . ultimately concluded that [o]ur legislature . . . intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to [or] necessary for the commission of another crime against that victim.[9] Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime . . . or than that which was merely incidental to that underlying crime. . . .

"Our Supreme Court thus explained in *Salamon* that a defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during, or after the commission of that other crime, the victim is moved or confined in a way that had independent criminal significance, that is, the victim was restrained to an extent exceeding that which was [incidental to or] necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to [or] necessary for another crime will depend on the particular facts and circumstances of each case. Consequently, when the evidence reasonably

supports a finding that the restraint was not merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider . . . various relevant factors . . . .

"Since its decision in *Salamon*, our Supreme Court has reiterated that, when a criminal defendant is charged with kidnapping in conjunction with another underlying crime . . . the jury must be provided a *Salamon* instruction. . . . The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element . . . and thus gives rise to constitutional error . . . that is subject to harmless error analysis." (Citations omitted; footnote altered; internal quotation marks omitted.) *State* v. *McCarthy*, 210 Conn. App. 1, 11–14, 268 A.3d 91, cert. denied, 342 Conn. 910, 271 A.3d 136 (2022).

In *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 24–25, 259 A.3d 1082 (2021), our Supreme Court held "that, when a habeas petitioner convicted of kidnapping has demonstrated that the jury was not properly instructed in accordance with *Salamon*, the state meets its burden of establishing harmlessness only if the reviewing court, following a thorough, de novo review of the record, has confidence that a properly instructed jury would have found the [petitioner] guilty beyond a reasonable doubt."[10]

In the present case, it is undisputed that the court did not provide the jury with an incidental restraint instruction as later required by *Salamon*. In determining whether that omission was harmless, the habeas court applied the six factors set forth in *Salamon* for assessing whether the movement or confinement of the victims was merely incidental to or necessary for the other crimes. "Those factors are (1) the nature and duration of the victim's movement or confinement, (2) whether that movement or confinement occurred during the commission of the separate offense, (3) whether the restraint was inherent in the nature of the separate offense, (4) whether the restraint prevented the victim from summoning assistance, (5) whether the restraint reduced the perpetrator's risk of detection, and (6) whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." Id., 42.

The court concluded that these factors "could tip one way or the other. A jury could reasonably find that the act of hogtying [F] was not necessary or incidental to the commission of the robbery or burglary. Similarly, a jury could also reasonably find that it was so. . . . [T]he court cannot say that a jury would not find . . . that the facts demonstrate that the restraint on liberty was merely incidental to the commission of other offenses. The evidence as presented to the jury demon-

strates that, at all times that [F] and [R] were restrained, [the petitioner] and his accomplices were committing other offenses.

"Ultimately, the motion for summary judgment must be granted because this court cannot, with confidence, say that a properly instructed jury, faced with these facts and these charges, would have reached only one conclusion: that the restraint and abduction bore independent criminal significance. Thus, because the court is in equipoise as to the question . . . the error must be deemed to have affected the verdict. . . . Since the evidence regarding the perpetrator's intent is susceptible to more than one interpretation, that question is one for the jury." (Citations omitted; internal quotation marks omitted.)

On appeal, the respondent claims that "consideration of *Salamon*'s six factors lead[s] inexorably to the conclusion that the petitioner's restraint of R and F was not limited to any restraint inherent in the charged robbery and burglary, or in the [uncharged] sexual assault . . . ." The petitioner responds that the court properly applied the *Salamon* factors in concluding that the respondent was unable to demonstrate harmless error. On the basis of our review of the record and consideration of those factors, we conclude that, given the expanse and duration of the petitioner's criminal conduct and the kidnapping statute under which the petitioner was charged, the failure to provide an incidental restraint instruction was harmless because a properly instructed jury would have found the petitioner guilty of kidnapping and conspiracy to commit kidnapping beyond a reasonable doubt.

At the outset, we note that, when "a victim is restrained in the midst of a robbery, rather than after the victim's property has been taken, then it rarely will be possible to say, as a matter of law, that the restraint bore independent criminal significance and was not merely incidental to the completion of the underlying crime. That determination will hinge on heavily fact based considerations, such as the distance of the asportation, the duration and degree of the restraints, the perpetrator's apparent motives for restricting the victim's movements, and the additional risks to which the victim was subjected." *Bell* v. *Commissioner of Correction*, 339 Conn. 79, 93–94, 259 A.3d 1073 (2021). Additionally, "[a]nalyses of *Salamon* claims have focused on a variety of factors in determining whether a kidnapping conviction can stand, but the timing, location, and manner in which the [petitioner] commits criminal acts against a victim are particularly crucial factors." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 743, 129 A.3d 796 (2016). With these principles in mind, we consider the habeas court's application of the *Salamon* factors in the present case.

A

As to the first factor, the nature and duration of the victims' movement or confinement, our Supreme Court has explained that, "[a]lthough no minimum period of restraint or degree of movement is necessary for the crime of kidnapping, an important facet of cases where the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. See *State* v. *Hampton*, [293 Conn. 435, 463–64, 988 A.2d 167 (2009)] (defendant confined victim in a car and drove her around for approximately three hours before committing sexual assault and attempted murder); *State* v. *Jordan*, [129 Conn. App. 215, 222–23, 19 A.3d 241] (evidence showed the defendant restrained the victims to a greater degree than necessary to commit the assaults even though assaultive behavior spanned entire forty-five minute duration of victims' confinement) [cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011)]; *State* v. *Strong*, [122 Conn. App. 131, 143, 999 A.2d 765] (defendant's prolonged restraint of victim while driving for more than one hour from one town to another not merely incidental to threats made prior to the restraint) [cert. denied, 298 Conn. 907, 3 A.3d 73 (2010)]; and *State* v. *Nelson*, [118 Conn. App. 831, 860–62, 986 A.2d 311] (harmless error when defendant completed assault and then for several hours drove victim to several locations) [cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010)]. Thus, as these cases demonstrate, multiple offenses are more readily distinguishable—and, consequently, more likely to render the absence of a *Salamon* instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement.

