KATZ, J., concurring in part and dissenting in part. The majority concludes that the conviction of the defendant, Quentin T. Ray, of five counts of sale of narcotics by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b)[1] was improper because, as a matter of law, he had met his burden of proving his drug dependence, as that term is defined in General Statutes § 21a-240 (18),[2] at the time that he committed the offenses. I agree with that determination, given the uncontroverted medical evidence of the defendant's lengthy, unbroken history of treatment for, and diagnosis of, drug dependence. I disagree, however, with the scope of the remand that this determination necessitates. The majority concludes that the trial court must reverse the defendant's conviction of violations of § 21a-278 and resentence him solely on the remaining offenses of which he had been convicted. Although the majority acknowledges that General Statutes § 21a-277 (b),[3] sale of narcotics, is a lesser included offense of § 21a-278—the only difference being the defendant's status as a person who is not drug-dependent in the greater offense[4]—it concludes that we need not consider whether to direct the trial court to modify the judgment to reflect convictions of § 21a-277 (b) and to resentence the defendant in accordance therewith because neither party asked the trial court, as the finder of fact, to consider that lesser included offense, the state did not charge the defendant with violations of that lesser included offense and the state has not requested such an order in this appeal. I find the majority's rationale unpersuasive and would conclude that, because there is no undue prejudice to the defendant in the present case, it is in the interests of justice and judicial economy for the court to modify the judgment to reflect the fact finder's necessary findings that the defendant committed the lesser included offenses of § 21a-277 (b) beyond a reasonable doubt.

In *State* v. *Grant*, 177 Conn. 140, 147, 411 A.2d 917 (1979), this court first adopted the rule that it "may order the modification of an erroneous judgment where the evidence is insufficient to support an element of the offense stated in the verdict but where the evidence presented is sufficient to sustain a conviction for a lesser included offense." Although the court recognized that "[t]his power should be exercised only when it is clear that no undue prejudice will result to the accused"; (internal quotation marks omitted) id., 148; it determined that no such prejudice occurs if "[t]he defendant has had a fair adjudication of guilt on all the elements of the crime . . . ." Id. A defendant is deemed to have received such a fair adjudication when the crime "is a lesser included offense of the crime charged, and the [fact finder], under the circumstances of the case, could

have explicitly returned such a verdict [and] the defendant was aware of his potential liability for this crime." Id., 149; accord *State* v. *Saracino*, 178 Conn. 416, 421, 423 A.2d 102 (1979) ("[s]ince the jury could have explicitly returned . . . a verdict [of guilty of the lesser included offense of fourth degree larceny], the defendant was aware of her potential liability for this crime and would not now be prejudiced by modification of the judgment"). This court has explained that, "[i]n *State* v. *Grant*, supra, [147], and *State* v. *Saracino*, supra, [421], we held that even though the trial evidence did not support the defendant's conviction of the offense charged, we were free to modify the judgment to reflect a conviction of a lesser crime. We came to this conclusion because the evidence was sufficient to support a conviction of a lesser included offense on which the jury properly had been charged and the jury's verdict necessarily included a finding that the defendant was guilty of that lesser offense. See also *State* v. *Carpenter*, 214 Conn. 77, 85, 570 A.2d 203 (1990), on appeal after remand, 220 Conn. 169, 595 A.2d 881 (1991), cert. denied, 502 U.S. 1034, 112 S. Ct. 877, 116 L. Ed. 2d 781 (1992); *State* v. *Scielzo*, 190 Conn. 191, 204–205, 460 A.2d 951 (1983); *State* v. *Coston*, 182 Conn. 430, 437, 438 A.2d 701 (1980)." *State* v. *Desimone*, 241 Conn. 439, 460 n.28, 696 A.2d 1235 (1997).

I recognize that most of the cases in which this court has ordered the modification of a judgment to reflect a conviction of a lesser included offense have involved circumstances wherein the jury had been instructed on that lesser included offense. We never have stated, however, that the absence of a jury instruction is an absolute bar to this court's ability to modify a judgment.[5] Indeed, our modification of the judgment of conviction in *State* v. *Greene*, 274 Conn. 134, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006), undermines any such claim.

