PALMER, J., with whom ZARELLA and McLACHLAN, Js., join, dissenting. Because I agree with the majority that fists are not a dangerous instrument for purposes of General Statutes § 53a-59 (a) (1), I also agree that the conviction of the defendant, Steeve LaFleur, of assault in the first degree arising out of his assault against Diana Hazard cannot stand. I disagree, however, with the majority's refusal to order a modification of the judgment of conviction to reflect a conviction of the lesser included offense of assault in the second degree in violation of General Statutes § 53a-60 (a) (1)[1] merely because the trial court did not instruct the jury on that offense. As the state correctly asserts, it is undisputed that the jury found, beyond a reasonable doubt, that the defendant had committed the lesser included offense of assault in the second degree by intentionally causing serious physical injury to Hazard. The evidence contained within the record amply supports that finding and the defendant has made no claim that a modification reflecting a conviction of assault in the second degree would be prejudicial in light of the fact that the jury was not instructed on that offense. In fact, it is crystal clear from the record that the defendant would suffer no prejudice whatsoever if we were to order a modification of the judgment as the state requests. Despite its inability to point to any such harm, the majority insists that the defendant must be relieved of all criminal responsibility for his brutal beating of Hazard. Because there is no sound reason why the defendant should not be held accountable for his vicious assault, the majority bestows a windfall on the wholly undeserving defendant—and does so at the expense of the victim of the assault, the state and the general public—without any countervailing public benefit.

As I explain more fully herein, there are several fundamental problems with the majority opinion. First, in reaching its conclusion, the opinion relies primarily, if not entirely, on the analysis that we employed in *State* v. *Sanseverino*, 291 Conn. 574, 590–98, 969 A.2d 710 (2009), in which we concluded that, "[u]nder the unique circumstances of [that] case"; id., 595; imposition of a conviction of a lesser included offense was appropriate even though the jury had not been instructed on the lesser offense. Contrary to the majority's assertion, the approach that we took in light of the "unique circumstances" presented by *Sanseverino* is wholly inapposite for purposes of this case, which presents no such unusual circumstances. Second, the majority purports to eschew a "bright line" test in favor of an approach that takes into account the particular facts and procedural posture of each individual case. In fact, the majority adopts the general rule that a defendant will not be

subject to conviction of a lesser included offense unless the trial court has instructed the jury on that offense. Finally, the majority fails to provide any persuasive reason why we should adopt such a rule in this state. Although asserting that fairness to the defendant is the paramount consideration for determining whether imposition of a conviction of a lesser offense is appropriate in the absence of a jury instruction on that offense, the majority does not explain—and cannot explain—how that result would be the slightest bit unfair to the defendant in this or any like case. For all these reasons, I respectfully dissent.

I

The first flaw in the majority's analysis is its reliance on the methodology that we used in *State* v. *Sanseverino*, supra, 291 Conn. 590–98, to resolve the issue of whether, under the highly unusual facts and procedural posture of that case, the state was entitled to imposition of a conviction of a lesser included offense despite the fact that the jury had not been instructed on that offense. To understand why the majority's reliance on *Sanseverino* is misplaced, it is necessary, first, to summarize what occurred in that case and, second, to explain how we addressed and resolved the issue of whether to permit a modification of the judgment to reflect a conviction of a lesser included offense.

