KATZ, J., concurring. In *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), this court recognized that, contrary to our long-standing interpretation of the kidnapping statutes, the legislature never had intended for confinement or movement of a victim that was merely incidental to the commission of another crime to constitute kidnapping. As the plurality properly recognizes, the question in the present case of whether the petitioner, Peter Luurtsema, whose conviction was rendered final before that decision was issued, is entitled to collaterally attack his conviction on the basis of *Salamon* raises two potential questions: first, whether it violates due process to allow the petitioner's conviction for kidnapping to stand; and second, whether, under our common-law authority, *Salamon* must be applied retroactively to the petitioner's conviction. Although recognizing the obvious due process implications, the plurality declines to decide the first question, which indisputably would require consistent treatment of habeas petitioners under like legal circumstances. Instead, it crafts a novel rule of retroactivity under our common-law authority, under which habeas courts may decline to afford relief "where it is clear that the legislature did intend to criminalize the conduct at issue, if perhaps not under the precise label charged." In so doing, the plurality eschews the approach taken by the overwhelming majority of jurisdictions to consider this question, which apply a per se rule of retroactive application of a decision narrowing the scope of conduct deemed criminal under a statute. I would conclude that it violates due process to allow the petitioner's conviction for kidnapping to stand in light of *Salamon*. I further would conclude that, even if it were necessary to decide this case under our common-law authority, we should adopt a per se rule that decisions narrowing the interpretation of criminal statutes apply retroactively.

I

Turning first to the due process question, it seems clear to me that we cannot properly avoid deciding this question, despite the fact that it requires us to resolve what the majority characterizes as "the thorny question of whether [*Salamon*] represented the sort of clarification of the law for which the federal constitution *requires* collateral relief under *Fiore* [v. *White*, 531 U.S. 225, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001)]." (Emphasis in original.) It undoubtedly is a well settled principle that "we eschew *unnecessarily* deciding constitutional questions . . . ."[1] (Emphasis added.) *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009); accord *State* v. *Lemon*, 248 Conn. 652, 663 n.15, 731 A.2d 271 (1999); *State* v. *Floyd*, 217 Conn. 73,

89, 584 A.2d 1157 (1991); *Negron* v. *Warden*, 180 Conn. 153, 166, 429 A.2d 841 (1980). Resolution of the constitutional question in the present case, however, is necessary.

In *Fiore* v. *White*, supra, 531 U.S. 226, the United States Supreme Court explained that the due process inquiry implicated when a state's highest court narrows the scope of conduct previously deemed criminal under a state statute turns on the state court's characterization of the decision as either clarifying or changing the law. As I explain later in greater detail, a clarification implicates due process concerns, whereas a change implicates retroactivity principles. The court unequivocally stated that, when a decision clarifies what the statute meant at the time of the petitioner's conviction, "retroactivity is not at issue."[2] Id.; id., 228 ("[b]ecause [the state court's later decision] was not new law, this case presents no issue of retroactivity"); see also *Bunkley* v. *Florida*, 538 U.S. 835, 840, 123 S. Ct. 2020, 155 L. Ed. 2d 1046 (2003) ("Because Pennsylvania law—as interpreted by the later State Supreme Court decision—made clear that . . . [the] conduct [of William Fiore, the petitioner in *Fiore* v. *White*, supra, 531 U.S. 225] did not violate an element of the statute, his conviction did not satisfy the strictures of the Due Process Clause. Consequently, 'retroactivity [was] not at issue.' . . . *Fiore* controls the result here. As [Florida Supreme Court] Justice Pariente stated in dissent, 'application of the due process principles of *Fiore*' may render a retroactivity analysis 'unnecessary.' " [Citations omitted.]). The analysis applied by numerous other courts reflects a clear understanding that the due process question is determinative of whether retroactivity is even implicated.[3] See, e.g., *Henry* v. *Ricks*, 578 F.3d 134, 138–41 (2d Cir. 2009); *Chapman* v. *LeMaster*, 302 F.3d 1189, 1195–98 (10th Cir. 2002), cert. denied, 538 U.S. 980, 123 S. Ct. 1782, 155 L. Ed. 2d 671 (2003); *Dixon* v. *Miller*, 293 F.3d 74, 79 (2d Cir.), cert. denied sub nom. *Dixon* v. *Keane*, 537 U.S. 955, 123 S. Ct. 426, 154 L. Ed. 2d 305 (2002); *People* v. *Wenzinger*, 155 P.3d 415, 420 (Colo. App. 2006); *Bryant* v. *State*, 280 Kan. 2, 10–11, 118 P.3d 685 (2005); *Nika* v. *State*, 198 P.3d 839, 849 (Nev. 2008), cert. denied, U.S. , 130 S. Ct. 414, 175 L. Ed. 2d 284 (2009); *People* v. *McCrae*, 68 App. Div. 3d 1451, 1452, 892 N.Y.S.2d 574 (2009); *Hernandez* v. *Kelly*, 108 Ohio St. 3d 395, 399, 844 N.E.2d 301 (2006); *In re Personal Restraint of Hinton*, 152 Wn. 2d 853, 859–61, 100 P.3d 801 (2004).