"Conversely, multiple offenses occurring in a much shorter or more compressed time span make the same determination more difficult and, therefore, more likely to necessitate submission to a jury for it to make its factual determinations regarding whether the restraint is merely incidental to another, separate crime. In those scenarios, where kidnapping and multiple offenses occur closer in time to one another, it becomes more difficult to distinguish the confinement or restraint associated with the kidnapping from another substantive crime. The failure to give a proper *Salamon* instruction in those scenarios is more likely to result in harmful error precisely because of the difficulty in determining whether each crime has independent criminal significance. See *State* v. *Thompson*, [118 Conn. App. 140, 144, 162, 983 A.2d 20 (2009)] (within fifteen minutes defendant entered victim's car, pushed her behind a building and sexually assaulted her) [cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010)]; *State* v. *Flores*, [301 Conn. 77, 82, 89, 17 A.3d 1025 (2011)] (defendant's robbery of victim in her bedroom lasted between five and twenty minutes); *State* v. *Gary*, [120 Conn. App. 592,

611, 992 A.2d 1178] (defendant convicted of multiple sexual assaults and an attempted sexual assault that were in close temporal proximity to the defendant's restraint of the victim; thus court determined evidence reasonably supports a finding that the restraint merely was incidental to the commission of other crimes, namely, sexual assaults and attempted sexual assault; lack of *Salamon* instruction harmful error) [cert. denied, 297 Conn. 910, 995 A.2d 637 (2010)]." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 92–93, 136 A.3d 596 (2016).

In the present case, the criminal conduct took place over the course of more than one and one-half hours, during which time the petitioner and his accomplices committed multiple crimes against the victims and restrained them in multiple ways. F and R were first restrained at gunpoint in their garage and ordered to lay on the ground. F was hogtied there. The intruders then forcibly restrained R by the head and moved her into the house and upstairs to her bedroom. One of the intruders then restrained R on her bed by placing his legs on top of her. R was forced at gunpoint to perform oral sex on one of the intruders with her infant daughter, who had been forcibly removed from her crib in another room, on the bed next to her. Approximately one hour after the incident began, two of the intruders forced F into R's car and drove him to a bank located more than one mile from the victims' house and forced him to withdraw money from an ATM. After obtaining the cash from F, the two men forced him back into the car, brought him back to the house, and hogtied him again, this time in the upstairs hallway. While F was hogtied, one armed intruder remained with him while the other two removed items from the victims' house.

The respondent argues that these facts establish that "the nature and length of the restraints cannot be characterized as anything other than extreme, and they provide strong evidence that the restraints had independent criminal significance." The petitioner responds that this factor favors him because "[F's] and R's restraint occurred so close in time as to make it difficult to determine whether there was independent criminal significance to the conduct." We agree with the respondent.

Given both the duration of the incident and the nature of the restraints—hogtying F and holding both victims at gunpoint throughout the entire ordeal—the present case is in line with those cases in which the victims were restrained for longer and confined or moved to a greater degree than necessary to complete other crimes. Indeed, the encounters deemed brief and the movements deemed incidental by this state's appellate courts have been counted in minutes and measured in feet or yards, whereas the incident here lasted for more than one hour, during which time both victims were

restrained in multiple ways, and F was transported more than one mile from the house to a bank and then back to the house. Compare *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 42 ("jury reasonably could conclude that moving robbery victims fewer than ten yards and confining them for, at most, a few minutes during a perpetrator's escape from the crime scene does not, simply by virtue of the times and distances involved, bear independent criminal significance"), and *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 79 (finding *Salamon* error harmful when petitioner's actions "were a continuous, uninterrupted course of conduct lasting minutes"), with *Nogueira* v. *Commissioner of Correction*, 168 Conn. App. 803, 841, 149 A.3d 983 (reasoning that, because petitioner dragged victim 113 feet during incident that lasted approximately two hours, "petitioner's movement of the victim . . . [was] distinguishable from the facts in *Hinds*, where the victim was moved only a matter of yards, which occurred in a matter of seconds" (internal quotation marks omitted)), cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

In the present case, the court recognized the long duration of the restraint of the victims but seemed to discount it because the "the 'kidnapping related actions were closely aligned in time, place, and manner to [the petitioner's] other criminal acts.' *Wilcox* v. *Commissioner of Correction*, supra, 162 Conn. App. 743." A closer examination of our decision in *Wilcox* makes clear that the habeas court's reliance on the isolated language it quoted from that decision is misplaced.

In *Wilcox*, the petitioner offered the victim a ride to her home, which was a five minute walk from where the petitioner picked her up. Id., 747. The petitioner drove the victim past her home, refused to permit her to exit the car, and drove her for about twenty minutes to Cockaponset State Forest. Id., 747–48. Once there, the petitioner dragged the victim out of his car and approximately twenty feet into the woods where he sexually assaulted her and then attempted to sexually assault her a second time before the victim escaped. Id., 748. On the basis of these facts, this court concluded that the absence of a *Salamon* incidental restraint instruction at the petitioner's criminal trial was harmless because the "restraint and abduction of the victim in [the petitioner's] car were not merely incidental to [the] ultimate sexual assault of her in Cockaponset State Forest." Id. In particular, the court concluded that it was reasonable to infer that the drive to the state forest "was to avoid detection, and not necessary only to complete the act of sexual assault" and was "to hinder [the victim's] ability to call for assistance . . . ." Id., 749. This court explained that "[o]ne also can reasonably infer, given that the petitioner attempted a second sexual assault of the victim, that he intended to confine her for a lengthy period of time in order to perpetrate more than a single sexual assault of her." Id. Thus, the

closeness in time, place, and manner of the restraint to other criminal acts must be considered in light of the purpose of the restraint. In *Wilcox*, the restraint of the victim, although closely aligned in time, place, and manner with the sexual assault, had independent legal significance because it was done not just to commit the sexual assault but also to evade detection, to hinder the victim from calling for help, and to commit additional crimes against her. Id. As we discuss more fully in connection with the other *Salamon* factors, the same is true in the present case.

B

As to the second *Salamon* factor, whether the movement or confinement occurred during the commission of the separate offense, it is significant that the petitioner was convicted of violating § 53a-92 (a) (2) (B), which provides in relevant part that "[a] person is guilty of kidnapping in the first degree when he abducts another person and . . . he restrains the person abducted with intent to . . . accomplish or advance the commission of a felony . . . ." Thus, the jury in the petitioner's criminal trial was instructed that "[t]he state charges that the [petitioner] aided in the abduction and restraint of [F and R] with intent to accomplish or advance the commission of the felonies of robbery and sexual assault."

