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STATE OF CONNECTICUT *v.* CARLOS POLANCO
(SC 18771)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Harper, Js.*

Argued September 17, 2012—officially released April 2, 2013

Elizabeth M. Inkster, assigned counsel, and *Daniel M. Erwin*, assigned counsel, with whom, on the brief, was *Neal Cone*, senior assistant public defender, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Patricia M. Froehlich*, state's attorney, *Mark Stabile*, supervisory assistant state's attorney, and *Andrew J. Slitt*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. Presently in Connecticut, when a defendant is convicted of a greater offense and a lesser included offense in violation of the double jeopardy clause of the federal constitution,[1] the appropriate remedy is to merge the convictions and to vacate the sentence for the lesser offense. In accordance with that approach, the Appellate Court concluded that the trial court improperly had failed to merge the cumulative convictions of the defendant, Carlos Polanco, for possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b) and possession of narcotics with intent to sell in violation of General Statutes § 21a-277 (a), greater and lesser included offenses, respectively, and to sentence him on the conviction for the greater offense only. *State* v. *Polanco*, 126 Conn. App. 323, 336, 339, 11 A.3d 188 (2011). The defendant now appeals, upon our grant of certification, claiming that, although the Appellate Court's judgment was proper under *State* v. *Chicano*, 216 Conn. 699, 725, 584 A.2d 425 (1990), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), and its progeny, Connecticut's rubric for sentencing defendants convicted of greater and lesser included offenses fails to conform to the requirements of federal constitutional law in light of the United States Supreme Court's decision in *Rutledge* v. *United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996). We conclude that it is unnecessary to reach the defendant's constitutional claim, relying instead on the exercise of our inherent supervisory authority over the administration of justice to hold that, when a defendant has been convicted of greater and lesser included offenses, the trial court must vacate the conviction for the lesser offense rather than merging the convictions pursuant to *Chicano*. Accordingly, we reverse in part the judgment of the Appellate Court.

The Appellate Court opinion set forth the following undisputed facts and procedural history. As part of a statewide narcotics task force investigation conducted in the spring of 2008, police officers focused their attention on apartment 107 of 287 Main Street in Willimantic, where they suspected that narcotics were being trafficked. *State* v. *Polanco*, supra, 126 Conn. App. 325. Their investigatory efforts included the arranged purchase of cocaine at that location on three occasions. On the basis of their investigation, the police secured search warrants for the apartment and for the defendant's person. Pursuant to those warrants, which were executed on April 22, 2008, the officers conducted a search, first, of the defendant's person after stopping him in his vehicle, and, then, of apartment 107. The officers discovered $100 in cash on the defendant, but no narcotics. Id. The search of the apartment yielded cocaine, drug paraphernalia, and approximately $1500

in cash. Id., 326. The defendant was tried by a jury and found guilty of: (1) possession of a narcotic substance with intent to sell by a person who is not drug-dependent in violation of § 21a-278; (2) possession of a narcotic substance with intent to sell in violation of § 21a-277; and (3) possession of drug paraphernalia in violation of General Statutes § 21a-267. Id. The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a ten year term of imprisonment on the first count, five of those mandatory, with ten years of special parole, and a ten year term of imprisonment on the second count to be served concurrently with the first count. Id. The court also ordered an unconditional discharge on the third count, which is not at issue in this certified appeal.

The defendant subsequently appealed from the judgment to the Appellate Court on two grounds. He claimed that: (1) the state violated his due process rights under the Connecticut constitution due to its destruction or loss of potentially exculpatory evidence; and (2) his sentence violated the federal constitutional prohibition against double jeopardy due to the trial court's merger of his sentences rather than his convictions. Id., 325. Rejecting the first claim on its merits; id., 336; the Appellate Court thereafter concluded that the defendant was entitled to review of the second, unpreserved claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). *State* v. *Polanco*, supra, 126 Conn. App. 337. Because the defendant's convictions were for greater and lesser included offenses arising out of the same transaction, the court explained, he could not be punished for both without running afoul of the prohibition against double jeopardy. Id., 336, 338. To correct this defect, as directed by this court's case law, the Appellate Court applied the merger of convictions approach, which provides that "when a defendant has been sentenced for both [greater and lesser included offenses, the appropriate remedy] is to merge the conviction for the lesser included offense with the conviction for the greater offense and to vacate the sentence for the lesser included offense." (Internal quotation marks omitted.) Id., 338. Accordingly, the Appellate Court held that the defendant's § 21a-277 conviction must be merged with his § 21a-278 conviction and that the sentence for the former, lesser included offense must be vacated. Id., 339. Relying on this controlling precedent, the Appellate Court declined to consider the defendant's "alternate" argument—that it should vacate both the conviction and the sentence for the lesser offense. Id., 339 n.8. The defendant's certified appeal to this court followed, in which the sole issue is whether the Appellate Court properly ordered the trial court to merge the defendant's convictions for the greater and lesser included offenses and to vacate the sentence for the lesser included offense, pursuant to *State* v. *Chicano*, supra, 216 Conn. 699, rather than order the court to vacate