In *Sanseverino*, the defendant, Paolino Sanseverino, was convicted of sexual assault in the first degree, attempted sexual assault in the first degree and kidnapping in the first degree in connection with his sexual assault of two employees in the back room of his bakery. Id., 579–82. On appeal to this court, Sanseverino claimed that his kidnapping conviction should be reversed because this court's previous construction of the kidnapping statute rendered it unconstitutionally overbroad. Id., 584. We agreed with Sanseverino that he was entitled to reversal of his kidnapping conviction but on a different, nonconstitutional ground, namely, that the jury had not been instructed in accordance with our then recent opinion in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). In *Salamon*, we concluded, contrary to long-standing precedent of this court, that the jury cannot find a defendant guilty of kidnapping in the first degree "unless it first found beyond a reasonable doubt that the restraint used to commit the crime of kidnapping in the first degree was not merely incidental to and necessary for the commission of the crime of sexual assault in the first degree." *State* v. *Sanseverino*, supra, 291 Conn. 584. In *Sanseverino*, we also revisited our earlier determination that Sanseverino was entitled to a judgment of acquittal on the kidnapping charge, concluding, upon reconsideration, that the state was free to retry Sanseverino for that offense in the unlikely event that, at a retrial, the state could adduce facts sufficient to satisfy the *Salamon* standard. Id., 588–90.

In addition, and most important for present purposes, we addressed the state's claim that, if it elected not to retry the defendant on the kidnapping charge, it nevertheless was entitled to a modification of the judgment to reflect a conviction of unlawful restraint in the second degree, a lesser included offense of first degree kidnapping. Id., 590–91. We ultimately concluded that the modification sought by the state was appropriate. Id., 596.

We reached this conclusion for several reasons, the most fundamental of which was our observation that, "although it is true that the jury could not have found the defendant guilty of unlawful restraint in the second degree in view of the fact that it was not instructed on that charge as a lesser included offense of kidnapping, there can be no doubt that the *jury necessarily* found that the defendant had committed that lesser offense because it found the defendant guilty of the greater crime of kidnapping. . . . Thus, there is no basis for the claim that this court may be viewed as usurping the role of the jury in holding that the state is entitled to a judgment of conviction of the lesser offense of unlawful restraint in the second degree. . . . [O]n the contrary, [by virtue of the jury verdict of guilty on the kidnapping offense] we *know* that the jury found that the defendant had committed [that lesser offense]." (Citation omitted; emphasis in original.) Id., 596 n.17.

We then explained, first, that because our unforeseeable holding in *Salamon* was not announced until after Sanseverino's trial, the state had no reason to doubt that its evidence was sufficient to support a kidnapping conviction. Consequently, the state also had no reason to seek an instruction on the lesser included offense of unlawful restraint in the second degree and, therefore, its failure to do so could not possibly have been the product of a strategic decision to which the state arguably should be bound. Id., 595. Second, we observed that because his appeal was pending when *Salamon* was decided, Sanseverino had benefited from our holding in *Salamon* even though he had not raised the claim that we found persuasive in *Salamon*. Id. Third, we noted that Sanseverino had not raised an objection to the state's request for a modification. Id. Finally, we stated that we could conceive of no reason why it otherwise would be unfair to Sanseverino to impose a conviction of unlawful restraint in the second degree. Id.

It must be emphasized, however, that we expressly reserved decision on the broader issue of whether, and if so, when, the state may obtain a modification of the judgment to reflect a conviction of a lesser included offense for which no jury instruction had been given. Id., 596–97 n.18. We stated: "[W]e limit our holding to the particular facts and procedural history of this case, and . . . decline to decide the broader issue presented, namely, under what particular circumstances it is

appropriate for an appellate court to require the conviction of a lesser included offense upon reversal of a conviction of a greater offense." Id., 597 n.18. "We do not doubt that we will have the opportunity to consider the broader issue, sooner rather than later, when our decision actually will make a difference to the outcome of the case." Id., 596 n.18. We made this point in response to the separate opinions of Chief Justice Rogers and Justice Katz, each of whom agreed with the result of the majority opinion but opined on the broader issue of what standard to adopt for purposes of determining when the court properly may impose a conviction of a lesser included offense about which the jury had not been instructed.[2] Specifically, the majority in *Sanseverino* explained that it was neither necessary nor advisable to address that broader question because the highly unusual circumstances of *Sanseverino* dictated a result for which there was near unanimous agreement among the members of the court.[3]

It is readily apparent, therefore, that we did not adopt an approach or methodology in *Sanseverino* for use in future cases not presenting the same kind of unique circumstances found in *Sanseverino*. Indeed, we expressly recognized in *Sanseverino* that our analysis of the issue in that case was limited to the specific circumstances of that case. Accordingly, we made no attempt to determine the relative weight or import of any particular factor or consideration because there simply was no need to do so.