Moreover, the plurality acknowledges the obvious due process concerns implicated in the present case. It notes: "[R]egardless of whether one reads *Salamon* to be a change or clarification of the law, the court in *Salamon* saw itself as discerning the original legislative meaning of [General Statutes] § 53a-92 (a) (2) (A). . . . If the legislature never intended an assault to constitute kidnapping, without evidence of the perpetrator's inde-

pendent intent to restrain the victim, then the petitioner in the present case stands convicted of a crime that he arguably did not commit. This conclusion raises serious due process concerns." (Citation omitted.) Given this acknowledgment, I see no justification for avoiding the constitutional question.

Of course, as the plurality recognizes, answering that question would require us to weigh in on a matter over which there is a split of authority as to when a decision may be deemed clarifying. Nonetheless, that fact should not dictate our approach to deciding the present case or dissuade us from this task. Accordingly, I turn to the due process question.

Prior to *Fiore*, it had been a well settled principle that "state courts are under no [federal] constitutional obligation to apply their decisions retroactively." (Internal quotation marks omitted.) *Fiore* v. *White*, supra, 531 U.S. 227, quoting *Fiore* v. *White*, 149 F.3d 221, 222 (3d Cir. 1998); see generally *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364–65, 53 S. Ct. 145, 77 L. Ed. 360 (1932); see also *Wainwright* v. *Stone*, 414 U.S. 21, 23–24, 94 S. Ct. 190, 38 L. Ed. 2d 179 (1973); *Henry* v. *Ricks*, supra, 578 F.3d 140. In *Fiore*, the Supreme Court granted certification to consider "when, or whether, the Federal Due Process Clause requires a state to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Fiore* v. *White*, supra, 531 U.S. 226; see also *Bunkley* v. *Florida*, supra, 538 U.S. 839 (applying *Fiore* analysis). Specifically, as in the present case, *Fiore*, and later *Bunkley*, presented circumstances in which postconviction relief had been sought on the basis of a later decision by the state's highest court construing more narrowly the statute under which the petitioner had been convicted.[4]

To determine whether that precise question in fact had been presented in *Fiore*, the United States Supreme Court asked the state's highest court to indicate whether its decision interpreting the statute was a change in the law, or whether it was, instead, a correct statement of the law when the petitioners' conviction became final. *Fiore* v. *White*, supra, 531 U.S 226. The Pennsylvania Supreme Court replied that "[its] interpretation . . . 'merely clarified' the statute and was the law of Pennsylvania—as properly interpreted—at the time of Fiore's conviction." Id., 228. In light of this characterization, the United States Supreme Court held that, the Pennsylvania court's response "has now made clear that retroactivity is not at issue. At the same time, that court's interpretation of its statute makes clear that Fiore did not violate the statute." Id., 226. The Supreme Court noted that it violates due process for a state to "convict [a defendant] for conduct that its criminal statute, *as properly interpreted*, does not prohibit." (Emphasis added.) Id., 228. Accordingly, the court held:

"This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." Id., 228–29. Because the Pennsylvania court's clarification meant that Fiore's conviction was not based on proof of all of the requisite elements of the offense for which he was convicted, the Supreme Court concluded that "[t]he simple, inevitable conclusion is that Fiore's conviction fails to satisfy the Federal Constitution's demands." Id., 229.

Thereafter, in *Bunkley* v. *Florida*, supra, 538 U.S. 840–42, the Supreme Court sought similar clarification of a case in which the Florida Supreme Court had characterized its subsequent interpretation of a criminal statute as an " 'evolutionary refinement' . . . ." Id., 840. Because, on remand, the Florida Supreme Court determined that its later decision did not control at the time of the petitioner Clyde Timothy Bunkley's conviction, due process was not offended by the conviction, and the court could decide the case on grounds of retroactivity. *Bunkley* v. *State*, 882 So. 2d 890, 894–96 (Fla. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 939, 160 L. Ed. 2d 822 (2005).

Fiore and *Bunkley* make clear that the due process question turns on this change/clarification dichotomy. Although in either case a corrected interpretation, if based on legislative intent, as opposed to constitutional constraints, reveals that the legislature never intended to criminalize particular conduct, apparently only those decisions deemed clarifying implicate due process concerns. I question the logic of this distinction.[5] Nonetheless, we can resolve the issue in the present case without running afoul of this distinction.