the conviction for the lesser offense.[2]

It is the defendant's position that *Rutledge* requires us to eschew the merger of convictions approach, and, instead, when a defendant is convicted of greater and lesser included offenses, to vacate the conviction for the lesser offense. The defendant contends that the existence of a conviction on a lesser offense, despite its merger with the conviction on the greater offense, is "inherently punitive as measured by collateral effects," a result the court in *Rutledge* deemed violative of the double jeopardy clause. Alternatively, the defendant posits that, as a jurisprudential matter, this court should reject the merger approach and resurrect the vacatur approach that was used in Connecticut prior to *Chicano*, which would bring Connecticut's law into conformity with *Rutledge* and the practice of the Circuit Courts of Appeals.

Conversely, it is the state's position that this court can and should adhere to the merger of convictions approach, which, the state argues, provides a constitutionally permissible alternative to the approach enunciated in *Rutledge*. In reliance on this premise, the state additionally contends that adoption of the vacatur approach would require this court to "depart from our well settled law defining vacated judgments" when there is no double jeopardy violation to justify such a departure, and that the doctrine of stare decisis compels adherence to *Chicano* and its progeny.

Without reaching the merits of the defendant's constitutional argument, we elect to exercise our supervisory authority to conclude that the vacatur approach shall replace the use of the merger of convictions approach when a defendant is convicted of greater and lesser included offenses.[3] We are led to this conclusion, because, first, the jurisprudential underpinnings to this court's approval of the merger approach have since been repudiated, and, second, the remedy in *Chicano* is now at odds with the remedy utilized almost uniformly within the Circuit Courts of Appeals. While we do not resolve the question of whether the merger approach survives as a constitutionally permissible alternative to *Rutledge*, we are not persuaded by the state's additional arguments, premised on that proposition, in favor of continued adherence to *Chicano*'s approach. Accordingly, the Appellate Court's judgment must be reversed insofar as it ordered the trial court to merge the defendant's convictions for violating §§ 21a-277 and 21a-278, and the case must be remanded with direction to vacate the defendant's § 21a-277 conviction.

For several years prior to *Chicano*, it was this court's policy, when "multiple punishments [were] imposed for the same offense . . . [to] set aside the judgment of conviction for one of the offenses, thereby vacating both the conviction and the sentence for that offense." *State* v. *Chicano*, supra, 216 Conn. 722; see *State* v.

John, 210 Conn. 652, 697, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *State* v. *Rawls*, 198 Conn. 111, 122, 502 A.2d 374 (1985); *State* v. *Amaral*, 179 Conn. 239, 245, 425 A.2d 1293 (1979); *State* v. *Goldson*, 178 Conn. 422, 427, 423 A.2d 114 (1979). In the midst of this period, the Second Circuit Court of Appeals, which had been applying the vacatur approach to greater and lesser included offenses, decided that merging or "combining" the convictions was the better approach. See *United States* v. *Aiello*, 771 F.2d 621, 632 (2d Cir. 1985); *United States* v. *Osorio Estrada*, 751 F.2d 128, 135 (2d Cir. 1984), modified on other grounds, 757 F.2d 27 (2d Cir.), cert. denied, 474 U.S. 830, 106 S. Ct. 97, 88 L. Ed. 2d 79 (1985). Because the Second Circuit's reasoning provided the rationale for this court's shift to the merger approach in *Chicano*, we begin with a discussion of the basis for those decisions.

