LAVERY, J., dissenting. Although I agree with the majority that the trial court properly denied the defendant's motion to suppress, I respectfully dissent from the majority's conclusion that the defendant did not receive multiple punishments for the same offense.

The defendant was charged with the following offenses which are relevant to this dissent. In count one, he was charged with possession of narcotics (cocaine) in violation of General Statutes § 21a-279 (a). In count two, he was charged with possession of narcotics (heroin) in violation of § 21a-279 (a). In count three, he was charged with possession of narcotics (heroin) with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b).[1] The jury returned a verdict of guilty on counts one and two. The jury acquitted the defendant on count three, but entered a guilty finding on the lesser included offense of possession of narcotics (heroin) with intent to sell in violation of § 21a-277 (a).

On count one, the defendant received a four year sentence. The court merged count two with count three, and on count three, the defendant received a twelve year sentence to run concurrently with the sentence

on count one. I would hold, pursuant to *State* v. *Rawls*, 198 Conn. 111, 502 A.2d 374 (1985), that counts one and two would merge, and since possession of narcotics is a lesser offense included within count three (possession with intent to sell), there should be only one sentence. I would therefore vacate the four year concurrent sentence on count one.

"In accordance with *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), double jeopardy claims challenging the constitutional validity of convictions pursuant to two distinct statutory provisions are traditionally analyzed by inquiring whether each provision requires proof of a fact of which the other does not require proof. . . . We prefer a different form of analysis in the circumstances of this case, in which only one statutory provision is at issue.

"The proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute. . . . *State* v. *Freeney*, 228 Conn. 582, 587, 637 A.2d 1088 (1994). The issue, though essentially constitutional, becomes one of statutory construction." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Garvin*, 242 Conn. 296, 304, 699 A.2d 921 (1997).

I will first consider whether the two charges of possession of narcotics, one of which alleged possession of heroin, the other of which alleged possession of cocaine, both should have been merged into one count of possession of narcotics. As previously noted, this issue is governed by *State* v. *Rawls*, supra, 198 Conn. 111. The majority's summary of *Rawls* is an accurate one, and I need not resummarize its facts and holding here. In short, *Rawls* concluded that the defendant's conviction of two counts of possession of narcotics for the simultaneous possession of heroin and cocaine punished him twice for the same offense, thus violating the double jeopardy provision of the United States constitution. Id., 122. Our Supreme Court in *State* v. *Chicano*, 216 Conn. 699, 706, 584 A.2d 425 (1990), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), later sharpened *Rawls*' focus and concluded that in such a situation in which *Rawls* applies, only the sentence is to be vacated and not the conviction. Id., 724–25.

Similar to *Rawls*, the defendant here was convicted of two counts of possession of narcotics for the simultaneous possession of heroin and cocaine. Section 21-279 (a) prohibits the possession of narcotic substances. Cocaine and heroin are substances that are covered under the "narcotic substance" umbrella. General Statutes § 21a-240 (30). Under § 21-279 (a), one criminal act, possession of narcotics, embraces multiple types of specific drugs, and "[m]erely because one element

of a single criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count.'' (Internal quotation marks omitted.) *State* v. *Rawls*, supra, 198 Conn. 120. ''Unless a clear intention to fix separate penalties for each narcotic substance involved is expressed, the issue should be resolved in favor of lenity and against turning a single transaction into multiple offenses.'' Id., 122. I see no clear intention from the legislature to demarcate possession of cocaine and heroin, both of which are ''narcotic substances'' pursuant to § 21a-240 (30), as separate offenses. Accordingly, the conviction for possession of narcotics (cocaine) and the conviction for possession of narcotics (heroin) should have been merged as one count of possession of narcotics. Furthermore, since possession of narcotics in violation of § 21a-279 (a) is a lesser offense included within the offense of possession of narcotics with intent to sell in violation of § 21a-277 (a); see *State* v. *Clark*, 56 Conn. App. 108, 109 n.2, 741 A.2d 331 (1999); the possession of narcotics count properly merges into the count alleging possession of narcotics with intent to sell.

This case is distinguishable from *State* v. *Hill*, 237 Conn. 81, 675 A.2d 866 (1996), which contemplated a scenario different from the case here. In *Hill*, the defendant challenged on double jeopardy grounds his conviction of different offenses *under different statutes*, which arose out of the same transaction. Id., 98. As previously noted, this scenario requires an entirely different analysis focusing on whether each statutory provision requires proof of a fact that the other does not. Id., 100.

The defendant here was originally charged with possession of narcotics (heroin) with the intent to sell in violation of § 21a-278 (b), similar to the charge issued in *Hill*. Unlike the situation in *Hill*, however, the defendant in this case was convicted of possession of narcotics (heroin) with intent to sell in violation of § 21a-277 (a), and counts one and two are lesser offenses included within that charge. Accordingly, *Hill* and its analysis does not apply.[2]

I therefore conclude that the defendant has been sentenced twice for the same crime in violation of the double jeopardy clause of the United States constitution. I would vacate the four year sentence given as a result of the conviction on count one because that conviction should merge with the conviction on count two, constitute a lesser offense included within count three and become one sentence arising out of the same transaction, that of twelve years.

For the foregoing reasons, I respectfully dissent.

[1] In count four, the defendant was charged with and convicted of posses-

sion of narcotics (heroin) with intent to sell within 1500 feet of a school in violation of General Statutes § 21a-278a (b). The defendant was sentenced on that count to three years, consecutive to all of the other counts. That count is not relevant to the issues here.

[2] The *Hill* court concluded that it had no occasion to reconsider *Rawls* because it discussed a different analysis. "In *Rawls*, we concluded that multiple convictions were barred under § 21a-279 (a) because 'neither the language of [§ 21a-279 (a)] nor its legislative history indicates an intention to authorize multiple punishment for the simultaneous possession of more than one narcotic.' *State* v. *Rawls*, supra, [198 Conn.] 121. We have no occasion to reconsider our determination in *Rawls* in this case." *State* v. *Hill*, supra, 237 Conn. 102–103 n.27.