The United States Supreme Court has not dictated the circumstances under which a state court's decision interpreting a criminal statute will be deemed to clarify or change the law.[6] Instead, the court has indicated that it is a matter for state courts to determine the effect of their own decisions construing state criminal statutes. See *Bunkley* v. *Florida*, supra, 538 U.S. 840–42 (relying on state court's answer to certified questions as to whether state court interpretation of state criminal statute reflected change in, rather than clarification of, state law); *Fiore* v. *White*, 528 U.S. 23, 25, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999) ("[b]efore deciding whether the Federal Constitution requires that Fiore's conviction be set aside in light of [*Commonwealth* v. *Scarpone*, 535 Pa. 273, 634 A.2d 1109 (1993)], we first must know whether Pennsylvania itself considers *Scarpone* to have explained what [the statute] always meant, or whether Pennsylvania considers *Scarpone* to have changed the law"); *Graves* v. *Ault*, 614 F.3d 501, 511 (8th Cir.) ("*Fiore*

relied exclusively on the state supreme court's determination of what conduct the criminal statute prohibited at the time of the conviction. In *Bunkley*, the [United States Supreme] Court could not answer the *Fiore* question without determining what conduct the statute criminalized at the time of the conviction, so the Court remanded the case to the state supreme court to make that determination."), cert. denied, U.S. , S. Ct. , 178 L. Ed. 2d 377 (2010); *Warren* v. *Kyler*, 422 F.3d 132, 137 (3d Cir. 2005) ("[I]t matters whether a state decision has established a new rule of law or merely clarified existing state law. But important as it may be, we read nothing in *Fiore* that authorizes us to make that kind of distinction based on our independent analysis of the effect of a state court's decision."), cert. denied sub nom. *Warren* v. *Grace*, 546 U.S. 1210, 126 S. Ct. 1421, 164 L. Ed. 2d 118 (2006); *Goosman* v. *State*, 764 N.W.2d 539, 544 (Iowa 2009) ("Taken together, *Fiore* and *Bunkley* stand for two propositions. First, where a court announces a new rule of substantive law that simply 'clarifies' ambiguities in existing law, federal due process requires that the decision be retroactively applied to all cases, including collateral attacks where all avenues of direct appeal have been exhausted. Second, where a court announces a 'change' in substantive law which does not clarify existing law but overrules prior authoritative precedent on the same substantive issue, federal due process does not require retroactive application of the decision."); *Nika* v. *State*, supra, 198 P.3d 849 ("As the [United States] Supreme Court has indicated, the question of whether a particular state court interpretation of a state criminal statute constitutes a change in—rather than a clarification of—the law is a matter of state law. It is thus for this court to determine whether a decision of this court changed or merely clarified state law.").

Although a few courts have read *Fiore* and *Bunkley* to limit clarifications to only those circumstances in which the particular issue of statutory interpretation is one of first impression for the state's highest court,[7] I agree with the courts that have concluded that the Supreme Court imposed no such limitation. See, e.g., *Clem* v. *State*, 119 Nev. 615, 625–26, 81 P.3d 521 (2003) ("[I]t is clear that under *Fiore* and *Bunkley*, a state's highest court may, by its first interpretation of a criminal statute's provisions, *either* change *or* clarify the law. It follows that where a state's highest court departs from its own previous interpretation of a statute, the new decision may also constitute either a change or a clarification of the law even though the statutory language was not changed." [Emphasis in original.]); *In re Personal Restraint of Hinton*, supra, 152 Wn. 2d 859–60 (deeming *Fiore* and *Bunkley* due process rubric to apply to case overruling prior decisions interpreting criminal statute). Indeed, it seems to me that no other approach affords the necessary deference to the pri-

macy of state courts' interpretations of their own laws consistent with principles of comity. See *Estelle* v. *McGuire*, 502 U.S. 62, 67–68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions").

Therefore, the due process question in the present case turns on whether this court characterizes *Salamon* as a clarification or a change to the law. For the following reasons, I would conclude that *Salamon* clarified the meaning of our kidnapping statutes, and, therefore, states the correct law at the time of the petitioner's conviction. At the outset, I acknowledge that there is language in *Salamon* that the state reasonably points to as indicating an intent to change the law. We unequivocally "overruled" our long-standing interpretation of the kidnapping statutes to allow a conviction even when the restraint involved in the kidnapping is merely incidental to the commission of another offense perpetrated against the victim by the accused. *State* v. *Salamon*, supra, 287 Conn. 513–14, 518 n.11. Indeed, we expressly acknowledged therein that, in *State* v. *Luurtsema*, 262 Conn. 179, 811 A.2d 223 (2002), on the petitioner's direct appeal from his conviction, "we [had] rejected a claim identical in all material respects to the claim that the defendant raises in the present case . . . ." *State* v. *Salamon*, supra, 513 n.6. Reading *Salamon* with less emphasis on the particular terminology and with greater attention to the basis for the decision, however, favors characterizing it as a clarification of the law. *Salamon* rested on grounds that never had been considered by this court. Not only was it the first time that this court examined the intent element of the kidnapping statutes and the first time that we examined the circumstances surrounding the statutes' enactment, but it also was the first time that this court considered the meaning of the statute en banc. Id., 532–42. Our reexamination was prompted in part by an issue expressly left open in our prior decisions regarding whether the existing interpretation could lead to bizarre, and therefore legislatively unintended, results. Id., 533–34. Finally, we underscored that our holding did not refute completely the principles established by our prior kidnapping jurisprudence. Id., 546; see id. (reaffirming principle that "the state is not required to establish any minimum period of confinement or degree of movement"); id., 548 (affirming principle that "an accused may be charged with and convicted of more than one crime arising out of the same act or acts, as long as all of the elements of each crime are proven"). In my view, these factors demonstrate that the court in *Salamon* intended to clarify what the kidnapping statute has meant since its inception.