In *Banks*, our Supreme Court discussed § 53a-92 (a) (2) (B) and explained: "As we concluded in *Salamon* with respect to the underlying crime of assault . . . it is clear that the legislature did not intend to criminalize as kidnapping unlawful restraint that is no greater than necessary for, [or] involves no wrongful intent other than that inherent in, the completion of a robbery. It is equally clear, however, that the legislature, in adopting § 53a-92 (a) (2) (B), *did* intend that additional, gratuitous restraint used to accomplish or advance the commission of a robbery carry the added penalties associated with kidnapping. In other words, the mere fact that a perpetrator restrains a victim during the course of and in the service of a robbery does not mean that, under *Salamon*, the conduct does not constitute kidnapping. To so hold—or to permit a jury to so reason—would be to render § 53a-92 (a) (2) (B) a nullity, insofar as that statute criminalizes only such kidnappings. See *State* v. *Buggs*, 219 Kan. 203, 214, 547 P.2d 720 (1976) (construing similar Kansas statute).

"Accordingly, we are not persuaded by the reasoning . . . that a jury reasonably might find that the petitioner's conduct was not kidnapping merely because it occurred as part of the course of events of the robberies. . . . [T]hat is not the relevant legal inquiry. . . . Rather, under *Salamon*, a jury, having found abduction, restraint, and the criminal intent associated therewith in the furtherance of a robbery, will necessarily find the petitioner guilty of kidnapping under § 53a-92 (a)

(2) (B) *unless* it also finds that the restraint, and the associated criminal intent, was limited to that *inherent* in the robbery itself. . . . [T]o instruct a jury that it could find that there was no kidnapping merely because the restraint occurred in the course of an ongoing robbery would effectively override the will of our state's legislature, which was to impose heightened penalties for precisely such conduct." (Citations omitted; emphasis in original.) *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 36–38.

In the present case, the habeas court, although mentioning *Banks* when discussing the second and third *Salamon* factors, did not seem to appreciate that the statute under which the petitioner was charged affects the application of the *Salamon* factors. It made no mention of § 53a-92 (a) (2) (B) or of the discussion in *Banks* of how a charge under that statute significantly impacts a court's analysis.

The respondent, relying on our Supreme Court's discussion in *Banks*, argues that "the mere fact that the victims' restraint occurred in close connection with the commission of other felonies does not favor the petitioner, where, as here, a jury convicted him of violating . . . § 53a-92 (a) (2) (B)." (Internal quotation marks omitted.) The petitioner responds that "[F's] and R's restraint occurred close in time and place to the other offenses and no gratuitous restraint was used to accomplish the commission of the other crimes. Although the restraint occurred over a long period of time, it was done within the confines of the other crimes. In other words, this is unlike cases where the victims were restrained for several hours before or after the crimes or moved far away for purposes unrelated to the commission of the crime." We are not persuaded by the petitioner's argument.

In short, our Supreme Court has rejected the same reasoning advanced by the petitioner in the present case because such reasoning "runs afoul of the statutory language . . . ." *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 38. Indeed, the petitioner's argument that the restraint, though lengthy, did not constitute kidnapping because "it was done within the confines of the other crimes" misses the forest for the trees. That is, the victims were held captive for a lengthy period of time specifically so that the petitioner and his accomplices could commit a series of other felonies against them. For example, F testified that the intruders initially suggested taking one of the children to the bank to be sure that the victims provided the correct access code but, instead, took F and held his family captive at the house, which is precisely the type of "additional, gratuitous restraint used to accomplish or advance the commission of a robbery" proscribed by § 53a-92 (a) (2) (B). *Banks* v. *Commissioner of Correction*, supra, 37. The same is true with respect to R: the restraint of

R at gunpoint in a bedroom for more than one hour while the petitioner and his accomplices robbed the victims and while one of them sexually assaulted her exceeded the force and restraint necessary to commit the other crimes against her. Indeed, the man who sexually assaulted R pointed a gun at her and her infant daughter, and threatened to kill the family's cat, while forcing R to perform oral sex on him, all of which clearly exceeded any restraint inherent in the sexual assault. The perpetrator of the sexual assault then continued to physically restrain R in the house afterward so that he and his accomplices could commit more crimes when the accomplices returned from the bank with F. These acts constituted gratuitous restraints used to advance both the sexual assault and subsequent robbery of the house in violation of § 53a-92 (a) (2) (B). Accordingly, we conclude that this factor supports the respondent's claim that the failure to give an incidental restraint instruction was harmless.

C

The third factor, whether the restraints were inherent in the nature of the separate offenses, is essentially the same as the second factor when the kidnapping charge is a violation of § 53a-92 (a) (2) (B). Put another way, a gratuitous restraint that would support a conviction under § 53a-92 (a) (2) (B) is greater restraint than is inherent in the nature of the separate offenses. See id., 339 Conn. 37. For the reasons previously stated as to the second factor, we conclude that the restraints the victims endured were not inherent in the other crimes committed by the petitioner and his accomplices.

D

The fourth and fifth factors—whether the restraint prevented the victims from summoning assistance and whether the restraints reduced the perpetrators' risk of detection—both favor the respondent.

After the initial confrontation in the garage when F was hogtied, the petitioner and his accomplices moved both victims inside the house, held both victims at gunpoint throughout the incident, drove F to a bank, and brought him back to the house. All of these actions undoubtedly prevented the victims from summoning assistance and reduced the perpetrators' risk of detection. The petitioner nevertheless argues that "the restraint could be interpreted as preventing resistance while the crimes were being completed and not to reduce detection." Although some of the restraint involved could be interpreted as preventing resistance, much of it was solely for the purpose of avoiding detection and hindering the victims in summoning assistance. For example, the intruders continued to restrain F after he withdrew money from the bank even though that part of the robbery was completed. They could have released F at that point because he was in no position

to interfere with the bank robbery or with the additional crimes being committed at the house. The only reason to continue to restrain F and to bring him back to the house was to allow the petitioner and his accomplices to complete their criminal activities without fear that F would summon assistance and thereby increase the risk that they would be caught. Accordingly, restraining F *after* completion of the bank transactions is not susceptible to more than one reasonable interpretation. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 44 ("The goal of a robbery is to take possession of another's property. Once that property has been taken by force, the purpose of leading the victims to a different, more isolated location and requiring that they remain there for some period of time is, undoubtedly, to facilitate the offender's escape from the premises, undetected and unobstructed."). Similarly, one of the intruders continued to restrain R after he sexually assaulted her while waiting for his accomplices to return with F from the bank. The restraint of R at that time necessarily could not be to thwart her resistance to the sexual assault; its only purpose was to prevent R from summoning help or escaping.