In *United States* v. *Osorio Estrada*, supra, 751 F.2d 135, the Second Circuit noted that, in accordance with several other Courts of Appeals, "[t]he law in this Circuit is that a conviction on a lesser included offense may not stand as a separate conviction. . . . The rationale for vacating a conviction as well as the sentence is that a conviction alone—even without a sentence—may entail adverse 'collateral consequences.' " Some of the court's more recent decisions, however, had indicated that a conviction for a lesser included offense should be allowed to stand even though the sentence thereon is vacated, adopting the Third Circuit's reasoning "that if the conviction on the lesser offense were vacated, a defendant might avoid all punishment if an appellate court later reversed the single conviction on the compound offense but would have upheld the conviction on the lesser count." Id., 134, citing *United States* v. *Gomez*, 593 F.2d 210 (3d Cir.), cert. denied, 441 U.S. 948, 99 S. Ct. 2172, 60 L. Ed. 2d 1952 (1979). The Second Circuit concluded that, to balance these concerns, the proper remedy, when a defendant had been convicted of greater and lesser included offenses, was to combine the convictions and sentence the defendant on the greater offense only. *United States* v. *Osorio Estrada*, supra, 135. Under this approach, the court reasoned, "[t]he convictions on the lesser offenses would not exist as separate convictions so long as the . . . conviction [on the greater offense] remained in place. Thus, the risk of any collateral consequences that separate convictions may entail would be eliminated . . . ." Id. One member of the panel wrote separately, expressing the view that it would be more appropriate for the court to vacate the convictions on the lesser offenses, on the condition that those convictions would be reinstated in the event that the conviction on the greater offense were ever overturned, but nonetheless concurred in the judgment "in the hope that its import is that the convictions on the lesser-

included offenses have ceased, in light of the conviction on the greater offense, to be a basis upon which collateral consequences, such as more severe parole treatment, may follow." Id., 135 (Kearse, J., concurring).

Subsequent to *Osorio Estrada*, however, the United States Supreme Court held that "the only remedy consistent with the congressional intent [to punish the defendant only once for the cumulative convictions for possession and receipt of a firearm] is for the District Court . . . to exercise its discretion to vacate one of the underlying convictions." *Ball* v. *United States*, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). The court explained that, "[t]he second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction* . . . has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction." (Emphasis in original.) Id., 864–65.

In *United States* v. *Aiello*, supra, 771 F.2d 633, the Second Circuit acknowledged the emergent tension "between the Supreme Court's statement in *Ball* that the District Court must vacate one of the two convictions and [the Second Circuit's] approach in *Osorio Estrada* of combining the two convictions." Nevertheless, the court concluded that continued adherence to *Osorio Estrada*'s approach conformed to the requirements of *Ball*, because "[t]he Supreme Court's objective . . . to avoid the punitive consequences that might follow from having dual convictions on a defendant's record, is achieved by the procedure . . . of combining convictions to eliminate the risk of any collateral consequences that separate convictions may entail." (Internal quotation marks omitted.) Id. Furthermore, the court in *Aiello* concluded that merger was preferable to vacatur because, in accordance with the concern identified in *Osorio Estrada*, "should the defendant's conviction of the greater offense be reversed, an issue not before the Supreme Court in *Ball*, our procedure would resuscitate the lesser conviction and permit punishment for the lesser crime." Id., 634.

In *Chicano*, which involved a defendant's cumulative convictions for felony murder and manslaughter in the first degree—a single crime for double jeopardy purposes—this court considered the state's request for this court to abandon its established vacatur remedy in favor of the Second Circuit's merger approach. *State* v. *Chicano*, supra, 216 Conn. 721–22. Relying exclusively on the reasoning of *Osorio Estrada* and *Aiello*, this court

ultimately was persuaded that the merger of convictions approach should be adopted. Id., 725. The court agreed with the Second Circuit that this approach "adequately addresses the dual concerns [of *Osorio Estrada* and *Ball*, respectively] relating to a subsequent reversal of the remaining conviction and subjecting a defendant to the collateral consequences of multiple convictions." Id. Subsequently, the Appellate Court, and then this court, extended the merger remedy to cumulative convictions of greater and lesser included offenses. See *State* v. *Mullins*, 288 Conn. 345, 379, 952 A.2d 784 (2008); *State* v. *Jeffreys*, 78 Conn. App. 659, 683, 828 A.2d 659, cert. denied, 266 Conn. 913, 833 A.2d 465 (2003); *State* v. *Porter*, 76 Conn. App. 477, 486, 819 A.2d 909, cert. denied, 264 Conn. App. 910, 826 A.2d 181 (2003); *State* v. *Mincewicz*, 64 Conn. App. 687, 693, 781 A.2d 455, cert. denied, 258 Conn. 924, 783 A.2d 1028 (2001).