I also would conclude that *Salamon* must be deemed as clarifying our kidnapping statutes for a more fundamental reason. Such a conclusion is the only one consis-

tent with our limited role in the constitutional scheme when interpreting statutes generally and criminal statutes particularly. "When we construe a statute, we act not as plenary lawgivers but as surrogates for another policy maker, [that is] the legislature. In our role as surrogates, our only responsibility is to determine what the legislature, within constitutional limits, intended to do." (Internal quotation marks omitted.) Id., 519. "[S]ince the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty whe[n] the legislature has not clearly and unequivocally prescribed it." (Internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 675, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006); accord *Bousley* v. *United States*, 523 U.S. 614, 620–21, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) ("[D]ecisions of this [c]ourt holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct beyond the power of the criminal law-making authority to proscribe . . . necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal. . . . For under our federal system it is only Congress, and not the courts, which can make conduct criminal." [Citations omitted; internal quotation marks omitted.]). If the statute did not criminalize the petitioner's conduct as later properly construed, it never criminalized that conduct. Simply because this court belatedly may have come to recognize the meaning intended by a legislative enactment, the statute's meaning never changed. See *People* v. *Rodriguez*, 355 Ill. App. 3d 290, 294, 823 N.E.2d 243 (2005) ("Logically, a statute . . . can have only one meaning. . . . If the interpretation in [the later decision] is right, the interpretation in [the earlier decision] was wrong from the outset, and the trial court was wrong when it [rendered its decision]. . . . If the error was of the kind that rendered the resulting judgment void, it is, and has always been, void." [Citation omitted.]); *In re Personal Restraint of Hinton*, supra, 152 Wn. 2d 860 n.2 ("[w]hen this court construes a statute, setting out what the statute has meant since its enactment, there is no question of retroactivity; the statute must be applied as construed to conduct occurring since its enactment"); see also *United States* v. *McKie*, 73 F.3d 1149, 1153 (D.C. Cir. 1996) ("a decision interpreting a statute does not change the statute but rather interprets the law as enacted by the legislature"); *Buradus* v. *General Cement Products Co.*, 159 Pa. Super. 501, 504, 48 A.2d 883 (1946) ("[T]he construction placed upon a statute by the courts becomes a part of the act from the very beginning. And when former decisions are overruled, the reconsidered pronouncement becomes the law of the statute from the date of the enactment."), aff'd, 356 Pa. 349, 52 A.2d 205 (1947).

Indeed, although not deciding the case specifically on due process grounds, the California Supreme Court relied on the same reasoning in affording habeas relief in a case similar to the present case.[8] In *People* v. *Mutch*, 4 Cal. 3d 389, 392–93, 482 P.2d 633, 93 Cal. Rptr. 721 (1971), the habeas petitioner was convicted under California's aggravated kidnapping statute, which made punishable the " 'kidnap[ping] or carry[ing] away' " of another person during the course of a robbery. In affirming the petitioner's conviction, the California Court of Appeals had applied the construction consistently given to the statute by the California Supreme Court in numerous cases over the preceding years. Id. Under that construction, the statute applied to any movement of the victim, no matter how slight the distance, in the course of a robbery. Id., 393. Despite this settled precedent, after the petitioner's conviction became final, the California Supreme Court reexamined the question of the legislature's intent with respect to whether the statute applied to incidental movements and reached a contrary conclusion.[9] *People* v. *Daniels*, 71 Cal. 2d 1119, 1126–39, 459 P.2d 225, 80 Cal. Rptr. 897 (1969). Thereafter, in *Mutch*, the court considered whether the petitioner was entitled to habeas relief in light of *Daniels*. The court noted: "[T]he purpose of our decision in *Daniels* was not to 'redefine' the crime of kidnap[p]ing to commit robbery—under our tripartite system of government, that power is vested exclusively in the legislative branch—but simply to declare what the intent of the [l]egislature has been in this regard since the [statute's] enactment . . . . In *Daniels* we did not overturn a judge-made rule of common law; rather, we recognized a statutory rule which the [l]egislature adopted in 1951 but to which courts had not previously given appropriate effect. . . . .

"Here, as in *Daniels*, the issue is 'whether the acts of [the defendant], on the record in this case, constitute the kind of conduct proscribed by [the kidnapping statute].' From the foregoing analysis we conclude that a robber who suffered a . . . conviction of violating [the kidnapping statute] because he compelled his victim to perform movements which were 'merely incidental to the commission of the robbery and [did] not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself,' was convicted under a statute which did not prohibit his acts at the time he committed them. As the Court of Appeal correctly reasoned in a decision rendered shortly after *Daniels*, 'There, the Supreme Court stresses that its interpretation of [the kidnapping statute] is what the [l]egislature always intended that it should be. In this light, *what* [*the*] *defendant did was never proscribed under* [*the statute*].' " (Citations omitted; emphasis in original.) *People* v. *Mutch*, supra, 4 Cal. 3d 394–96, citing *People* v. *Ballard*, 1 Cal. App. 3d 602, 605, 81 Cal. Rptr. 742 (1969). Accordingly, the California

Supreme Court determined that the defendant was entitled to seek habeas relief and that, in light of the record establishing that the brief movements that he had compelled his victims to perform in furtherance of the robbery were merely incidental to that crime and did not substantially increase the risk of harm otherwise present, his conviction had to be reversed. *People* v. *Mutch*, supra, 397–99.