E

Finally, as to the sixth factor, whether the restraints created a significant danger or increased the victims' risk of harm independent of that posed by the separate offense, our Supreme Court has explained that "the distinct danger that is relevant to the question of whether criminal conduct bears independent significance as kidnapping need not be physical danger. . . . Criminal conduct that inspires distinct fears or has a uniquely harmful psychological impact on the victim also qualifies. . . . Isolating and restraining victims at gunpoint after having robbed them causes them to experience fears that are different both in degree and in kind from the fears that naturally accompany being robbed. . . . The case books are filled with instances in which a robber restrains, isolates, and/or moves his victims after taking their money as a prelude to committing additional, more dangerous crimes. The robbery victim who is led at gunpoint away from the visibility of a commercial storefront understands that the offender may be isolating and restraining her not merely to facilitate his escape but as a prelude to a physical assault, sexual assault, use of the victim as a hostage or human shield, or even murder. The prospect is undeniably terrifying. . . .

"Moreover, the harms and dangers involved in a post-robbery kidnapping are not solely psychological. Even if the perpetrator does not plan to assault, imperil, or kill his victims following a robbery, spiriting them at gunpoint to a more isolated location necessarily increases the risk that they will suffer serious physical injury or death. . . . [I]t takes but little imagination to

envision the kind of violent events whose likelihood of occurrence is great [when a kidnapping victim is forced to travel a great distance under the threat of injury by a deadly weapon]. Ready examples include not only desperate attempts by the victim to extricate himself but also unforeseen intervention by third parties. . . . Once again, one need not look far to find cases in which a victim, fearing that kidnapping would be a precursor to rape, assault, or murder, panicked or tried to resist, bringing about a tragic, self-fulfilling prophesy." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 46–48.

In the present case, the petitioner argues that "[t]here was nothing especially dangerous about the restraints that increased [F's] and R's risk of physical danger. Robberies and assaults are often accomplished with the use of weapons and by tying up the victims. . . . Most violent crimes create a significant amount of fear in the victims. . . . Because F and R would have some psychological trauma from any of these crimes, this factor does not necessarily favor the [r]espondent." (Citations omitted.) We are not persuaded.

It is hard to imagine a factual scenario that more clearly demonstrates the concerns identified in *Banks*. The petitioner and his accomplices robbed both victims in their garage, then violently forced R at gunpoint into the house while suggesting that they intended to sexually assault her. They took R upstairs, closer to where her two children were sleeping, and one of the intruders then removed F and R's daughter from her crib, threw her on the bed next to R, and told her to make her daughter stop crying. One intruder threatened to kill the family's cat before sexually assaulting R, as her daughter lay awake on the bed beside her. The intruders also first threatened to take F and R's children to the bank to ensure F's and R's assistance. When the intruders changed their plan and decided to take F to the bank, one of them told R that, if something went wrong, they would come back and "mess [her] up." Similarly, F knew that his wife and children were in danger if he did not cooperate with the intruders' demands. Furthermore, throughout the entire incident, the intruders kept F and R isolated from one another, not only while committing their crimes, but also afterward. The intruders' conduct undoubtedly caused the victims to experience greater fear than that involved in an ordinary robbery in which the perpetrator simply takes the victim's property and leaves. See *Banks* v. *Commissioner of Correction*, supra, 339 Conn. 46 ("[i]solating and restraining victims at gunpoint after having robbed them causes them to experience fears that are different both in degree and in kind from the fears that naturally accompany being robbed"); see also *State* v. *McCarthy*, supra, 210 Conn. App. 29–30 (noting that victim's fear that defendant would harm her grandchildren while they briefly were restrained in stolen vehicle was distinct from fear

involved in theft of vehicle). Accordingly, we are not persuaded by the petitioner's argument that the restraint and movement imposed on the victims did not increase the risk of physical and psychological harm independent of the other crimes.

F

In sum, we disagree with the habeas court's assessment of the *Salamon* factors and conclude that they lead to only one conclusion—the absence of an incidental restraint instruction was harmless error. As this court has observed, "[t]he salutary effect of the *Salamon* rule is to prevent the prosecution of a defendant on a kidnapping charge in order to expose him to the heavier penalty thereby made available, [when] the period of abduction was brief, the criminal enterprise in its entirety appeared as no more than an offense of robbery or rape, and there was lacking a genuine kidnapping flavor." (Internal quotation marks omitted.) *John B.* v. *Commissioner of Correction*, 194 Conn. App. 767, 783, 222 A.3d 984 (2019), cert. denied, 334 Conn. 919, 222 A.3d 513 (2020). In the present case, however, the period of abduction was extensive, the acts of restraint were particularly brutal, the criminal enterprise involved several distinct crimes committed against multiple victims, and the restraint and movement of the victims has "a genuine kidnapping flavor." (Internal quotation marks omitted.) Id. Simply put, any attempt to equate the brief and limited restraints at issue in *Bell* and *Salamon* with the restraints the petitioner and his accomplices used while they engaged in a series of violent crimes in this case is unavailing. Cf. *Bell* v. *Commissioner of Correction*, supra, 339 Conn. 94 ("given the relatively limited nature and scope of the petitioner's asportation and restraint of the victims, and the ambiguity surrounding why [the petitioner] chose to confine his victims during the robberies, we are not prepared to say that the omission of a *Salamon* instruction was harmless"); *State* v. *Salamon*, supra, 287 Conn. 549 (victim restrained on ground where assault began for "at least five minutes before she was able to get away"). Accordingly, we have no doubt that the conduct in the present case is precisely the type of gratuitous restraint the legislature intended to punish under § 53a-92 (a) (2) (B).