In *Greene*, a case in which the defendant had been charged with, inter alia, murder as an accessory, the trial court had granted the state's request to instruct the jury on what it had considered to be the lesser included offense of manslaughter in the first degree with a firearm as an accessory. Id., 154. On appeal, we concluded that the instruction was improper because manslaughter in the first degree with a firearm was not a lesser included offense of murder, as charged in the information. Id., 158–60. In rejecting the defendant's contention that the appropriate remedy for this constitutional instructional error was a judgment of acquittal, we determined that it would be proper to modify the judgment of conviction to manslaughter in the first degree. Id., 160–62. In doing so, we recognized that "[t]his court [previously] has modified a judgment of conviction after reversal, if the record establishes that the jury necessarily found, beyond a reasonable doubt, all of the essential elements required to convict the

defendant of a lesser included offense." Id., 160. We reasoned in *Greene* that, in the case before us, "[b]efore the jury could find the defendant guilty of manslaughter in the first degree with a firearm, the jury necessarily must have found the defendant guilty of manslaughter in the first degree. . . . Therefore, the trial court's improper instruction could not have affected the jury's finding that the defendant was guilty, beyond a reasonable doubt, of the essential elements of manslaughter in the first degree . . . ." (Citations omitted.) Id., 161. Significantly, although the trial court had instructed the jury on manslaughter in the first degree with a firearm, it had not instructed the jury that it could find the defendant guilty of first degree manslaughter. See id., 155. Nevertheless, we did not conclude that the jury's inability to return *explicitly* a verdict of guilty of manslaughter in the first degree precluded us from modifying the judgment by directing the trial court to enter a judgment of conviction on that crime. Accord *State* v. *Coston*, supra, 182 Conn. 437 (reversing for insufficient evidence conviction for attempted robbery in first degree and remanding with direction to modify judgment to reflect conviction of lesser included offense of attempted larceny in fourth degree); see also *State* v. *Ortiz*, 71 Conn. App. 865, 878, 804 A.2d 937 ("even in the absence of a request at trial for a jury instruction on a lesser included offense, an appellate court may invoke the [doctrine enunciated in *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980)][6] where the trial court record justifies its application and order that the judgment be modified to reflect a conviction on the lesser offense and that the defendant be sentenced thereon" [internal quotation marks omitted]), cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002).

Embodied in *Greene* is a recognition that "whe[n] one or more offenses are lesser than and included within the crime charged, notice of the crime charged includes notice of all lesser included offenses. . . . This notice permits each party to prepare a case properly, each cognizant of its burden of proof." (Internal quotation marks omitted.) *State* v. *Tomlin*, 266 Conn. 608, 617, 835 A.2d 12 (2003).[7] In addition to this guarantee of notice, the jury's verdict of guilty on the greater offense guarantees that it found the defendant guilty of all of the elements of the lesser included offense. See *State* v. *Carpenter*, supra, 214 Conn. 85 ("[b]ecause the jury's verdict necessarily includes a determination that, absent a specific intent, all the elements of [General Statutes] § 53a-55 [a] [3] have been proven beyond a reasonable doubt, the defendant would not be prejudiced by a modification of the judgment to reflect a conviction of that charge"). As long as such notice and jury findings exist, there is no constitutional impediment to the exercise of our power to reverse a conviction while at the same time ordering the entry of judgment on a lesser included offense. See *State* v.

Edwards, 201 Conn. 125, 134 n.6, 513 A.2d 669 (1986) ("[t]he constitutionality of the practice [of reversing a conviction while at the same time ordering the entry of judgment on a lesser included offense] has never seriously been questioned" [internal quotation marks omitted]); see also *Rutledge* v. *United States*, 517 U.S. 292, 305 n.15, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996) (citing with approval four-pronged test announced by the Court of Appeals for the District of Columbia, which does not require jury to be instructed on lesser included offense, but, rather, provides that judgment can be modified if it can be shown "[1] that the evidence adduced at trial fails to support one or more elements of the crime of which [the accused] was convicted, [2] that such evidence sufficiently sustains all the elements of another offense, [3] that the latter is a lesser included offense of the former, and [4] that no undue prejudice will result to the accused" [internal quotation marks omitted]).