For all of the aforementioned reasons, I would conclude that *Salamon* clarified the law, and, as such, it stated the correct interpretation of the kidnapping statute at the time of the petitioner's conviction. Accordingly, I would conclude that the petitioner in the present case is entitled to challenge his conviction on due process grounds.

II

Although this conclusion properly would dispose of the case before us, because the plurality has rested its judgment on the retroactivity question, I turn to that issue. I wholly agree with the plurality's thoughtful explanation as to why we should reject the state's call to adopt a per se rule against retroactivity and its equally persuasive rejection of the state's arguments against affording relief to the petitioner in the present case. For the reasons cited in part I of this concurring opinion, however, I would adopt, consistent with the overwhelming majority of courts to consider this issue, a per se rule that a decision of this court interpreting more narrowly the scope of conduct deemed criminal under a statute must apply retroactively to the date of the statute's enactment. I take issue with the fact that the plurality deems the better course to craft a novel rule to guard against certain fringe cases, as it concedes that those cases that cannot benefit from its rule of retroactivity would be "few and far between." As a general matter, I note that it has not been this court's past practice to craft rules to accommodate cases on the margins, and with good reason. I have, however, more specific concerns about the rule as stated.

I begin by noting that the mere fact that the plurality has adopted a novel approach to the question of retroactivity, in that it differs from both the per se retroactive rule adopted by the federal courts and most state courts and the balancing test adopted by a handful of other jurisdictions,[10] may be cause to scrutinize it carefully but is not a reason, in and of itself, to reject that approach. Rather, my concerns are with the standard itself and, more importantly, the lack of a persuasive justification for adopting such an approach.

The plurality determines that retroactivity will not apply to cases in which to decline to do so would be "neither arbitrary nor unjust." It elaborates that such circumstances are those in which "it is clear that the legislature did intend to criminalize the conduct at

issue, if perhaps not under the precise label . . . .'' It notes that, ''[i]n 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.'' As examples of such extraordinary cases, the plurality cites a line of cases from New York and an Indiana Court of Appeals case.[11]

My first concern is that this standard is unclear, begging the following questions:

Would it apply only when either the petitioner's claim involves a concession that he committed some other crime for which he was not convicted or when the jury's findings actually support a conviction for another crime? Or also when the evidence presented to the jury *could* have supported a conviction for another crime?

Would it apply when the conduct at issue in the challenged conviction could satisfy the elements of any other criminal offense? Only an offense carrying the same potential penalty? Only an offense of comparable moral culpability?

Does the limitation apply only when the conviction involved an act of violence or one causing serious physical injury or death?

Would it apply only when vacating the conviction would preclude retrial?

Is it a matter left wholly to the discretion of the habeas court as to whether to apply our decision retroactively? Or is retroactivity barred if the circumstances meet the majority's criteria?

More fundamentally, I am not persuaded that, under Connecticut law, there would be much risk of the concern cited by the majority that, without its exception to retroactivity, defendants otherwise may go unpunished for criminal conduct. Connecticut requires ''the jury to deliberate thoroughly, and to consider and dispose of a greater offense before it deliberates on the lesser included offense . . . .'' *State* v. *Salgado*, 257 Conn. 394, 405, 778 A.2d 24 (2001). Under well established principles, if a court reverses judgment on the greater offense, it may direct judgment to be entered on a lesser included offense. See *Carpenter* v. *Commissioner of Correction*, 290 Conn. 107, 120, 961 A.2d 403 (2009) (''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 . . . 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 . . . . A defendant is deemed to have such a fair adjudication when the crime is a lesser included offense of the crime charged, and, under the circumstances of the case, the jury could have explicitly returned [a verdict of guilty on the lesser included offense and] the defendant was aware of his potential liability for this crime." [Citations omitted; internal quotation marks omitted.]).

Indeed, this court has adopted a broad view of lesser included offenses in the context of homicides, such that, as a matter of law, manslaughter in the first degree (a crime requiring a reckless state of mind) is a lesser included offense of murder (a crime requiring an intentional state of mind). Id. Under such circumstances, this court has reversed a conviction for murder and directed a judgment on reckless manslaughter in the first degree. See id., 127. Therefore, the situation at issue in the New York cases cited by the plurality—wherein retroactive application would have vacated a conviction for depraved indifference murder and the defendant could not be convicted of intentional murder—would not arise in Connecticut courts.[12] In sum, unless the lesser included offenses are similarly affected by the court's narrowing construction of the criminal statute, there should be no bar to obtaining a conviction on a lesser included offense.