Consequently, given the facts involved in the present case, we are confident that a reasonable jury, properly instructed, would have found the petitioner guilty of the kidnapping offenses beyond a reasonable doubt. Therefore, the habeas court improperly granted summary judgment for the petitioner on the first count of the petition.

II

AC 44957

In the petitioner's appeal, he claims that the court

improperly granted the respondent's motion for summary judgment as to the second count of his petition alleging that his nolo contendere pleas in the Bridgeport cases were not knowing, intelligent, and voluntary. We disagree.

The following additional facts are relevant to the petitioner's claim. In Docket No. CR-97-131450-T, the state charged the petitioner with kidnapping in the first degree, robbery in the first degree, burglary in the second degree with a firearm, commission of a felony with a firearm, larceny in the third degree, and being a persistent dangerous felony offender. *State* v. *Gregory*, Conn. Appellate Court Records & Briefs, September Term, 2002, Record pp. 24–26. In that matter, the petitioner pleaded nolo contendere to one count of kidnapping in the first degree and one count of burglary in the second degree with a firearm. The prosecutor stated the following factual basis for the charges on the record:

"[The crimes] occurred on [January 5, 1997], in the area of Madison Avenue in Bridgeport. . . . [T]he victim indicate[d] that he was out visiting friends. When he returned home, he found two individuals, this was about 8:30 in the evening hours, and he saw two individuals who apparently were in the process of burglarizing his house. When he realized what was happening and they saw him there, he was confronted by one of them who had a handgun and admonished him not to scream or attempt to leave or he would shoot. At that point, they threw a coat over his head so he could not observe them any further, brought him into the basement of his home, and tied him up with electrical wire. [While] he was bound in [the] basement, he heard people carrying things out of his house. And, eventually, when he didn't hear the noises anymore, he managed to free himself and went to a nearby business and called the police, who eventually came. There were items taken from his home that were valued at approximately . . . $1000. But, in any event, this is an individual who was born in 1922, is about now seventy-seven years old, so he would have been about seventy-five at the time that this occurred."

In Docket No. CR-97-131100-T, the state charged the petitioner with sexual assault in the first degree, robbery in the first degree, burglary in the first degree, kidnapping in the first degree, larceny in the first degree, assault in the third degree, and being a persistent dangerous felony offender. *State* v. *Gregory*, Conn. Appellate Court Records & Briefs, September Term, 2002, Record pp. 9–11. In that matter, the petitioner entered conditional nolo contendere pleas to sexual assault in the first degree, burglary in the first degree, and kidnapping in the first degree. The prosecutor stated the following factual basis on the record:

"A female who was at the time sixty years old indicated that she had just fallen asleep in her bedroom

and she was sleeping on the second floor of her home . . . . In any event, she said she was just falling asleep and woke up and noticed a man was there with a hand over her mouth in her bedroom. And this man then proceeded, when she tried to resist, to strike her several times in the face with his hand [and] told her to be quiet. At that point, he had immobilized her on the floor by holding her down so she could not escape, and at that time had sexual intercourse with her and ejaculated inside of her at that point. She was then persuaded by this man to tell [him] where she kept her jewelry, and he then went about the house, getting other items after making her go downstairs, pushing her down the stairs . . . where she retrieved her pocketbook. She saw that he had a gun. She saw a second male in the house carrying items from her home. She emptied out her pocketbook, which included her cash and car keys . . . . After he took some cash and the car keys, she was taken back upstairs, her nightgown was ripped off, and there was another attempt to sexually assault her . . . . At that point, the second suspect came upstairs and this was interrupted. She was bound at that point by her hands and her feet with the phone cord and was able to free herself after she heard the two individuals leave in her car, which was parked in an attached garage. . . .

"The [petitioner's] blood was taken in order to analyze it with regard to the Ansonia crime, which also involved a sexual assault, and there was a search warrant ultimately applied for [by] the state to compare . . . the [petitioner's] DNA . . . with samples taken from the victim . . . . And, in fact, at that point it was determined by the state forensic laboratory that [the petitioner's] DNA matched the DNA of the sample that was taken from the victim."

The court accepted the petitioner's nolo contendere pleas and imposed a total effective sentence of 100 years to run concurrently with the ninety years imposed in the Ansonia cases.

In the second count of the underlying habeas petition, the petitioner alleged that his convictions and incarceration in the Bridgeport cases are illegal because they were obtained in violation of his due process rights under the state and federal constitutions in light of our Supreme Court's decision in *State* v. *Salamon*, supra, 287 Conn. 509. The respondent moved for summary judgment on the second count of the petition. Relying on this court's decision in *Little* v. *Commissioner of Correction*, 177 Conn. App. 337, 172 A.3d 325, cert. granted, 327 Conn. 990, 175 A.3d 562 (2017) (appeal withdrawn February 15, 2019), the respondent argued that *Salamon* did not apply retroactively in the petitioner's case because (1) the petitioner waived his right to a jury trial by pleading nolo contendere, (2) applying *Salamon* retroactively to his negotiated pleas would

grant the petitioner an undeserved windfall when the state had relied on the prior interpretation of the kidnapping statutes in entering into the plea agreement, and (3) the petitioner could not establish that the failure to apply *Salamon* retroactively would be a miscarriage of justice given the evidence of the requisite intent under *Salamon*.

In *Little*, the petitioner, Jermaine Little, and three accomplices forced the victim into his car outside his office in Bridgeport and drove the victim to his house in Shelton, where they stole money and jewelry from a safe in the victim's bedroom. Id., 339–40. Little "was charged in state court with kidnapping in the first degree . . . burglary in the first degree . . . and robbery in the first degree . . . . [Little] was further charged in federal court with being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g) (1) . . . . During this time, [Little] also had an ongoing state narcotics case, for which he received a sentence of eight years of imprisonment while the state and federal cases remained pending. . . .

"[Little] decided to plead guilty pursuant to separate written plea agreements with the state and the federal government. Under the terms of those agreements, [Little] agreed to plead guilty to kidnapping in the first degree in the state case and to being a felon in possession of a firearm in the federal case. In exchange, the state and the federal government agreed to recommend to their respective sentencing courts a sentence of fifteen years and eight months of imprisonment, and to request that the state and federal sentences run concurrently. The parties further agreed that it would be left to the discretion of the sentencing courts whether to run those sentences concurrently with or consecutively to the eight year sentence that [Little] had begun serving in the narcotics case.