Such modifications are not limited to jury trials. In *State* v. *McGann*, 199 Conn. 163, 506 A.2d 109 (1986), a case tried to the court, as in the present case, this court modified a judgment of conviction from murder for hire, a capital felony, to murder; id., 179; because the latter crime was a lesser included offense and "the defendant could not have committed murder for hire without also committing intentional murder . . . ." (Internal quotation marks omitted.) Id., 178. The court modified the judgment of conviction because it concluded that "[t]he failure of the state to prove the additional element of a hiring to commit the murder leaves standing the finding . . . that the defendant did murder [the victim]." Id., 178–79. Because *McGann* involved a bench trial, there were no jury instructions that might have given the defendant *express* notice of his criminal liability on the lesser included offense. There is also no indication in this court's decision in *McGann* that the state had requested this court to modify the judgment. Nevertheless, we noted that "[o]ur conclusion that the judgment of the trial court was erroneous in convicting the defendant of a capital felony [did] not require a remand for a new trial." Id., 178.

Indeed, it is well settled that, even in the absence of a request from either party, the trial court may, sua sponte, submit a lesser included offense to the jury if the evidence supports such a charge. *State* v. *Rodriguez*, 180 Conn. 382, 408, 429 A.2d 919 (1980); *State* v. *Horne*, 19 Conn. App. 111, 145, 562 A.2d 43 (1989), rev'd on other grounds, 215 Conn. 538, 577 A.2d 694 (1990); see also *State* v. *Jacobowitz*, 194 Conn. 408, 412–13, 480 A.2d 557 (1984) (implicitly recognizing court's discretion in concluding that trial court properly could have declined to instruct jury on lesser included offense in absence of request); *State* v. *Whistnant*, supra, 179 Conn. 581–82 (noting that question of whether due process clause of fourteenth amendment *requires* trial

court to instruct jury, sua sponte, on lesser included offense has not been resolved by federal courts). Thus, it is clear that the parties' conduct vis-á-vis jury instructions does not control exclusively whether a conviction may lie for a lesser included offense. The trial court's authority in this regard is rooted in the interests of justice, so that "the jury should not be . . . forced by its verdict to choose only between the offense with the [greater culpability] and acquittal." *State* v. *Asherman*, 193 Conn. 695, 731–32, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). Similarly, the interests of justice would not be served by precluding an appellate court from ordering modification of the judgment to a conviction of a lesser offense simply because the parties did not request the trial court to provide such an instruction.

It is also significant that we have held that a jury cannot consider an instruction on a lesser included offense unless it first has determined that the defendant is not guilty of the greater offense. See *State* v. *Sawyer*, 227 Conn. 566, 579, 630 A.2d 1064 (1993) ("to ensure that the charged offense has been determined by unanimous agreement, the court must direct the jury to reach a unanimous decision on the issue of guilt or innocence of the charged offense before going on to consider the lesser included offenses"); id., 585–87 (same, citing "acquittal first" rule). Therefore, in the present case, even if the trial court, as the fact finder, had been requested to consider the lesser included offense, once it found the defendant guilty of the greater offense, it would not have reached the lesser offense. Accordingly, it makes no sense to conclude that, in a case in which the evidence would have rendered it proper to provide an instruction on the lesser offense; see footnote 6 of this concurring and dissenting opinion; the absence of such a request precludes modification of the judgment.

With respect to the majority's concern that the state did not charge the defendant with violations of § 21a-277, it is well settled that the state's failure to charge a lesser included offense does not preclude the submission of that charge to the jury. See *State* v. *Smith*, 185 Conn. 63, 77, 441 A.2d 84 (1981); *State* v. *Maselli*, 182 Conn. 66, 72, 437 A.2d 836 (1980), cert. denied, 449 U.S. 1083, 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Rodriguez*, supra, 180 Conn. 405; see also *United States* v. *Dhinsa*, 243 F.3d 635, 676 (2d Cir.), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed. 2d 156 (2001); *United States* v. *Martel*, 792 F.2d 630, 638 (7th Cir. 1986). We have relied on this rationale to conclude that, even when a defendant has not been charged with the lesser included offense, and the jury has not rendered a finding on the lesser included offense because of its finding of guilty on the greater offense, this court may order a modification of a defective judgment on the greater to the lesser. See *State* v. *Carpenter*, supra, 214 Conn. 85. Therefore, the state's failure to charge the defendant

with the lesser included offense should not bar modification of the judgment of conviction.