This case, by contrast to *Sanseverino*, presents no unique circumstances; rather, it represents the typical case in which the issue ordinarily arises. Consequently, this court's first task is to determine what test or standard to adopt for purposes of resolving the broader issue that we reserved in *Sanseverino*. The majority, however, merely applies the factors that we considered relevant in *Sanseverino* as a check-list for determining whether modification of the judgment is appropriate in the present case. This methodology is both unfounded and inappropriate because it presumes, erroneously, that the methodology used in *Sanseverino* is applicable to the present case. Instead, it is necessary to engage in the kind of analysis that Chief Justice Rogers and Justice Katz undertook in their separate opinions in *Sanseverino*; see *State* v. *Sanseverino*, supra, 291 Conn. 598–604 (*Rogers*, *C. J.*, concurring); id., 604–17 (*Katz*, *J.*, concurring in part and dissenting in part); in addressing the broader issue raised by this appeal. The majority's failure to undertake that analysis due to its misplaced reliance on *Sanseverino* leads to a result that is flawed because it is the product of an inadequate methodology.[4] For good reason, therefore, the test adopted by the majority has never been employed by any other court in any jurisdiction.

Furthermore, the majority purports to adopt a case-

by-case approach for determining whether it is appropriate to permit imposition of a conviction of a lesser included offense for which there had been no jury instruction. In particular, the majority explains that we now must look to the several considerations that we identified in *Sanseverino* to decide whether, as in *Sanseverino*, "it would be fair to the defendant to modify the judgment of conviction" under all the circumstances. The majority concludes, however, that, in the absence of the *Sanseverino* considerations, it "would not be appropriate" to modify the judgment of conviction. In reaching this conclusion, the majority effectively has adopted a bright line rule pursuant to which the state's request for modification of the judgment to reflect the lesser included offense will *never* be granted unless the jury was instructed on that offense. This is so because henceforth, the state will be no more able to satisfy the *Sanseverino* conditions than it can in the present case since, as we explained in *Sanseverino*, the combination of conditions that were present in that case are unique.[5] Indeed, it is telling that the majority has failed to provide even one example of a scenario under which it would be appropriate to impose a conviction of the lesser offense.

Moreover, although not all of the *Sanseverino* considerations are unique, in the future, the state will be unable to satisfy any one of them due to the majority's faulty analysis.[6] Specifically, the majority presumes, first, that when the state fails to request an instruction on the lesser included offense, it is seeking a strategic advantage over the defendant and, second, that the absence of such an instruction prejudiced the defendant because he might have employed a different trial strategy had the instruction been given.[7] As I explain hereinafter, as applied to the facts of the present case, the first presumption is wholly speculative and the second is belied by the record. Indeed, with respect to the second presumption, it is fair to say that if the state cannot rebut it in the present case, it will never be able to do so. Thus, although the majority purports to reject a bright line test, it actually adopts one because the state will not be able to prove either that it did not fail to seek a lesser included instruction for strategic reasons or that the defendant would not have altered his trial strategy had the jury been instructed on that lesser offense. Unfortunately, the majority's flawed approach is, in reality, a bright line test that does not serve the interests of fairness and justice.

II

I now turn to the reasons why, in the present case, the state should be entitled to an order modifying the judgment to reflect a conviction of the lesser included offense of assault in the second degree. As I previously have explained, the jury necessarily found the defendant guilty of that offense when it found him guilty of

assault in the first degree. When, as here, the defendant has been found to have committed the lesser offense, the defendant should stand convicted of that offense unless he offers some legitimate reason why it would be unfair to hold him responsible for his proven criminal conduct. Although the logic of such an approach seems unassailable, the majority fails to address it.