Moreover, unlike the New York double jeopardy principles that precluded retrial on the other comparably serious charge that could have been supported by the evidence had the jury reached it; see *Policano* v. *Herbert*, 453 F.3d 79, 80–81 (2d Cir. 2006) (Raggi, J., dissenting from denial of rehearing en banc); there is no comparable double jeopardy bar under the federal or Connecticut constitutions.[13] See generally *State* v. *Hedge*, 297 Conn. 621, 665–66, 1 A.3d 1051 (2010); *State* v. *Colon*, 272 Conn. 106, 293–94, 297 n.108, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). Indeed, in light of the routine practice of the prosecutors in this state of charging any serious offense that the evidence would support, it seems highly unlikely that a defendant who has obtained relief from a conviction that his conduct did not support would escape conviction of all charges commensurate with his criminal conduct if we were to apply a per se rule of retroactivity. In addition, double jeopardy would not bar prosecution of a charge that satisfies the test enunciated in *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). See *State* v. *Alvarez*, 257 Conn. 782, 789, 778 A.2d 938 (2001) (*Blockburger*, which provides sole test for deciding whether two offenses constitute same offense for double jeopardy purposes, assesses whether each offense requires proof of fact that other does not). In light of these facts and the plurality's persuasive rejection of the state's arguments regarding the burdens

attendant to retrial, I see no justification for crafting a limited exception to a rule favoring retroactivity.[14]

Even if a rare case were to exist in which a defendant could not be prosecuted for a comparable offense, I find it incongruous to craft an exception to retroactivity predicated on the view that the legislature did intend to penalize the conduct at issue, but under a different label than the one charged. The entire basis for considering retroactivity is that the legislature never intended for the charge on which the conviction was based to reach the defendant's conduct. With respect to the question of whether the defendant's conduct violated some other statute for which he was not convicted, the legislature does not make that individualized assessment, a jury does. Thus, a related concern is that allowing the habeas court to decline to afford relief in light of its finding that a jury *could have* convicted the defendant of another offense is in some tension with a fundamental constitutional principle. A criminal defendant has a constitutionally protected right to jury findings on every element of the crime. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (noting that sixth amendment right to trial by jury in serious criminal cases "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' "); *State* v. *Hines*, 187 Conn. 199, 210, 445 A.2d 314 (1982) ("[i]t must always be borne in mind that litigants have a constitutional right to have issues of fact decided by the jury and not by the court" [internal quotation marks omitted]). Although, technically, allowing the habeas court to make such a determination does not violate this constitutional right because the defendant would remain convicted under the offense for which the jury did render a verdict, such an approach would seem to violate the spirit of this principle. If the defendant properly could be convicted of another crime, I would leave that determination to a jury.

Therefore, I concur in the judgment.

[1] Indeed, this principle is applied most often in circumstances in which the resolution of a nonconstitutional question is an essential predicate to the constitutional issue, such as the proper interpretation or application of the statute that is being challenged on constitutional grounds. See, e.g., *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 560, 964 A.2d 1213 (2009); *Pasquariello* v. *Stop & Shop Cos.*, 281 Conn. 656, 662, 916 A.2d 803 (2007); *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 57, 808 A.2d 1107 (2002); *State* v. *Campbell*, 224 Conn. 168, 175, 617 A.2d 889 (1992), cert. denied, 508 U.S. 919, 113 S. Ct. 2365, 124 L. Ed. 2d 271 (1993); *In re Valerie D.*, 223 Conn. 492, 532 n.35, 613 A.2d 748 (1992); *State* v. *Rinaldi*, 220 Conn. 345, 353, 599 A.2d 1 (1991).

[2] This point is manifest in the question certified to the state's highest court when the matter first came before the United States Supreme Court, wherein it articulated its question as follows: "We respectfully request that the Pennsylvania Supreme Court accept our certification petition because, in our view, the answer to this question will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case." *Fiore* v. *White*, 528 U.S. 23, 29, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999).

[3] The Ninth Circuit case cited by the plurality, *Kleve* v. *Hill*, 243 F.3d 1149 (9th Cir.), cert. denied, 534 U.S. 948, 122 S. Ct. 341, 151 L. Ed. 2d 257 (2001),

is not to the contrary. That court reconsidered its decision affirming a denial of habeas relief upon remand by the United States Supreme Court in light of *Fiore*. The Ninth Circuit concluded: "There is nothing in our earlier decision in this case that is inconsistent with the Supreme Court's decision in *Fiore*." Id., 1151. It noted two reasons for its conclusion: first, the decision at issue that was rendered subsequent to the petitioner's conviction "may have changed the law," which would not violate due process concerns; id.; and second, even if the later decision did change the law, the petitioner's conviction was proper under that law as stated in that later decision. Id.

With respect to the Florida decision cited by the plurality, *Thompson* v. *State*, 887 So. 2d 1260, 1262–64 (Fla. 2004), I would agree that the Florida Supreme Court addressed retroactivity before discussing due process concerns. I simply would point out that this approach stems from the rule eventually crystallized in the following statement by that court: "[S]ince we have now squarely held that all decisions of this Court disagreeing with a statutory construct previously rendered by a district court constitute 'changes' in the applicable law from the law at the time of conviction, we recede from the 'clarification/change' scheme . . . ." *State* v. *Barnum*, 921 So. 2d 513, 528 (Fla. 2005), cert. denied, 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 365 (2006).