The majority's final reason for concluding that we need not consider whether to modify the judgment to conviction of the lesser offense—that the state did not ask *this* court to do so—fails to consider the fact that it is highly unusual, if not unprecedented, for this court to hold that, as a matter of law, the fact finder improperly concluded that the defendant had failed to meet his burden of proving his affirmative defense. Thus, we should not presume that the state intentionally declined to ask for modification. Indeed, the absence of such a request has not been an impediment in other cases. See, e.g., *State* v. *Edwards*, supra, 201 Conn. 125; *State* v. *Coston*, supra, 182 Conn. 430. Moreover, given that the state undoubtedly hereafter will make such a request in response to the majority's invitation, interests of judicial economy certainly counsel in favor of modification.

In sum, in the present case, as in all of the aforementioned cases in which we have observed that the jury's verdict of guilty of the greater offense required the jury first to find beyond a reasonable doubt that all the elements of the lesser offense had been proven, the court's finding as to the violations of § 21a-278 (b), as charged, necessarily was predicated on its finding that the defendant had committed a violation of § 21a-277 (b). The conclusions by the majority that, as a matter of law, "the defendant met his burden of proving that he was a drug-dependent person under § 21a-278 (b)" because, "on the basis of the evidence presented, no reasonable fact finder could conclude that the defendant was not drug-dependent at the time of his discharge from treatment in April, 2001, or that, after years of dependence on drugs, the defendant finally had managed to conquer his addiction at some point during the five months between that date and the date of the first offense," are highly unusual. The determination that the trial court should not upon remand modify the judgment to reflect conviction of the lesser included offenses of § 21a-277 (b) is remarkable.[8] There has been no challenge on appeal to the trial court's finding that the defendant sold narcotics on the dates alleged in the information. The defendant has not raised any issue, nor can I surmise any, that would suggest that, as a result of the failure to charge him with or request the court to consider the lesser included offense of sale of narcotics, "undue prejudice will result to the accused" if the judgment is modified to enter convictions on that lesser included offense. (Internal quotation marks omitted.) *State* v. *Grant*, supra, 177 Conn. 148. Accordingly, I respectfully dissent from the majority's remand order insofar as it fails to order modification of the judgment and resentencing in accordance therewith.

[1] General Statutes § 21a-278 (b) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic

substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance except as authorized in this chapter, and who is not at the time of such action a drug-dependent person, for a first offense shall be imprisoned not less than five years nor more than twenty years . . . ."

[2] General Statutes § 21a-240 (18) provides: " 'Drug dependence' means a psychoactive substance dependence on drugs as that condition is defined in the most recent edition of the 'Diagnostic and Statistical Manual of Mental Disorders' of the American Psychiatric Association . . . ."

[3] General Statutes § 21a-277 (b) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled substance, except a narcotic substance, or a hallucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisoned . . . ."

[4] The test governing lesser included offenses is well settled. For one offense to be included within another, it must not be "possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser . . . ." *State* v. *Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980); accord *State* v. *Greene*, 274 Conn. 134, 158, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006). This inquiry is governed by the cognate pleadings approach. *State* v. *Tomlin*, 266 Conn. 608, 618, 835 A.2d 12 (2003). "The cognate-pleadings approach . . . does not insist that the elements of the lesser offense be a subset of the higher offense. It is sufficient that the lesser offense have certain elements in common with the higher offense, which thereby makes it a cognate or allied offense even though it also has other elements not essential to the greater crime. [In addition], the relationship between the offenses is determined not by a comparison of statutory elements in the abstract, but by reference to the pleadings in the case. The key ordinarily is whether the allegations in the pleading charging the higher offense . . . include all of the elements of the lesser offense." (Internal quotation marks omitted.) Id.