This approach mirrors the methodology adopted by the United States Court of Appeals for the District of Columbia in *Allison* v. *United States*, 409 F.2d 445, 451 (D.C. Cir. 1969), and quoted with approval by the United States Supreme Court in *Rutledge* v. *United States*, 517 U.S. 292, 305 n.15, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), pursuant to which a judgment may be modified to reflect a lesser included offense, even if the jury was not instructed on that offense, if it is "clear (1) that the evidence adduced at trial fails to support one or more elements of the crime of which [the defendant] 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 [defendant]." *Allison* v. *United States*, supra, 451. Many courts have adopted this approach. See, e.g., *United States* v. *Petersen*, 622 F.3d 196, 207 (3d Cir. 2010) (modifying judgment to reflect conviction for lesser included offense even though instruction had not been given because defendant could not demonstrate that he would be prejudiced by such modification); *United States* v. *Brisbane*, 367 F.3d 910, 915 (D.C. Cir. 2004) ("By convicting [the defendant] of [the greater offense], the jury necessarily concluded that [the defendant had committed the lesser included offense]. The jury's conclusion would not have changed even if the [D]istrict [C]ourt had given instructions [on the lesser offense]."); *United States* v. *Hunt*, 129 F.3d 739, 745–46 (5th Cir. 1997) (modification of judgment permissible despite fact that trial court did not instruct jury on lesser included offense if, inter alia, such modification would not result in undue prejudice to defendant); *United States* v. *Smith*, 13 F.3d 380, 383 (10th Cir. 1993) (same); *Shields* v. *State*, 722 So. 2d 584, 586–87 (Miss. 1998) (same); *People* v. *Patterson*, 187 Colo. 431, 437, 532 P.2d 342 (1975) (modification of judgment appropriate because, "[e]ven though the jury was not instructed as to the lesser included offense, the defendant [was] given his day in court," "[a]ll [of] the elements of the lesser included offense [were] included in the more serious offense," and "[h]is guilt of the lesser included offense [was] implicit and part of the jury's verdict"); *State* v. *Farrad*, 164 N.J. 247, 266, 753 A.2d 648 (2000) ("[a] guilty verdict may be molded to convict on a lesser-included offense . . . if . . . [the] defendant has been given his day in court . . . all the elements of the lesser included offense are contained in the more serious offense and . . . [the] defendant's guilt of the lesser included offense is

implicit in, and part of, the jury verdict" [internal quotation marks omitted]).[8]

This methodology also accords with our own case law concerning the right to a fair trial and modification of judgments generally. It is well established that this court and the Appellate Court have "authority to affirm, *modify* or reverse a judgment of the trial court." (Emphasis added.) *Kim* v. *Magnotta*, 249 Conn. 94, 103, 733 A.2d 809 (1999); see also Practice Book § 60-5 (appellate court "may reverse or modify the decision of the trial court if it determines that the factual findings are clearly erroneous in view of the evidence and pleadings in the whole record, or that the decision is otherwise erroneous in law"). As Justice Katz explained in her separate opinion in *Sanseverino*: "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' . . . 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., 148–49; 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." *State* v. *Sanseverino*, supra, 291 Conn. 606–607.

As Justice Katz further explained, although in most of the cases in which this court has ordered the modification of a judgment to reflect a conviction of a lesser included offense the jury had been instructed on the lesser included offense, this court nevertheless has ordered modification of a judgment in the absence of

such an instruction. Specifically, Justice Katz cited *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), "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 . . . [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 . . . . 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*, [182 Conn. 430, 437, 438 A.2d 701 (1980)] (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)] 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 . . .), cert. denied, 261 Conn. 942, 808 A.2d 1136 (2002).

"Embodied in *Greene* is [the] 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. . . . *State* v. *Tomlin*, 266 Conn. 608, 617, 835 A.2d 12 (2003). 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*, [214 Conn. 77, 85, 570 A.2d 203 (1990)] ([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) [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)]. 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 . . .) . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Sanseverino*, supra, 291 Conn. 608–11.

