BISHOP, J., concurring in part and concurring in the judgment. I believe that the evidence at trial was sufficient to convict the defendant, Akov Ortiz, of tampering with a witness in violation of General Statutes § 53a-151 (a), not for the reasons stated by the majority, but because the trial evidence permitted the jury reasonably to infer, from the defendant's threatening behavior toward the victim, that he intended to prevent the victim from testifying at trial. I write separately because I believe that by adopting the state's argument in this matter, the majority contributes to broadening the sweep of the tampering statute beyond its clear legislative bounds.

At the outset, I acknowledge that the language of *State* v. *Pommer*, 110 Conn. App. 608, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008), lends support to the majority's view. To the extent that the majority's holding relies on *Pommer*, I respectfully suggest that *Pommer*'s reasoning warrants further consideration. Although *Pommer*, on its face, appears to direct the outcome of this appeal, I do not believe that the *Pommer* court specifically analyzed the defendant's sufficiency claims relating to the statutory terms "witness" and "testimony." In *Pommer*, as in this case, the factual predicate for the tampering charge was an alleged threat by the defendant, intended to keep a witness from talking to the police regarding the defendant's criminal activity. On appeal, the defendant in *Pommer* claimed that, to be sufficient, the tampering evidence had to relate to his interference with the witness' testimony, not to discussions with the police, and that the required intent had to be to prevent a witness from testifying at trial.[1] The defendant claimed, as well, that there was no evidence that when the alleged inducement was made, he believed that an official proceeding was pending or about to be instituted. *State* v. *Pommer*, supra, 612. The *Pommer* court characterized the defendant's claims as follows: "The defendant argues in effect that a court case actually had to be pending and that the statute's reference to testimony refers necessarily only to testimony under oath at a trial or other official proceeding and that importuning a witness to withhold statements to police prior to trial is not within the prohibition of the statute." Id., 615–16. Although acknowledging that the defendant was claiming both that the evidence was insufficient to demonstrate that he knew an official proceeding was pending or about to be instituted and that tampering had to relate to a person's testimony at such a proceeding, the court concentrated its analysis on the meaning of the terms "an official proceeding is pending" and "about to be instituted." Id., 613. As to the defendant's claim that the intent required under the tampering statute must

be to prevent a witness from testifying at trial and that the intent to prevent a witness from speaking to the police is not sufficient, the court responded: "We reject the contention that discouraging the witness from speaking to the police could not suffice when there was evidence that the defendant believed an official proceeding was imminent." Id., 618. The *Pommer* court concluded: "[I]t is enough under the tampering with a witness statute to satisfy the required belief that an official proceeding is 'about to be instituted' and is therefore imminent if a defendant, knowing he has been implicated as a participant in a crime, threatens a likely witness to that crime, to withhold evidence from the police, who, as the [court in *State* v. *Foreshaw*, 214 Conn. 540, 572 A.2d 1006 (1990)] noted, play a crucial role in the commencement of criminal prosecutions." *State* v. *Pommer*, supra, 618. Without further citation or analysis, the *Pommer* court held that the tampering with a witness statute proscribes tampering with a police investigation.

I have concerns with the *Pommer* court's explicit reliance on *Foreshaw*, as I believe *Foreshaw* must be read in the context of the evidence tampering statute; General Statutes § 53a-155; which, although akin to the witness tampering statute, is not identical to it in the behavior that it proscribes.[2] Although it fairly can be argued that the conduct of a person in destroying or secreting evidence to keep it from police discovery during an investigation invariably compels a necessary inference that the actor intends, as well, for the evidence to be unavailable in any proceeding likely to ensue from the police investigation, a similar inference is not necessarily compelled from the conduct of an actor who asks another not to talk with the police during an investigation. In the latter case, whether asking a person not to talk with the police during an investigation permits a reasonable inference that, by such conduct, the actor has also attempted to influence that person's testimony in an official proceeding likely to ensue will vary depending on the facts and circumstances that pertain. Certainly, one cannot reasonably conclude as a matter of law that such an inference is invariably compelled.