[5] In this regard, I note that one of the decisions in which this court has concluded that it would not prejudice the defendant to reduce his conviction to a lesser included offense does not state whether the jury, through express instructions by the court, had been given the opportunity to consider the lesser included offense. See *State* v. *Edwards*, 201 Conn. 125, 133–34 n.6, 513 A.2d 669 (1986) ("While the evidence was insufficient to sustain the conviction on the second count of the substitute information charging the crime of accessory to robbery in the second degree, it did suffice to sustain a conviction for the lesser included offense of accessory to robbery in the third degree. The jury's verdict on the second count necessarily determined that the state had proven all the elements of accessory to robbery in the third degree beyond a reasonable doubt upon which the trial court instructed the jury. Under the circumstances of this case, the reduction of the defendant's conviction on the second count to the lesser included offense cannot prejudice the defendant."). A careful review of the record and briefs in the present case does disclose a statement in the defendant's brief to this court suggesting that the jury did receive an instruction on the lesser offense. Presumably, however, if a jury instruction on the lesser included offense is a necessary predicate to modifying a judgment from the greater offense to a lesser offense, this court's opinion would have reflected that fact expressly. Therefore, in the absence of any such reference, I would conclude the opposite.

[6] In *State* v. *Whistnant*, supra, 179 Conn. 588, this court held that a jury properly may be instructed on a lesser included offense when, inter alia, the evidence could justify the conviction of the lesser offense and the proof on elements that differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant not guilty of the greater offense but guilty of the lesser offense.

[7] In fact, we have relied on the same notice considerations to conclude that a defendant's waiver of his constitutional rights to a jury trial and his court trial election as to the greater offense were valid as to any lesser included offenses. See *State* v. *Williams*, 205 Conn. 456, 466, 534 A.2d 230 (1987) (defendant's waiver of right to jury trial for burglary in first degree constituted waiver for burglary in second degree as charged in substitute information "because a defendant is deemed to be on notice that a charge

of the more serious offense encompasses the lesser offenses").

[8] In *State* v. *Edwards*, supra, 201 Conn. 133 n.6, this court noted a long history of state and federal appellate courts exercising their power to reverse a conviction while at the same time ordering the entry of judgment on a lesser included offense. See id., citing *United States* v. *Cobb*, 558 F.2d 486, 489 (8th Cir. 1977); *Austin* v. *United States*, 382 F.2d 129, 140–42 (D.C. Cir. 1967); *Luitze* v. *State*, 204 Wis. 78, 84, 234 N.W. 382 (1931). I am aware, however, that there is not consensus among the various jurisdictions to have considered the issue as to whether modification of a judgment to conviction of a lesser included offense is proper in the absence of a jury instruction on that lesser offense. Compare *United States* v. *Hunt*, 129 F.3d 739, 745–46 (5th Cir. 1997) (instruction not required but should be considered in determining whether modification of judgment unduly prejudicial to defendant), *United States* v. *Smith*, 13 F.3d 380, 383 (10th Cir. 1993) (no undue prejudice due to modification of judgment because possibility of instruction on lesser included offense existed throughout trial, and all elements were proven beyond reasonable doubt), *United States* v. *LaMartina*, 584 F.2d 764, 766–77 (holding that, although District Court erred in refusing to instruct on lesser included offense, sentence should be vacated and case remanded for sentencing on lesser included offense, as there was sufficient evidence to support lesser but not greater offense), cert. denied, 440 U.S. 928, 99 S. Ct. 1263, 59 L. Ed. 2d 483 (1979), *Shields* v. *State*, 722 So. 2d 584, 587 (Miss. 1998) ("lesser included offense need not be before the jury in order to apply the direct remand rule"), *State* v. *Farrad*, 164 N.J. 247, 266, 753 A.2d 648 (2000) (reversing case for new trial but noting that "guilty verdict may be molded to convict on a lesser-included offense even if the jury was not instructed on that offense if [1] [the] defendant has been given his day in court, [2] all the elements of the lesser included offense are contained in the more serious offense and [3] [the] defendant's guilt of the lesser included offense is implicit in, and part of, the jury verdict" [internal quotation marks omitted]), *State* v. *Briggs*, 787 A.2d 479, 486–87 (R.I. 2001) (approving sentencing remand when, although jury was not instructed on lesser offense, defendant's trial testimony constituted evidence meeting all elements of lesser included offense of larceny) and *State* v. *Garcia*, 146 Wash. App. 821, 830, 193 P.3d 181 (2008) (order to modify judgment to lesser included offense proper, even though state did not charge or request trial court, sitting as finder of fact, to consider lesser offense because lesser degree necessarily proved at trial and charge on greater offense gave defendant sufficient notice) with *United States* v. *Dhinsa*, supra, 243 F.3d 676 (because there was no jury instruction, court could not grant government's request to modify judgment of conviction), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed. 2d 156 (2001), *United States* v. *Dinkane*, 17 F.3d 1192, 1198 (9th Cir. 1994) (jury instruction on lesser included offense required to modify judgment), *Ex parte Roberts*, 662 So. 2d 229, 232 (Ala. 1995) ("[i]t is well established that if an appellate court holds the evidence insufficient to support a jury's guilty verdict on a greater offense, but finds the evidence sufficient to support a conviction on a lesser included offense, it may enter a judgment on that lesser included offense, provided that the jury was charged on the lesser included offense"), *State* v. *Villa*, 136 N.M. 367, 368, 98 P.3d 1017 (2004) ("conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error"), *State* v. *Brown*, 360 S.C. 581, 594, 602 S.E.2d 392 (2004) (jury must be instructed on lesser included offense in order to remand for sentencing on that crime) and *Collier* v. *State*, 999 S.W.2d 779, 782 (Tex. Crim. App. 1999) (appellate court may reform judgment to conviction of lesser included offense only if [1] court finds evidence is insufficient to support conviction of charged offense but sufficient to support conviction on lesser included offense and [2] either jury was instructed on lesser included offense or one of parties asked for but was denied such instruction). In my view, the rationale provided in those jurisdictions holding that modification of a judgment is improper in the absence of an instruction on the lesser offense is unpersuasive. See *United States* v. *Dhinsa*, supra, 674, 676 (reasoning that rule of criminal procedure providing that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense . . . applies to the jury's—rather than a reviewing court's—finding of guilt on a lesser-included offense" [internal quotation marks omitted]); see *United States* v. *Vasquez-Chan*, 978 F.2d 546, 554 n.5 (9th Cir. 1992) (citing cases