"On November 29, 2004, [Little] pleaded guilty in federal court to being a felon in possession of a firearm. . . . On December 22, 2004, [Little] pleaded guilty to kidnapping in the first degree. . . . [After canvassing Little as to his plea], [t]he court found that [Little's] plea was knowing, intelligent, and voluntary and accepted it.

"[Little] was subsequently sentenced, in accordance with the terms of his plea agreement, to fifteen years and eight months of imprisonment in the state case and the federal case, and those sentences were run concurrently with each other and with [Little's] sentence in the narcotics case. The prosecutor in the state case further indicated at the sentencing hearing that she had entered a nolle prosequi with respect to the . . . remaining charges of burglary in the first degree and robbery in the first degree." (Citations omitted; footnotes omitted.) Id., 341–44.

In 2013, Little brought a habeas petition alleging that

his guilty plea was not knowing, intelligent, and voluntary because *Salamon* had not been decided when he entered his plea and that he was actually innocent of kidnapping in the first degree pursuant to *Salamon* because he did not possess the requisite intent to prevent the victim's liberation. See id., 346. After a trial, the habeas court denied both claims. Id.

On appeal, the issue presented was whether *Salamon* applied retroactively to Little's conviction when he pleaded guilty to one count of kidnapping. Id., 351. In resolving that issue, this court reviewed our Supreme Court's decision in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 764, 773, in which the court addressed whether *Salamon* applied retroactively in habeas corpus proceedings and whether it applied in that petitioner's case in particular. *Little* v. *Commissioner of Correction*, supra, 177 Conn. App. 354.

In a plurality opinion in *Luurtsema*, our Supreme Court decided the retroactivity issue as a matter of state common law and "adopted a general presumption in favor of full retroactivity for judicial decisions that narrow the scope of liability of a criminal statute. . . . The plurality cautioned that this general presumption 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 underlying the writ of habeas corpus may not favor full retroactivity. . . . The plurality observed that 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. . . . For example, [i]f 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. . . .

"The plurality [also] agree[d] with [Peter Luurtsema] that, as a matter of state common law, *Salamon* should be afforded fully retroactive effect in his particular case. . . . The plurality reasoned: [Luurtsema's case] is not a case . . . in which the state, in selecting the crimes with which to charge [Luurtsema], can plausibly be said to have relied to its detriment on the prior interpretation of the kidnapping statutes. . . . Here, [Luurtsema] was charged with every crime for which he might reasonably have been held liable . . . . That is, the record discloses no indication that the state would have charged [Luurtsema] differently had it anticipated the subse-

quent interpretation of § 53a-92 (a) (2) (A) in *Salamon*. . . . The plurality further stated that it could not discern any evidence from the current record that [Luurtsema] intended to restrain the victim more than was necessary to effect the underlying assault. . . . Justices Katz, Palmer, and McLachlan each filed concurring opinions in which no other justices joined." (Citations omitted; internal quotation marks omitted.) Id., 355–56.

This court determined in *Little* "that the only parts of the plurality opinion . . . that have any precedential value are the court's affirmative answers to the reserved questions of whether *Salamon* applie[d] retroactively in habeas corpus proceedings and to Luurtsema's case in particular. . . .

"With respect to the first reserved question, although a majority of the court . . . agreed that *Salamon* could be applied retroactively in collateral proceedings, there was no clear majority concerning how and to what extent *Salamon* should be applied retroactively. The three justice plurality adopted a general presumption of full retroactivity, subject to certain limited exceptions, while Justice Katz supported a per se rule in favor of full retroactivity. Neither Justice Palmer nor Justice McLachlan expressly endorsed a particular approach to retroactivity; they concurred only in the result reached by the plurality.

"With respect to the second reserved question, the facts of [*Little*] are sufficiently distinguishable from those in *Luurtsema* . . . such that the court's affirmative answer to the second reserved question also does not control the outcome of [*Little*]. [Little] was convicted after pleading guilty pursuant to a plea agreement with the state and federal government, and admitting his role in the [victim's] abduction and robbery. Luurtsema was convicted after a jury trial in which the jury was not instructed that, to find him guilty of kidnapping, it had to find beyond a reasonable doubt that he intended to prevent the victim's liberation for a longer period of time or to a greater degree than that which was necessary to commit the other crime. A majority of the court in *Luurtsema* . . . further appears to have agreed that this instructional error was not harmless beyond a reasonable doubt in light of the facts and circumstances of Luurtsema's case.

"As a result, there [was] no binding precedent controlling the unique issue [in *Little*]: whether *Salamon* should be applied retroactively to collateral attacks on a kidnapping conviction when the defendant pleaded guilty to that charge, and only that charge, pursuant to a plea agreement. . . . [This court found] the reasoning of the plurality of the [Supreme] [C]ourt . . . to be the most persuasive in the context of *Salamon*. As the United States Supreme Court has observed, one of the reasons that decisions narrowing the scope of a criminal statute should generally apply retroactively is because

[those decisions] 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. . . . As [Little's] case exemplifies, however, there are situations where the traditional rationales underlying the writ of habeas corpus simply do not favor full retroactivity." (Citations omitted; internal quotation marks omitted.) Id., 358–60.

Little argued "that *Salamon* should be applied retroactively because there is no differentiation between a conviction obtained as a result of a trial or by way of a plea and because there is a risk that after *Salamon*, his conviction does not comport with the due process requirements for guilty pleas." (Internal quotation marks omitted.) Id., 360. In rejecting his claim, this court explained that, although plea bargains provide speedy dispositions of cases and thereby conserve judicial resources, "[t]hese advantages can be secured . . . only if dispositions by guilty plea are accorded a great measure of finality. . . . Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees. . . .

"To balance these competing interests of finality and personal freedom from detention in violation of constitutional guarantees, our courts have required a petitioner to demonstrate a miscarriage of justice or other prejudice and not merely an error which might entitle him to relief on appeal in order to mount a successful collateral attack on his conviction. . . . [T]o demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Citations omitted; internal quotation marks omitted.) Id., 361–62.