This discussion leads us to the United States Supreme Court's decision in *Rutledge* v. *United States*, supra, 517 U.S. 292, upon which the defendant's constitutional claim in the present case is premised. The issue in *Rutledge* was whether it was improper for the District Court to have sentenced the defendant to concurrent life sentences for dual convictions on the greater and lesser included offenses of a continuing criminal enterprise and conspiracy. Id., 294, 300. The Seventh Circuit Court of Appeals had held that the District Court's judgment accorded with double jeopardy principles because, even if the conspiracy charge was a lesser included offense of the criminal enterprise charge, "the cumulative punishment [did] not exceed the maximum under [the continuing criminal enterprise] act." (Internal quotation marks omitted.) Id., 296. The Supreme Court noted that "[t]he decision of the Seventh Circuit is at odds with the practice of other Circuits. Most federal courts that have confronted the question hold that only one judgment should be entered when a defendant is found guilty on both a [continuing criminal enterprise] count and a conspiracy count based on the same agreements. The Second and Third Circuits have adopted an intermediate position, allowing judgment to be entered on both counts but permitting only one sentence rather than the concurrent sentences allowed in the Seventh Circuit. We granted certiorari to resolve the conflict." Id., 296–97.

Relying principally on *Ball*, the Supreme Court concluded that the proper remedy was to vacate one of the convictions. Id., 307. In so doing, the court rejected the government's contention that even if conspiracy is a lesser included offense, the resulting presumption against multiple punishments would not invalidate either of the convictions because the second conviction may not amount to a punishment. Id., 301. The court observed that "the force of the [government's] argument [was] . . . limited by . . . *Ball*." Id. "Under *Ball*, the collateral consequences of a second conviction make

it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence." Id., 302. The court concluded that it need not address the government's argument that the petitioner never would be exposed to collateral consequences like those described in *Ball*, because he had received concurrent life sentences without the possibility of release on the convictions, in light of the fact that the second conviction carried with it, at the very least, a $50 assessment. Id.

Finally, the court rejected the government's contention "that Congress must have intended to allow multiple convictions because doing so would provide a 'backup' conviction, preventing a defendant who later successfully challenges his greater offense from escaping punishment altogether . . . ." Id., 305. The court observed that "there is no reason why this pair of greater and lesser offenses should present any novel problem beyond that posed by any other greater and lesser included offenses, for which the courts have already developed rules to avoid the perceived danger." Id. "[F]ederal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense. . . . There is no need for us now to consider the precise limits on the appellate courts' power to substitute a conviction on a lesser offense for an erroneous conviction of a greater offense. We need only note that the concern motivating the [g]overnment in asking us to endorse either the Seventh Circuit's practice of entering concurrent sentences on [continuing criminal enterprise] and conspiracy counts, or the Second Circuit's practice of entering concurrent judgments, is no different from the problem that arises whenever a defendant is tried for greater and lesser offenses in the same proceeding. In such instances, neither legislatures nor courts have found it necessary to impose multiple convictions, and we see no reason why Congress, faced with the same problem, would consider it necessary to deviate from the traditional rule." (Citations omitted.) Id., 306–307.

Since the Supreme Court decided *Rutledge*, this court has not revisited the appropriateness of *Chicano*'s remedy.[4] The issue now has been squarely presented to us, with the defendant in the present case asserting both constitutional arguments predicated on *Rutledge* and broader jurisprudential arguments in favor of returning to the vacatur approach. We conclude that it is appropriate to exercise our inherent supervisory authority over the administration of justice to terminate application of the merger of convictions approach and to require, instead, the vacatur approach under which the conviction for a lesser included offense must be vacated.[5]