in which other courts have modified judgment under facts wherein instruction on lesser offense had been given and relying on proposition that acquittal of greater offense necessarily means acquittal of lesser offense to conclude that "[i]f no such lesser-included offense instruction is given, the acquittal [whether at trial or on appeal] on the greater offense precludes a conviction on a lesser offense"); *State* v. *Brown*, supra, 594–97 (citing as reasons: [1] "appellate court does not sit as a [fact finder] in a criminal case and should avoid resolving cases in a manner which appears to place the appellate court in the jury box"; [2] "this view preserves the important distinction between an appellate determination [that] the record contains sufficient evidence to support a guilty verdict and a jury determination [that] the [s]tate proved its case beyond a reasonable doubt"; [3] "[when a jury instruction on the lesser has been given], it can be said with some degree of certainty that a [sentencing remand] is but effecting the will of the fact finder within the limitations imposed by law; and, that the appellate court is simply passing on the sufficiency of the implied verdict . . . [but when] no instruction at all has been offered on the lesser offense, second guessing the jury becomes far more speculative"; [4] "when the jury could have explicitly returned a verdict on the lesser offense, the defendant is well aware of his potential liability for the lesser offense and usually will not be prejudiced by the modification of the judgment from the greater to the lesser offense"; [5] "adopting a practice of remanding for sentencing on a lesser included offense when that offense has not been submitted to the jury may prompt the [s]tate to avoid requesting or agreeing to submit a lesser included offense to the jury"; [6] "the [s]tate would obtain an unfair and improper strategic advantage if it successfully prevents the jury from considering a lesser included offense by adopting an all or nothing approach at trial, but then on appeal, perhaps recognizing the evidence will not support a conviction on the greater offense, is allowed to abandon its trial position and essentially concede the lesser included offense should have been submitted to the jury"; and [7] "[t]he defendant may well have foregone a particular defense or strategy due to the trial [court's] rejection of a lesser included offense" [internal quotation marks omitted]).

To the extent that the majority could find any of these rationales convincing, at the very least, rather than determine that the judgment should not be modified, the better course would be to request supplemental briefs on whether this court can and should modify the judgment to reflect a conviction of § 21a-277 (b) as a lesser included offense of § 21a-278 (b).