The interests of justice are served by the *Allison* approach, first, because the defendant does not escape responsibility for a crime—the lesser included offense—that the jury necessarily found he had committed and, second, because under the *Allison* test, the court will not impose a conviction of that lesser offense if the defendant can demonstrate that it would be unfair to do so. Placing the focus on whether prejudice will result to the defendant rather than on the technicality of whether a jury instruction was given is consistent with—indeed, it is mandated by—this court's repeated admonition that "a trial is not a game of technicalities, but one in which the facts and truth are sought." (Internal quotation marks omitted.) *State* v. *Allen*, 205 Conn. 370, 375–76, 533 A.2d 559 (1987); see also *Kotteakos* v. *United States*, 328 U.S. 750, 760, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) (explaining harmless error review as encouraging courts "not [to] be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects" [internal quotation marks omitted]). "We often have stated that the fundamental purpose of our criminal justice system [is] to convict the guilty and acquit the innocent. . . . Like the harmless error doctrine, that purpose promotes public respect for the criminal process by focusing on the underlying fairness of the trial

rather than on the virtually inevitable presence of immaterial error." (Citation omitted; internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 244–45, 856 A.2d 917 (2004); see also *State* v. *Sawyer*, 227 Conn. 566, 578–79, 630 A.2d 1064 (1993) ("It is true . . . that the defendant's liberty is at stake in a criminal trial. That interest is certainly substantial. That does not mean, however, that the defendant's liberty interest is the only substantial interest at stake in a criminal trial . . . . The state also has a substantial interest, namely, its interest in securing a conviction on the most serious charge that the evidence will reasonably support."). These principles are no less applicable to the question of whether, and if so, when, the state may obtain a modification of a judgment to reflect a conviction of a lesser included offense for which no jury instruction was given.

Indeed, strong parallels can be drawn between the present case and the issue before this court in *State* v. *Perkins*, supra, 271 Conn. 218. In *Perkins*, the defendant challenged the legitimacy of the "waiver rule." Id., 221–22. Under the rule, " 'when a motion for [a judgment of] acquittal at the close of the state's case is denied, a defendant may not secure appellate review of the trial court's ruling without [forgoing] the right to put on evidence in his or her own behalf. The defendant's sole remedy [rather] is to remain silent and, if convicted, to seek reversal of the conviction because of insufficiency of the state's evidence. If the defendant elects to introduce evidence, the appellate review encompasses the evidence in toto.' "[9] Id., 220. In declining the defendant's invitation to abolish the waiver rule, we reasoned that "[t]he waiver rule supports fact-finding and the ultimate truth seeking function of a trial . . . [because it] eliminates the bizarre result that could occur in its absence, namely, that a conviction could be reversed for evidentiary insufficiency, despite evidence in the record sufficiently establishing guilt." (Citations omitted.) Id., 237–38. To reach a contrary conclusion, we further explained, would result in "a perception of the criminal trial as a sporting event in which the rules of the game trump the search for truth." Id., 245.

For similar reasons, we should reject the defendant's claim in the present case.[10] Indeed, the present case demonstrates why justice demands an approach that results in the defendant's conviction of the lesser offense when it is not unfair to the defendant to achieve that outcome. As previously indicated, although the defendant's conviction of assault in the first degree cannot stand because of our conclusion that, as a matter of law, fists are not a dangerous instrument, there is no question that the jury found beyond a reasonable doubt that the state had proved all of the elements of the crime of assault in the second degree. Indeed, the defendant was convicted of beating Hazard so brutally about the face, head and neck that she suffered multiple

fractures for which she needed to be hospitalized for more than one week. The defendant himself, in his brief to this court, describes the assault on Hazard as "brutal" and "shocking in nature . . . ." He further asserts that "the hospital report indicates that Hazard was punched in the face [twenty to thirty] times. . . . As a result of being punched in the face so many times, Hazard suffered potential life-threatening injuries and therefore received 'modified trauma' treatment by a multidisciplinary treatment team at Yale-New Haven Hospital's pediatric unit."