Typically, "[w]e . . . invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy." *State* v. *Diaz*, 302 Conn. 93, 106, 25 A.3d 594 (2011). In the present case, however, we are not inclined to express an opinion on the constitutionality of the merger of convictions approach, specifically, whether after *Rutledge*, that approach remains a constitutionally permissible alternative to vacatur. We find *Rutledge* to be less than a model of clarity as to what extent its holding was constitutionally based rather than jurisprudentially based or a matter of statutory construction. Although it is indubitable that the court rejected as violative of the double jeopardy clause the Seventh Circuit's approach of convicting a defendant of both the greater and lesser included offenses whilst ordering concurrent sentences; see *Rutledge* v. *United States*, supra, 517 U.S. 301–302; and that the court declined the government's alternative request to adopt the Second Circuit's merger approach; id., 306–307; we find it less easy to discern the court's position on the constitutionality of the Second Circuit's approach in regard to the question of collateral consequences. It appears that the Second Circuit, too, has had some difficulty in interpreting the legal underpinnings to *Rutledge*. Compare *United States* v. *Polanco*, 145 F.3d 536, 541 (2d Cir. 1998) (pursuant to *Rutledge* "[a] conviction under both the conspiracy and the [continuing criminal enterprise] statutes is *unconstitutional* where the alleged [continuing criminal enterprise] is the same enterprise as the conspiracy" [emphasis added]) with *Underwood* v. *United States*, 166 F.3d 84, 87 n.2 (2d Cir. 1999) ("the statutory interpretation that *Rutledge* offers is *not constitutional*" [emphasis added]).[6] Therefore, we think it imprudent to enter into an analysis of that case, particularly when the exercise of our supervisory authority provides an appropriate alternative. See *State* v. *Rose*, 305 Conn. 594, 606–607, 46 A.3d 146 (2012) (This court observed that "on several previous occasions [we] have declined to address a defendant's constitutional claim precisely because we elected to exercise our supervisory authority. See, e.g., *State* v. *Padua*, 273 Conn. 138, 178–79, 869 A.2d 192 [2005]; *State* v. *Coleman*, 242 Conn. 523, 534, 700 A.2d 14 [1997]."). "[O]ur supervisory powers are invoked only in the rare circumstance where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . ." (Internal quotation marks omitted.) *Smith* v. *Andrews*, 289 Conn. 61, 79, 959 A.2d 597 (2008). In the present case, invocation of those powers is appropriate, because, first, the jurisprudential underpinnings to this court's approval of the merger approach in *Chicano* have since been repudiated, and, second, the remedy established in *Chicano* is now at odds with the remedy utilized almost uniformly by the Circuit Courts of Appeals.

In *Rutledge*, the Supreme Court expressly found unpersuasive the policy rationale underlying the Second Circuit's adoption of the merger of convictions approach; *Rutledge* v. *United States*, supra, 517 U.S. 306–307; the very rationale on which this court had relied in *Chicano*. Following *Rutledge*, the Second Circuit repudiated the merger approach that it previously had applied in *Osorio Estrada* and *Aiello*.[7] See *United States* v. *Rosario*, 111 F.3d 293, 300–301 (2d Cir. 1997). As in *Rutledge*, one of the defendants in *Rosario* was convicted of the greater and lesser included offenses of a continuing criminal enterprise and conspiracy. Id. Following the "prevailing practice" at the time, the District Court had entered a written judgment on both counts. Id., 301. On appeal, the Second Circuit vacated the defendant's conviction on the lesser offense, observing that, in *Rutledge*, "[the Supreme Court] specifically disapproved of the Second Circuit's practice of entering concurrent judgments . . . and held in that case that [o]ne of [the defendant's] convictions . . . is unauthorized punishment for a separate offense and must be vacated . . . ." (Citations omitted; internal quotation marks omitted.) Id.; accord *United States* v. *Miller*, 116 F.3d 641, 678 (2d Cir. 1997) ("the Supreme Court in *Rutledge* instructed that instead [of combining the conviction for the lesser included offense with the conviction for the greater], one of the convictions must be dismissed"), cert. denied, 524 U.S. 905, 118 S. Ct. 2063, 141 L. Ed. 2d 140 (1998).[8]