[4] In *Fiore*, the Pennsylvania Supreme Court had declined to review the decision of an appellate court rejecting the argument of the petitioner, Fiore, that he could not be convicted of violating a statute barring the operation of a hazardous waste facility without a permit for deviating from the terms of such a permit. *Fiore* v. *White*, supra, 531 U.S. 226–27. The Pennsylvania Supreme Court later agreed to review the conviction of Fiore's codefendant, and concluded that a person who has a permit, but deviates from its terms, does not violate the statute. Id., 227. In answer to a question reserved to it by the United States Supreme Court, the Pennsylvania court concluded that its decision in the case of Fiore's codefendant was a clarification of the law that stated the correct interpretation of the statute at the time Fiore's conviction became final. Id., 228.

In *Bunkley*, a Florida appellate court had affirmed Clyde Timothy Bunkley's conviction for burglary in the first degree on the basis of his being armed with a "dangerous weapon," namely, a pocketknife with a blade approximately three inches in length that Bunkley neither had used nor threatened to use during the commission of the burglary. *Bunkley* v. *Florida*, supra, 538 U.S. 836. Bunkley unsuccessfully sought postconviction relief after the Florida Supreme Court interpreted for the first time, in a different case, the "common pocketknife" exception to the statutory definition of "weapon" to mean a pocketknife with a blade of less than four inches. Id., 837–38. The Florida Supreme Court concluded that Bunkley was not entitled to relief because: (1) its decision represented a change in the law that culminated a " 'century-long evolutionary process' " in the meaning of the pocketknife exception, and that such an evolutionary refinement does not apply retroactively under Florida precedent. Id., 840–41. Because it concluded that this analysis did not answer the *Fiore* due process question, the United States Supreme Court remanded the case back to the Florida Supreme Court for a determination as to whether, under this " 'evolutionary refinement' "; id., 840; the law had changed before or after Bunkley's conviction was rendered final. Id., 842. On remand, the Florida Supreme Court concluded that Bunkley properly had been convicted under the law as it existed at the time of his conviction. *Bunkley* v. *State*, 882 So. 2d 890, 894–96 (Fla. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 939, 160 L. Ed. 2d 822 (2005).

[5] Specifically, I question why due process does not demand application of any decision interpreting more narrowly the scope of a criminal statute. It cannot be said that the court is not stating what the legislature always intended. In the context of a newly articulated *constitutional* rule, the Supreme Court has recognized that "the very word 'retroactivity' is misleading because it speaks in temporal terms. 'Retroactivity' suggests that when we declare that a new constitutional rule of criminal procedure is 'nonretroactive,' we are implying that the right at issue was not in existence prior to the date the 'new rule' was announced. But this is incorrect. As we have already explained, the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." *Danforth* v. *Minnesota*, 552 U.S. 264, 271, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008); see also *American Trucking Assns., Inc.* v. *Smith*, 496 U.S. 167, 201, 110 S. Ct. 2323, 110 L.

Ed. 2d 148 (1990) (Scalia, J., concurring) ("[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision . . . shall 'apply' retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of 'the judicial Power,' U.S. Const., Art. III, § 1, which is not only the common and traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, see *Marbury* v. *Madison*, [5 U.S. (1 Cranch) 137, 2 L. Ed. 60] (1803)—the very exercise of judicial power asserted in [the prior decision]. To hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it; and when, as in this case, the constitutionality of a state statute is placed in issue, the question is not whether some decision of ours 'applies' in the way that a law applies; the question is whether the Constitution, as interpreted in that decision, invalidates the statute. Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue . . . was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then [our prior decision] was wrong, and the issue of whether to 'apply' that decision needs no further attention." [Emphasis in original.]). In my view, the same reasoning applies when this court interprets a statute enacted by the legislature and should require application of the later interpretation in every case as a matter of due process.

[6] By contrast, the United States Supreme Court has set parameters for determining when *federal* case law sets forth a new *constitutional* rule. See *Teague* v. *Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) ("It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. See, e.g., *Rock* v. *Arkansas*, 483 U.S. 44, 62 [107 S. Ct. 2704, 97 L. Ed. 2d 37] [1987] [per se rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf]; *Ford* v. *Wainwright*, 477 U.S. 399, 410 [106 S. Ct. 2595, 91 L. Ed. 2d 335] [1986] [eighth amendment prohibits the execution of prisoners who are insane]. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." [Emphasis in original.]).