The majority posits two substantive reasons why, in its view, the state is not entitled to a modification of the judgment of conviction to reflect a conviction of the lesser included offense of assault in the second degree. Neither one provides support for the majority's conclusion.

The majority's first asserts that it has reason to "suspect" that the state did not seek an instruction on the lesser included offense for strategic reasons related to its interest in obtaining a conviction of the greater crime. In fact, there is nothing in the record of this case to establish why the state did not seek a lesser included offense instruction, and the majority's suspicion on that score is nothing more than speculation—the very kind of speculation that this court regularly eschews as inherently unreliable and thus unworthy of reliance for any reason. E.g., *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 510, 970 A.2d 578 (2009) (this court will not "engage in speculation and conjecture, which have no place in appellate review" [internal quotation marks omitted]).

Moreover, even if the state had made a conscious or strategic decision not to seek an instruction on the offense of assault in the second degree, that alone is insufficient reason to bar the state from seeking the imposition of a conviction of that offense. The defendant also has the right to seek an instruction on the lesser included offense, and he is absolutely entitled to such an instruction if there is some evidence adduced at trial which, when viewed in the light most favorable to the defendant, would justify conviction of the lesser offense. See, e.g., *State* v. *Jones*, 289 Conn. 742, 757–68, 961 A.2d 322 (2008). Consequently, the defendant had the unfettered opportunity to thwart any strategic decision by the state not to seek a jury charge on the lesser included offense. The majority ignores this critical consideration in concluding that there can be no imposition of a conviction of the lesser included offense anytime the state may be suspected of consciously electing not to seek an instruction on that lesser offense.[11] The majority offers a second reason for refusing to order a modification of the judgment as requested by the state, namely, "we cannot be sure that the defendant in the present case did not forgo a particular trial strategy

due to the lack of a lesser included offense charge." The majority identifies nothing in the trial record to substantiate this assertion; rather, the majority explains its rationale generally as follows: "Regardless of whether the defense challenged the state's claims as to elements of the lesser included charge, trial strategy and jury deliberation are inevitably colored by the inclusion of a lesser included charge to the jury." The majority provides no further support for its contention.

This reason for rejecting the state's claim lacks even a speculative basis in the record. In fact, the defendant himself has not alleged that his trial strategy was affected by the absence of a lesser included offense charge. No doubt the defendant has not made such an argument because it is unsupportable under the facts of the case. At trial, the defendant testified and denied assaulting Hazard, presenting, in essence, an alibi defense.[12] There is absolutely nothing in the record to suggest that the defendant would have defended the case differently if the court had instructed the jury both on the lesser offense of second degree assault and on the greater offense of assault in the first degree. The only difference in the two offenses is that to prove the latter, the state must establish that the defendant's fists constituted a dangerous instrument; otherwise the offenses are identical. In such circumstances, there is no rational justification for surmising that the defendant's trial strategy might have been different had the court given a lesser included offense instruction. Thus, contrary to the majority's bald assertion, we *can* be sure that the defendant would not have used a different trial strategy if the court had instructed the jury on the lesser offense. Cf. *Allison* v. *United States*, supra, 409 F.2d 451 ("[W]e perceive no possible prejudice to [the defendant] as a result of our disposition. . . . There is no indication that defense presentation would have been altered had the [greater offense] been dismissed at the close of the [g]overnment's case."); *United States* v. *Smith*, supra, 13 F.3d 383 ("[The defendant] has not offered the slightest suggestion of how the defense might have differed. Defense counsel already had a duty to explore all of [the defendant's] valid defenses in this case . . . .").