In addition to the Second Circuit, the other Circuit Courts of Appeals use the vacatur approach for cumulative convictions of greater and lesser included offenses. See *United States* v. *Ehle*, 640 F.3d 689, 699 (6th Cir. 2011); *United States* v. *Wayerski*, 624 F.3d 1342, 1351 (11th Cir. 2010); *United States* v. *Rea*, 621 F.3d 595, 601 (7th Cir. 2010); *United States* v. *Robertson*, 606 F.3d 943, 953 (8th Cir. 2010); *United States* v. *Cesare*, 581 F.3d 206, 209 (3d Cir. 2009); *United States* v. *Hutchinson*, 573 F.3d 1011, 1022 (10th Cir. 2009); *United States* v. *King*, 554 F.3d 177, 180–81 (1st Cir. 2009); *United States* v. *Schales*, 546 F.3d 965, 980–81 (9th Cir. 2008); *United States* v. *Marshall*, 332 F.3d 254, 263–64 (4th Cir. 2003); *United States* v. *Narviz-Guerra*, 148 F.3d 530, 534 (5th Cir. 1998); *United States* v. *Hoyle*, 122 F.3d 48, 49 n.1 (D.C. Cir. 1997).[9] With the Second Circuit no longer providing a jurisprudential foundation for our continued use of the merger approach, and finding no compelling reason to adhere to an approach that is not in conformity with the approach applied by the other Circuit Courts of Appeals, we conclude that it is an appropriate exercise of this court's supervisory authority to adopt a rule that when a defendant is convicted of greater and lesser included offenses, the trial court shall vacate the conviction for the lesser offense rather than merging it with the conviction for the greater offense.[10]

The state argues, however, that adoption of the vacatur approach would require this court to "depart from our well settled law defining vacated judgments" when there is no double jeopardy violation to justify such a departure,[11] and that the doctrine of stare decisis compels adherence to *Chicano* and its progeny. We address both arguments in tandem and reject them.

"We do not lightly overrule our existing precedent. This court repeatedly has acknowledged that because the doctrine of [s]tare decisis, although not an end in itself, serves the important function of preserving stability and certainty in the law . . . a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it." (Citation omitted; internal quotation marks omitted.) *State* v. *Lockhart*, 298 Conn. 537, 549–50, 4 A.3d 1176 (2010). We conclude, however, that the demanding standard for overruling prior precedent is satisfied here. See *State* v. *Guilbert*, 306 Conn. 218, 253 n.34, 49 A.3d 705 (2012). First, we note that rejecting the merger of convictions approach is not a complete departure from precedent. Rather, we simply are resurrecting the remedy this court used prior to *Chicano*. See *State* v. *John*, supra, 210 Conn. 697; *State* v. *Rawls*, supra, 198 Conn. 122; *State* v. *Amaral*, supra, 179 Conn. 245; *State* v. *Goldson*, supra, 178 Conn. 427. We cannot see how the use of that approach, which, for some time, existed harmoniously alongside the case law addressing vacated judgments, creates any sort of conflict within the body of criminal law. Furthermore, to the extent that use of the vacatur approach produces any discord between vacating a judgment, generally, and vacating a judgment for the conviction of a lesser included offense, specifically, we are persuaded that this putative cost is worth the benefit accrued by realigning our law with previously existing precedent and the current federal approach.

We additionally note that our overruling of *Chicano*'s remedy is consistent with another principle articulated by this court and reiterated since *Chicano* was decided, in *State* v. *Salgado*, 257 Conn. 394, 406, 778 A.2d 24 (2011), that " '[a] defendant can be found guilty either of the greater offense or the lesser offense, *but not both*.' *State* v. *Abdalaziz*, [248 Conn. 430, 435, 729 A.2d 725 (1999)]; see also *State* v. *Breton*, 235 Conn. 206, 215 n.9, 663 A.2d 1026 (1995); *State* v. *Bagley*, 35 Conn. App. 138, 150, 644 A.2d 386, cert. denied, 231 Conn. 913, 648 A.2d 157 (1994) ('a unanimous determination of guilty [on a greater offense] precludes the jury from proceeding to any lesser included offense')." (Emphasis added.) Accordingly, we are not persuaded by the state's jurisprudential arguments in favor of adhering to the merger approach.