Additionally, in resolving the defendant's claims on appeal, the *Pommer* court did not assess the meaning of the terms "witness" and "withhold testimony"; nor did the court confront the linguistic differences between Connecticut's witness tampering statute and the counterpart statute in the Model Penal Code.

Aside from *Pommer*'s likely misapplication of the language of *Foreshaw* and the majority's reliance on it, the plain language of the witness tampering statute belies the state's claim and the majority's affirmance that the statute proscribes tampering with a police investigation. In this regard, it is useful to compare and

contrast the language of Connecticut's witness tampering statute with its counterpart in the Model Penal Code. It has been often said that Connecticut's Penal Code, adopted in 1969, was based, in large part, on the Model Penal Code proposed by the American Law Institute and, accordingly, we look to the Model Penal Code and cases from other jurisdictions that have adopted the Model Penal Code for guidance in understanding like language of the Connecticut Penal Code. See *State* v. *Miranda*, 274 Conn. 727, 761–62, 878 A.2d 1118 (2005); see also *State* v. *Courchesne*, 296 Conn. 622, 671–72, 998 A.2d 1 (2010). Such an approach has particular value when the language of the statute under scrutiny tracks a parallel provision of the Model Penal Code. It is also instructive when the language of a state statute departs in a significant way from the language of a similarly named provision in the Model Penal Code. Such is the case in this instance.

The similarly named provision in the Model Penal Code, § 241.6, is captioned, "Tampering With Witnesses and Informants; Retaliation against Them." In relevant part, § 241.6 states as follows: "(1) Tampering. A person commits an offense if, believing that an official proceeding *or investigation* is pending or about to be instituted, he attempts to induce or otherwise cause a witness *or informant* to: (a) testify *or inform* falsely; or (b) withhold any testimony, *information*, document or thing . . . ." (Emphasis added.) Model Penal Code § 241.6 (1980). As can be readily seen, this language of the Model Penal Code differs from Connecticut's similarly named statute in two fundamental aspects. First, the Model Penal Code provision expressly criminalizes an attempt to induce a person not to cooperate with an investigation while Connecticut's provision contains no such provision. Additionally, the Model Penal Code provision makes it a crime to induce either a witness or an informant, while the Connecticut statute addresses only inducements to witnesses. The reach of the Model Penal Code's tampering section, therefore, is broader than Connecticut's tampering statute. In sum, our statute, unlike the similar Model Penal Code provision, proscribes only inducements to witnesses in their roles as witnesses not to testify in pending or prospective official proceedings, while the Model Penal Code section proscribes behaviors directed toward witnesses and informants and expressly relates to investigations as well as to official proceedings.

Although the state and the majority have effectively conflated the terms "witness" with "informant" and an "official proceeding" with an "investigation," the drafters of the Model Penal Code were well aware of the difference in scope created by the inclusion or omission of such terms. In their comment to § 241.6, the drafters noted that some states' tampering statutes proscribe tampering with informants as well as with witnesses while others focus only on witnesses. Model Penal

Code, supra, § 241.6, comment 1, p. 165. By its plain language, our tampering statute falls into the latter category. And, lest there be any doubt regarding the plain meaning of the term "witness" as it applies in the criminal justice context, the term has been given a statutory definition. General Statutes § 53a-146 (6) defines a "witness" as "any person summoned, or who may be summoned, to give testimony in an official proceeding." Additionally, the term "official proceeding" has a statutory definition. An official proceeding is "any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1). Therefore, a person who is asked to cooperate with a police investigation is not, for purposes of the investigation, a witness because an investigation is not an official proceeding.