Applying these principles, this court concluded in *Little* that the traditional rationales for the writ of habeas corpus did not favor applying *Salamon* retroactively. Id., 360, 363. The court reasoned: "There is no risk that [Little] stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him. The state has also relied sufficiently to its detriment on our Supreme Court's prior interpretation of our kidnapping statutes when constructing the terms of the plea agreement such that applying *Salamon* retroactively in the present case would be inappropriate. Accordingly, [Little's] due process claim, which is predicated on the retroactive application of *Salamon*, necessarily fails." Id., 367–68.

In the present case, the habeas court concluded that, as in *Little*, the petitioner could not "avail himself of the retroactive application of *Salamon* to undo his guilty plea[s]. . . . First, the facts clearly establish the commission of several criminal offenses—various robberies and sexual assaults. Second, the sentence imposed for the kidnapping is within the relevant statutory limits.

Third, and most importantly, [the petitioner] entered his pleas of nolo contendere to a number of charges with the express purpose of appealing the denial of his motion to suppress. Unlike the [Ansonia] cases, [the petitioner] did not go to trial and instead chose to accept the court's finding of guilty and imposition of sentence so that he could appeal a dispositive motion. If successful, that appeal would have significantly impacted the state's ability to prosecute [the petitioner]. . . .

"For those reasons, the court concludes that the traditional rationales underlying the writ of habeas corpus do not favor applying *Salamon* retroactively to the Bridgeport convictions. There is no miscarriage of justice or other prejudice resulting from [the petitioner] being convicted in the two Bridgeport cases, including the two kidnapping charges, because of his written nolo contendere pleas. These convictions are neither unreliable nor unfair. . . . The court concludes, therefore, that as a matter of law [the petitioner] cannot prevail on the claim in count two."[11] (Citation omitted.)

On appeal, the petitioner claims that *Salamon* should apply retroactively to his case. According to the petitioner, "[t]he key distinction between this case and *Little* is that [Little] received a benefit for pleading guilty—he had numerous charges nolled and received a sentence that was fifty years [fewer] than his exposure. . . . The only benefit [the petitioner] received was the recommendation for a concurrent sentence with his existing . . . sentence, which this sentence exceeded. . . . Further, retroactive relief would not grant [the petitioner] an unexpected windfall. [I]n selecting the crimes with which to charge [the petitioner], [the state cannot] plausibly be said to have relied to its detriment on the prior interpretation of the kidnapping statutes." (Citation omitted; footnote omitted; internal quotation marks omitted.) The respondent disagrees and argues that the state relied to its detriment on the law as it existed prior to *Salamon* and that retroactive application of *Salamon* to the petitioner's case would result in an unjust windfall. For the reasons that follow, we conclude that the traditional rationales for the writ of habeas corpus do not favor applying *Salamon* retroactively in the present case to undo the petitioner's negotiated plea agreement.

In *Little*, this court discussed the significance of Little's negotiated plea agreement with the state, explaining that Little "received precisely what he bargained for under the terms of that agreement. If *Salamon* is applied retroactively in the present case and the petitioner's conviction[s] [are] vacated, however, the state will have lost the benefit of its bargain. We recognize that in many cases the state and society's interest in finality must give way to the demands of liberty and a proper respect for the intent of the legislative branch. . . . Nevertheless, we cannot ignore the

fact that, unlike in *Luurtsema* [v. *Commissioner of Correction*, supra, 299 Conn. 773], the state in the present case can plausibly be said to have relied to its detriment on our Supreme Court's prior interpretation of our kidnapping statutes when constructing the terms of the plea agreement. To authorize a term of fifteen years and eight months imprisonment, [Little] could have pleaded guilty to kidnapping in the first degree, burglary in the first degree, robbery in the first degree, or another appropriate felony offense, e.g., conspiracy to commit one of the aforementioned felonies. Had the state been prescient enough to foresee *Salamon* and thus selected a nonkidnapping offense as the basis for the guilty plea, *Salamon* would be irrelevant and the state would not be faced with the prospect of reconstructing and reprosecuting a fourteen year old case.

"In light of these facts and circumstances, we fail to see how not applying *Salamon* retroactively in the present case would be fundamentally unfair or manifestly unjust. Plea bargains always entail risks for the parties—risks relating to what evidence would or would not have been admitted at trial, risks relating to how the jury would have assessed the evidence and risks relating to future developments in the law. The salient point is that a plea agreement allocates risk between the two parties as they see fit. If courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, they threaten to reduce the likelihood that prosecutors will bargain away counts (as the prosecutors did here) with the knowledge that the agreement will be immune from challenge on appeal." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Little* v. *Commissioner of Correction*, supra, 177 Conn. App. 366–67.

The same reasoning applies in the present case, in which the petitioner entered nolo contendere pleas to only five of the thirteen charges he faced. Significantly, among the charges bargained away by the state was a part B charge of being a persistent dangerous felony offender under General Statutes (Rev. to 1997) § 53a-40 (a) and (f), which would have allowed the sentencing court to impose an enhanced sentence of an additional forty years. See General Statutes (Rev. to 1997) § 53a-40 (f) (when person is found to be persistent dangerous felony offender and court is of opinion that extended incarceration will best serve public interest, court "shall sentence such person to a term of imprisonment of not more than forty years"). Accordingly, as in *Little*, the petitioner obtained the benefit of his bargain, but, if *Salamon* is applied retroactively to invalidate his pleas, the state would lose the benefit of its bargain.

Likewise, had the state anticipated *Salamon* in the present case, it could have selected one or more of the

nonkidnapping offenses to which the petitioner did not plead nolo contendere to achieve the desired sentence, and "*Salamon* would be irrelevant and the state would not be faced with the prospect of reconstructing and reprosecuting [twenty-four] year old case[s]." *Little* v. *Commissioner of Correction*, supra, 177 Conn. App. 366. Furthermore, assuming arguendo that the petitioner's pleas were involuntary, the entire plea agreement, and not just the kidnapping convictions, would have to be vacated. As noted by the respondent, given that the victims in the Bridgeport cases were in their sixties and seventies at the time of the crimes in 1997, it is questionable whether the state would be able to prosecute those crimes now, twenty-five years later. Such a result certainly would constitute an undeserved windfall for the petitioner.