Finally, the state urges this court, should we reject the merger of convictions approach, to hold expressly that the conviction for a lesser included offense, pre-

viously vacated as violative of the double jeopardy clause, may be reinstated if the defendant's conviction for the greater offense is subsequently reversed for reasons unrelated to the viability of the vacated conviction. The defendant does not argue that reinstatement would be improper and we cannot see how this procedure, which many other courts have sanctioned, would not be appropriate in our courts, too. See *Rutledge* v. *United States*, supra, 517 U.S. 305–306; cf. *United States* v. *Dhinsa*, 243 F.3d 635, 674 (2d Cir.) ("a reviewing court may vacate the conviction and sentence for the greater offense and enter a judgment of conviction on the lesser offense [or, in the alternative, remand the matter to the trial court with instructions to enter a judgment of conviction on the lesser offense] '[w]hen the evidence is insufficient to support the greater offense, but sufficient to support a conviction on the lesser-included offense' "), cert. denied, 534 U.S. 897, 122 S. Ct. 219, 151 L. Ed. 2d 156 (2001). Indeed, it is already a well established practice in our appellate courts to direct the trial court to render a judgment of conviction on a lesser included offense on which the jury did not even return a verdict, when the conviction for the greater offense is reversed for reasons that do not touch the elements of the lesser offense.[12] See *State* v. *Greene*, 274 Conn. 134, 160, 874 A.2d 750 (2005) ("[t]his court 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"), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006). Therefore, on this matter, we agree with the state and conclude that a defendant's conviction for a lesser included offense that was previously vacated as violative of double jeopardy may be reinstated if his conviction for the greater offense subsequently is reversed for reasons not related to the viability of the vacated conviction.

The judgment of the Appellate Court is reversed in part and the case is remanded to that court with direction to reverse in part the judgment of the trial court and to remand the case to that court with direction to vacate the defendant's conviction under § 21a-277; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] "The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 315, 25 A.3d 648 (2011).

[2] We granted the defendant's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the trial court correctly merged the lesser included offense into the sentence on the greater offense, pursuant to *State* v. *Chicano*, [supra, 216 Conn. 699],

rather than dismiss the conviction on the lesser offense?" *State* v. *Polanco*, 300 Conn. 933, 17 A.3d 69 (2011). It is now apparent, however, that this formulation misstates the judgments of both the trial court and the Appellate Court. We therefore have modified the certified question to more accurately reflect the issue presented. See *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 111 n.2, 49 A.3d 951 (2012) (modifying certified question).

[3] The present case deals solely with the merger of convictions for greater and lesser included offenses. As we explain later in this opinion, this court adopted the merger approach in another double jeopardy context—that is, a defendant's cumulative convictions for two crimes (felony murder and manslaughter in the first degree) that punish the same conduct (homicide) and arise out of the same act or transaction—but recognized that the same analytical framework applied in both contexts. See *State* v. *Chicano*, supra, 216 Conn. 712 ("[a]lthough felony murder and manslaughter in the first degree do not constitute greater and lesser included offenses, the relevant factors bearing upon the decision of which conviction to negate when two convictions cannot both stand are the same regardless of whether one of the offenses is a lesser included offense of the other"). While we are aware of no reason why our holding, of logical necessity, would not apply with equal force to other scenarios in which cumulative convictions violate the double jeopardy clause, we limit our discussion to the specific context that arises in the present case and as briefed by the parties.

[4] We note that our Appellate Court has had occasion to reconsider *Chicano* with inconsistent results. See *State* v. *Lee*, 138 Conn. App. 420, 447–48, 52 A.3d 736 (2012) (applying merger approach pursuant to *Chicano*); *State* v. *Johnson*, 137 Conn. App. 733, 756, 49 A.3d 1046 (2012) (applying vacatur approach pursuant to *Rutledge*).

[5] We note that it is difficult to know whether collateral consequences would necessarily result from use of the merger approach. Still, although we do not rest our decision on constitutional grounds, we think it wise to adhere to an approach that the federal courts seem to conclude is *less* likely to give rise to collateral consequences, which are oftentimes "legion"; *Barlow* v. *Lopes*, 201 Conn. 103, 112, 513 A.2d 132 (1986); and may produce devastating results for a defendant. See, e.g., *State* v. *Hall*, 303 Conn. 527, 534–35, 35 A.3d 237 (2012) (immigration consequences as collateral consequence); *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 170, 12 A.3d 948 (2011) (collateral consequence of felony conviction flows from second conviction of operating motor vehicle while under influence of intoxicating liquor or drugs within ten year period); *Richardson* v. *Commissioner of Correction*, 298 Conn. 690, 692, 698, 6 A.3d 52 (2010) (pursuant to sentence enhancement on basis of habeas petitioner's two prior state drug convictions, petitioner subsequently convicted of federal drug offense and sentenced to mandatory term of life imprisonment, which amounts to collateral consequence of expired state conviction—but collateral consequence not sufficient to render petitioner in "custody" for habeas purposes); *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 539–40, 911 A.2d 712 (2006) (deportation as collateral consequence); *State* v. *John*, supra, 210 Conn. 694 (describing risk of potential employers "considering [the] defendant's record in the future . . . [and misapprehending] the two convictions [for felony murder and manslaughter in the first degree] as relating to separate criminal activities" as collateral consequence [internal quotation marks omitted]).