[7] The courts that concluded that a decision may be deemed clarifying only if it is the first time that the state's highest court has considered the meaning of the provision at issue appear to rely solely on the fact that the United States Supreme Court expressly noted in both *Fiore* and *Bunkley* that the issue before it had arisen under those circumstances. See, e.g., *Henry* v. *Ricks*, supra, 578 F.3d 138; *Chapman* v. *LeMaster*, supra, 302 F.3d 1197 n.4. In my view, these passing references to the procedural posture of the case are a thin reed on which to rest such an important point. Indeed, one would have expected the Supreme Court to emphasize that fact as a necessary predicate to the due process question, and its failure to do so belies such a conclusion. I also am mindful that some courts have limited their own view of clarifications under state law to be only those decisions that interpret a statutory provision for the first time; see, e.g., *Kendrick* v. *District Attorney*, 591 Pa. 157, 171, 916 A.2d 529 (2007); *In re I.K.*, 220 P.3d 464, 469 (Utah 2009); but this court is free to reach a different conclusion under our law.

[8] The California Supreme Court's decision in *People* v. *Mutch*, 4 Cal. 3d 389, 482 P.2d 633, 93 Cal. Rptr. 721 (1971), predates by more than three decades the due process decisions of the United States Supreme Court in *Fiore* and *Bunkley*. Notably, however, the California court expressly disavowed reliance on retroactive application of the statute; id., 394–95; which would be the sole basis to afford habeas relief in the absence of a due process violation under *Fiore* and *Bunkley*. The California appellate courts have not considered the due process question since the United States Supreme Court issued its *Fiore* and *Bunkley* decisions.

[9] Like this court did in *Salamon*, the court in *People* v. *Daniels*, 71 Cal. 2d 1119, 1127–28, 459 P.2d 225, 80 Cal. Rptr. 897 (1969), declined to view the legislature's inaction following the court's earlier decisions as a legislative

endorsement of the court's construction. The court relied on case law construing closely related statutory language; id., 1128–30; which, unlike the court's earlier cases interpreting the aggravated kidnapping statute, had considered the rule of statutory construction that "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence." (Internal quotation marks omitted.) Id., 1130. The court also considered authority from other jurisdictions favoring a different interpretation. Id., 1134–39.

[10] The plurality accurately recites the positions of these jurisdictions on this question, and, therefore, there is no need to recite those cases here. Tallying the numbers reflects that: the federal courts and twelve state courts have adopted a per se rule in favor of retroactivity; a thirteenth state court has signaled that it intends to do the same; and a fourteenth state court has wavered on this question. Therefore, it appears that there are only three jurisdictions (Florida, New York and New Jersey) that clearly adhere to a balancing test.

[11] I would point out that, although the plurality accurately quotes from these cases, which essentially state the point that it is fair not to afford relief when the evidence demonstrates that the petitioner could have been convicted of some other crime, it fails to make clear that this concern was neither the sole or dispositive one in these cases. Rather, the courts made this comment in connection with their application of a balancing test. See *Powell* v. *State*, 574 N.E.2d 331, 334 (Ind. App. 1991); *Policano* v. *Herbert*, 7 N.Y.3d 588, 603–604, 859 N.E.2d 484, 825 N.Y.S.2d 678 (2006). Moreover, because Indiana has abandoned the balancing test in favor of a per se rule of retroactivity; see *Jacobs* v. *State*, 835 N.E.2d 485, 488–91 (Ind. 2005); there is no basis on which to conclude that such a consideration currently would have any bearing in that jurisdiction.

The plurality cites a third case in footnote 20 of its opinion, *Kleve* v. *Hill*, 185 F.3d 1009, 1014 (9th Cir. 1999), but that case provides no support for the rule that the plurality adopts. In *Kleve*, the court concluded that the jury *actually* had found each of the elements satisfied for conspiracy to commit murder in the first degree, despite having returned a verdict of guilty only on conspiracy to commit murder in the second degree and therefore a California case deeming the latter crime not to exist did not provide a basis on which to afford relief to the petitioner. Id., 1011–14.

[12] A death resulting from reckless indifference is punishable only as manslaughter, not murder, under Connecticut law. See General Statutes §§ 53a-55, 53a-55a and 53a-56.

[13] Of course, double jeopardy would bar retrial on any offense on which the jury acquitted the defendant. *State* v. *Hedge*, 297 Conn. 621, 665, 1 A.3d 1051 (2010).

[14] Indeed, I would point out that the egregious result that the plurality so assiduously seeks to avoid, if in fact such a result could occur under Connecticut law, would ensue for any comparable case in which the defendant had not yet exhausted his appeals by the time this court issued its clarifying decision. See *State* v. *Hampton*, 293 Conn. 435, 462 n.16, 978 A.2d 1089 (2009) ("[a]lthough *Salamon* was not decided until July 1, 2008, nearly two years after the trial in the present case, it is still applicable to our consideration of the defendant's appeal because of the general rule that judgments that are not by their terms limited to prospective application are presumed to apply retroactively . . . to cases that are pending" [internal quotation marks omitted]); *State* v. *DeJesus*, 288 Conn. 418, 429 n.9, 953 A.2d 45 (2008) (applying *Salamon* under similar circumstance); *State* v. *Thompson*, 118 Conn. App. 140, 154, 983 A.2d 20 (2009) (same), cert. denied, 294 Conn. 932, 986 A.2d 1057 (2010).