Of course, under the *Allison* test, if the defendant were able to demonstrate that he would have engaged in a different trial strategy in the event that the jury had been instructed on the lesser included offense, the state would not be entitled to imposition of a conviction of that lesser offense because it would be unfair to modify the judgment of conviction in that manner. Unless, however, the defendant can make such a showing, he should not be entitled to the windfall that the majority bestows on him. Because this test is fair to all interested parties—the defendant, the state, the victim and the public—it is the test that this court should adopt. Instead, the majority embraces a test that is

predicated on conjectural and irrelevant considerations and has never been employed by any other jurisdiction.

In the final analysis, the only reason for the majority's conclusion that modification of the judgment would be unfair to the defendant is to penalize the state for failing to request a charge on the lesser included offense. The majority reaches this conclusion despite the fact that the defendant suffered no prejudice as a result of that failure, the fact that the defendant could have requested such a charge himself and the fact that the jury necessarily found that the state had proven each element of the lesser included offense beyond a reasonable doubt. Under these circumstances, I can perceive of no legitimate justification for allowing the defendant to escape responsibility for his assault against Hazard. Indeed, the result obtained by the majority is no less bizarre than that which we eschewed in *Perkins*, namely, that the defendant escapes punishment for a crime notwithstanding the fact that the jury found him guilty of that crime after a fair trial. Such a result contravenes the fundamental purpose of our criminal justice system—to convict the guilty and acquit the innocent—as well as the fact-finding and ultimate truth seeking function of a trial. I therefore dissent.

[1] As noted by the majority, the test used for determining whether one crime is a lesser included offense of another crime is "whether it is not possible to commit the greater offense, in the manner described in the information . . . without having first committed the lesser . . . . This . . . test is satisfied if the lesser offense does not require any element which is not needed to commit the greater offense." (Citation omitted; internal quotation marks omitted.) *State* v. *Greco*, 216 Conn. 282, 292, 579 A.2d 84 (1990). There is no dispute that assault in the second degree in violation of § 53a-60 (a) (1) is a lesser included offense of assault in the first degree in violation of § 53a-59 (a) (1).

[2] Chief Justice Rogers wrote separately to align herself with the line of cases holding that, as a general rule, it is proper for the court to impose a conviction of a lesser included offense only when the jury has been instructed on that offense. *State* v. *Sanseverino*, supra, 291 Conn. 598–604. Chief Justice Rogers joined the majority opinion because she agreed that "under [the] unique circumstances [of that case] the state should have the option of . . . requesting a modification of the judgment to reflect the lesser included offense." Id., 604. By contrast, Justice Katz, who wrote separately on the issue because she felt "compelled to question the reluctance of [the majority] to embrace a universal rule consistent" with what she characterized as "well established lesser included offense jurisprudence"; *State* v. *Sanseverino*, supra, 291 Conn. 605; expressed the view articulated in a second line of cases that a conviction of a lesser included offense should be imposed whenever doing so would not be unduly prejudicial to the defendant. Id., 615–16.

[3] Only Justice Schaller dissented from the result of the majority opinion on this issue. Although acknowledging that the case "present[ed] a special set of circumstances"; *State* v. *Sanseverino*, supra, 291 Conn. 617; Justice Schaller would have adopted a hard and fast rule barring imposition of a conviction of a lesser included offense unless the jury had been instructed on that offense. Id., 617–20. Justice Schaller concluded that despite the "special . . . circumstances" presented by *Sanseverino*, because the jury had received no instruction on the offense of unlawful restraint in the second degree, it was not appropriate to modify the judgment to reflect a conviction of that offense.

[4] I note that the majority observes that the state has not challenged the applicability of our *Sanseverino* analysis to the present case. In fact, although the state argues that it is entitled to prevail even under that analysis, the state expressly advocates for adoption of the test first set forth in *Allison* v. *United States*, 409 F.2d 445, 451 (D.C. Cir. 1969). As discussed more fully

in part II of this dissenting opinion, I agree with the state that the *Allison* test is the methodology that this court should adopt.