[6] Part of this confusion may arise from the very nature of double jeopardy analysis. "Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. . . . [T]he role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. . . . The issue, though essentially constitutional, becomes one of statutory construction." (Citations omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 302 Conn. 287, 315–16, 25 A.3d 648 (2011).

[7] We note that, although the Second Circuit unequivocally has interpreted *Rutledge* as "explicitly [rejecting the Second Circuit's former] practice of combining sentences for the two convictions"; *Underwood* v. *United States*, supra, 166 F.3d 86; that court also has held that an offender seeking habeas relief for cumulative convictions imposed prior to *Rutledge* is not entitled to "relief on collateral review for an error that caused no prejudice" (i.e., no additional period of incarceration). Id., 87.

[8] The Second Circuit also has applied the vacatur approach to greater and lesser included offenses beyond the scheme at issue in *Rutledge*. See *United*

States v. *Gore*, 154 F.3d 34, 43–44, 47 (2d Cir. 1998) (concluding that "the conviction and sentencing of an individual for both distribution [of a controlled substance] and possession [of a controlled substance] with intent to distribute arising from the same transaction with no additional evidence of a separate drug quantity violates double jeopardy principles," and that appropriate remedy is to vacate second conviction).

[9] We note, however, that a few Circuit Courts have applied the merger approach in certain cases; see *United States* v. *Tann*, 577 F.3d 533, 538, 543 (3d Cir. 2009); *United States* v. *Parker*, 508 F.3d 434, 436, 442 (7th Cir. 2007); *United States* v. *Shorter*, 328 F.3d 167, 172–73 (4th Cir. 2003); while those same courts, in other cases, have utilized the vacatur approach. See *United States* v. *Rea*, supra, 621 F.3d 601; *United States* v. *Cesare*, supra, 581 F.3d 209; *United States* v. *Marshall*, supra, 332 F.3d 263–64. No explanation for this disparate treatment was provided. We can only speculate that, because *Tann*, *Parker*, and *Shorter* involved multiple convictions for violation of the same statute, thereby giving rise to the possibility that the record for the merged convictions would reflect a conviction for violation of a *single* statute, rather than merged convictions for violation of *separate* statutes, those courts have concluded that this result would not give rise to the collateral consequence concerns articulated in *Rutledge*.

[10] We note that at oral argument in this court, there was some question as to how a conviction for a lesser offense, which has been merged with a conviction on the greater offense, appears on a defendant's criminal record. On the basis of the state's representations, it appears that there has been some inconsistency among our judicial districts on how courts memorialize the conviction for the lesser offense. Still, it is clear that the conviction appears, in at least some capacity and in some instances, on the criminal record. To the extent that other defendants seek to have the rule enunciated in this opinion apply to their merged convictions, they may do so simply by requesting the administrative relief ordered in the present case. In the event of such a request, the responsible official for the judicial district involved will comply with the request and modify the subject record accordingly.

[11] Specifically, the state contends that "*Chicano*'s remedy harmonizes . . . [the] case law because it protects a defendant from multiple punishments, as required by our double jeopardy jurisprudence, without having to alter our case law defining vacated judgments," which "instructs that a vacated judicial determination results in a litigant being placed in the same position that [the litigant] occupied prior to that determination having been made." It appears that the state is concerned that, if we were to apply this definition within the rubric of the vacatur approach, vacating a defendant's conviction for a lesser included offense would amount to a reversion of his or her status to presumptively innocent, a result that would be wholly inconsistent with the verdict of guilty actually rendered.

[12] We note that it remains an open question, under *State* v. *Sanseverino*, 291 Conn. 574, 593–96, 969 A.2d 710 (2009), whether this practice is appropriate in the absence of a jury instruction on that offense or exceptional circumstances.