Accordingly, we conclude that the traditional rationales supporting the writ of habeas corpus do not favor applying the retroactive application of *Salamon* in the present case. As in *Little*, the state relied to its detriment on our Supreme Court's pre-*Salamon* interpretation of our kidnapping statutes when negotiating the petitioner's plea agreement and, therefore, "applying *Salamon* retroactively in the present case would be inappropriate." Id., 368. Consequently, the habeas court properly rendered summary judgment for the respondent on the second count of the petition.

The judgment is reversed as to the granting of the petitioner's motion for summary judgment on the first count of the petition, and the case is remanded to the habeas court for further proceedings on that count; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[1] We note that the petitioner's crimes predated the enactment of General Statutes § 53a-100aa (effective March 1, 2008), which created the crime of home invasion.

[2] Hereinafter, unless otherwise indicated, all references to § 53a-101 in this opinion are to the 1997 revision of the statute.

[3] The court merged the three conspiracy convictions and sentenced the petitioner to twenty years for conspiracy to commit first degree kidnapping. On the remaining counts charging the substantive crimes, the court sentenced the petitioner to twenty-five years for aiding first degree kidnapping, twenty years for aiding first degree burglary, twenty years for aiding first degree robbery, and five years for third degree larceny. The court ordered that all sentences run consecutively.

[4] In 2000, the petitioner filed his first habeas petition, alleging ineffective assistance of trial and appellate counsel in the Ansonia cases. The court, *Swords*, *J.*, denied the petition on April 23, 2007, and this court affirmed the judgment. See *Gregory* v. *Commissioner of Correction*, 111 Conn. App. 430, 431, 959 A.2d 633 (2008), cert. denied, 290 Conn. 906, 962 A.2d 794 (2009). In 2008, the petitioner filed his second habeas petition, which was denied on May 31, 2011. The petitioner withdrew his appeal challenging that judgment on January 18, 2012. In 2009, the petitioner filed his third habeas petition, alleging ineffective assistance of his first habeas counsel. The court, *Newson*, *J.*, denied the petition on October 23, 2012, and this court affirmed the judgment. See *Gregory* v. *Commissioner of Correction*, 157 Conn. App. 902, 114 A.3d 192 (2015).

[5] The respondent filed a motion for articulation, requesting that the court clarify whether it vacated the petitioner's conspiracy to commit kidnapping conviction. The court granted the motion and issued an articulation clarifying that it had vacated the conspiracy to commit kidnapping conviction.

[6] The court explained that the ineffective assistance claim was unproven as to the *Salamon* claim in the first count because the petitioner "provided neither meaningful evidence . . . that prior habeas counsel rendered deficient performance nor that such deficient performance prejudiced him" and was moot as to the claim raised in the second count because the court granted the respondent's motion for summary judgment on that claim.

[7] The petitioner has not appealed from the court's judgment denying the third count of his petition after a trial.

[8] The respondent also claims that the court lacked subject matter jurisdiction over the petitioner's claim as to the conspiracy to commit kidnapping conviction. More specifically, the respondent claims that the petitioner's challenge to his conspiracy to commit kidnapping conviction is moot because he failed to challenge the other two conspiracy convictions for burglary and robbery in the first degree, which were merged with the conspiracy to commit kidnapping conviction. We disagree.

Burglary and robbery in the first degree are class B felonies punishable by a term of imprisonment not less than one year nor more than twenty years; see General Statutes (Rev. to 1997) §§ 53a-35a (5) and 53a-101; General Statutes § 53a-134; whereas kidnapping in the first degree is a class A felony punishable by a term of imprisonment not less than ten nor more than twenty-five years. See General Statutes (Rev. to 1997) § 53a-35a (3); General Statutes § 53a-92 (a). Given the difference between the allowable sentences for the different conspiracy convictions, we are unable to conclude that the court would have imposed an identical sentence in the absence of the conspiracy to commit kidnapping conviction. As a result, we conclude that this claim is not moot and that the court therefore had subject matter jurisdiction over the petitioner's claim challenging his conspiracy to commit kidnapping conviction.

[9] In *Banks* v. *Commissioner of Correction*, 339 Conn. 1, 51–55, 259 A.3d 1082 (2021), "our Supreme Court stated that the terms incidental to the underlying crime, necessary to commit the underlying crime, inherent in the nature of the underlying crime, and having no independent criminal significance . . . are merely different ways of expressing the same concept, namely, whether the restraint imposed evidenced an independent criminal intent or subjected the victims to risks distinct from those necessarily entailed by or inherent in the underlying offenses. . . . Our Supreme Court concluded that conduct that is wholly incidental to the commission of an underlying crime cannot qualify as kidnapping, *regardless of whether it is strictly necessary to commit that crime*. . . . Accordingly, the court confirmed that a defendant is entitled to *Salamon*'s protections if his actions are either incidental to *or* necessary to commit the underlying offense. . . . Thus, throughout this opinion and in accordance with our Supreme Court's analysis in *Banks*, we use the phrase incidental to *or* necessary for, as opposed to incidental to *and* necessary for, the commission of another substantive crime." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *McCarthy*, 210 Conn. App. 1, 12–13 n.3, 268 A.3d 91, cert. denied, 342 Conn. 910, 271 A.3d 136 (2022).

[10] The court "adopted the harmlessness standard laid out by the United States Supreme Court in *Brecht* v. *Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), under which the harmlessness of constitutional errors is assessed according to whether the error had [a] substantial and injurious effect or influence in determining the jury's verdict. . . . The *Brecht* standard reserves the remedy of a new trial for errors resulting in actual prejudice, as distinguished from errors giving rise to a mere possibility of harm." (Internal quotation marks omitted.) *State* v. *McCarthy*, supra, 210 Conn. App. 14 n.4.

[11] We note that the habeas court did not credit the petitioner's testimony at the habeas trial that he would not have entered his nolo contendere pleas if he properly understood the intent required for kidnapping. Nevertheless, because the court granted the respondent's motion for summary judgment as to this count, we do not consider the court's credibility determination in our analysis. See *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211 Conn. App. 335, 350, 272 A.3d 677 (2022) ("[i]n deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party" (internal quotation marks omitted)).