[5] I note that the majority characterizes the circumstances of the present case as "unique" apparently to suggest that its decision in this case will not necessarily control the outcome of future cases. The majority does not, however, explain why this case is unique and I am unable to discern how the circumstances are even the least bit unusual, let alone unique. On the contrary, the circumstances of the present case typify the circumstances under which the issue ordinarily presents itself.

[6] In fact, the only truly unique aspect of *Sanseverino* was this court's unexpected interpretation of the kidnapping statute. See *State* v. *Sanseverino*, supra, 291 Conn. 598 (*Rogers*, *C. J.*, concurring) (explaining that she was able to join majority opinion only because of significant change in this court's construction of kidnapping statute after defendant's conviction but before resolution of his appeal).

[7] The final consideration identified by the court in *Sanseverino* was that on appeal, Sanseverino had not raised an objection to a modification of the judgment to reflect the lesser included offense. Of course, following today's decision, defendants in all future cases will raise a pro forma objection on appeal, thereby preventing the state from satisfying that so-called factor.

[8] The majority argues that *Allison* is distinguishable on its facts from the present case. Any such factual differences between this case and *Allison* are wholly immaterial because *Allison* is no less applicable to the circumstances presented here. Indeed, the Court of Appeals for the District of Columbia itself has applied the *Allison* test under circumstances identical to those of the present case; see, e.g., *United States* v. *Brisbane*, supra, 367 F.3d 914–15; and, as the foregoing citations reflect, so have courts in many other jurisdictions. Consequently, the majority's attempt to distinguish *Allison* is unavailing. Unfortunately, because the majority fails to address the *Allison* test on its merits, it also fails to explain why we should not adopt it.

The majority also observes that the court in *Allison* authorized the District Court to grant a new trial to the defendant in the event that that approach was in the best interest of justice. I fully agree that the trial court should have the discretion to order a new trial in lieu of modifying the judgment to reflect a conviction of the lesser included offense if for some reason that result is indicated.

[9] "Consistent with the overall truth-seeking function of a jury trial, the rationale underlying [the waiver] rule is that a reviewing court should not disturb a guilty verdict by reversing a judgment based on insufficient evidence without taking into account all of the evidence the jury considered in reaching that verdict, including proof adduced by the defense." *People* v. *Hines*, 97 N.Y.2d 56, 61, 762 N.E.2d 329, 736 N.Y.S.2d 643 (2001).

[10] In fact, the present case presents even stronger reasons than *Perkins* to reject the defendant's contention. In *Perkins*, we acknowledged that there were significant countervailing considerations that militated in favor of eliminating the waiver rule, including the dilemma that it potentially creates for defendants who might wish to testify in their own defense; see *State* v. *Perkins*, supra, 271 Conn. 243–45; and the fact the rule might otherwise bear upon the way in which a defendant conducts his defense at trial. Id., 233–34. In cases like the present one, the only persuasive reason not to impose a conviction of the lesser offense is prejudice to the defendant, but the standard I advocate bars imposing that conviction when the defendant can demonstrate such prejudice.

[11] Under this approach, if neither the state nor the defendant requests an instruction on the lesser included offense and, instead, adopt an "all or nothing" strategy, the state ultimately could obtain a modification of the judgment to reflect a conviction of the lesser offense, thereby eliminating the risk of its " 'go for broke' " strategy. In such circumstances, the fact that the state might obtain a conviction for the lesser offense notwithstanding its strategic decision to forgo a jury finding on that offense is outweighed by the benefit to the public that the defendant will be held to answer for his crime, by the fact that the defendant himself has a right to obtain an instruction on the lesser offense, and by the fact that the conviction of the lesser offense will not be imposed if the defendant would be prejudiced thereby. Cf. *Haynes* v. *State*, 273 S.W.3d 183, 194–97 (Tex. Crim. App. 2008) (Keller, P. J., dissenting) (explaining why modification of judgment of conviction to reflect uncharged lesser included offense should not be based on state's trial strategy of forgoing instruction on that offense).

[12] The defendant also presented the testimony of Donald Bland, who claimed that he was in his home with the defendant when the assault

took place.