In their inclusion of the term "investigations" in the proscriptions of the model tampering statute, the drafters of the Model Penal Code were mindful, as well, of the difference between an official proceeding and an investigation. On this point, the commentary states: "The phrase 'official proceeding' is defined in Section 240.0 (4) to mean 'a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceeding'. Section 241.0 (1) applies this definition to the tampering offense. Beyond dealing with corruption of witnesses in official proceedings, a secondary purpose of this provision is to prohibit inducing an informant to inform falsely or to withhold information. The usual context of this concern will be criminal investigations by law enforcement authorities. The word 'investigation,' however, is not strictly limited to police investigations but covers any kind of official investigation by a public servant." Model Penal Code, supra, § 241.6, comment 2, p. 167. The commentary continues: "Although neither 'witness' nor 'informant' is defined in the Model Code, the meaning of these terms is an important determinant of the reach of the tampering offense. Jurisdictions that condemn attempts to influence a 'witness' have found that word a rich source of confusion. Is 'witness' limited to a person under subpoena, or does it also cover one who will be subpoenaed or who may be called to testify? As it is used in Section 241.6, the intent of the word 'witness' does not derive from nice inquiries into the status of the person involved. Rather, the term identifies the function that the defendant seeks to affect. Thus, this subsection condemns attempts to induce or otherwise cause a person to engage in the specified conduct while acting in

his capacity as a witness." Id.

Applying the logic of the commentary concerning the term "witness," one may be guilty of attempting to induce a witness only as it applies to that person's capacity as a witness. And, although an informant may also later become a witness in an official proceeding, and one may be guilty of attempting to induce that person to testify in a certain way in a future official proceeding, one should not be found guilty of witness tampering if the inducement relates only to the informant's relationship to a police investigation. In sum, unlike Connecticut's witness tampering statute, the sweep of the Model Penal Code section on tampering to include informants as well as witnesses and investigations as well as official proceedings, renders criminal the act of inducing an informant not to cooperate with the police in an investigation without regard to whether the inducement relates, as well, to an official proceeding. That meaningful difference in statutory scope was apparently missed by this court in *Pommer* and has now been embraced by the majority in the case at hand.

The distinction between discouraging a person from talking with the police and inducing a witness not to testify at an official proceeding was recognized by the Oregon Supreme Court in *State* v. *Bailey*, 346 Or. 551, 565, 213 P.3d 1240 (2009). Oregon's tampering statute has parallels to Connecticut's. It provides that a person is guilty of witness tampering if: "(a) The person knowingly induces or attempts to induce a witness or a person the person believes may be called as a witness in any official proceeding to offer false testimony or unlawfully withhold any testimony; or (b) The person knowingly induces or attempts to induce a witness to be absent from any official proceeding to which the person has been legally summoned." Or. Rev. Stat. § 162.285 (1). In *Bailey*, the defendant had been convicted of tampering with a witness on the basis of evidence that he had made threats to his daughter after she had told him of her intention to report to the police that he was in possession of certain stolen articles. On appeal, the Court of Appeals dispensed with the defendant's claim that, in order to be found guilty under the statute, a proceeding had to be pending at the time of the threat or inducement in the same manner as was dispensed with by the *Pommer* court. As to the defendant's claim that threatening his daughter to induce her not to talk with the police was insufficient proof of an inducement not to testify at an official proceeding, the Supreme Court noted the sequence of inferences that a jury would have to make in order to find the defendant guilty of tampering: that when he threatened her not to go to the police, he did not want her to inform the police regarding the stolen articles. The court found this to be a reasonable inference. Next, the court observed, the jury would have to infer that, if the daughter went to the police, an investigation would

likely ensue. This, too, the court found to be a reasonable inference. Next, the court found, the jury would have to infer that, at the time of his threats, the defendant believed that his daughter likely would be called as a witness in a trial. This inference, as well, the court found the jury could reasonably draw from the evidence. Finally, the court noted, that the jury would have to infer that the threats made by the defendant were intended to induce his daughter not to testify at trial. This last inference, the Oregon Supreme Court found, was too attenuated. Thus, the court concluded, evidence that the defendant threatened his daughter to prevent her from calling the police was, itself, insufficient to prove that the defendant intended, by such an inducement, to keep her from testifying at a trial likely to ensue. *State* v. *Bailey*, supra, 567–68. The court concluded: "We do not suggest that, on other facts and in a different context, a threat made to someone advising her not to report criminal conduct to the police could not be found by a jury to have been made in a knowing attempt also to induce the threatened person to withhold testimony in a future criminal trial. We hold only that, on these facts, that inference could not reasonably be drawn." Id. Thus, Oregon's Supreme Court, in confronting language parallel to our tampering statute, has held that, for criminal liability, the evidence of tampering must support an inference that the actor intended for the witness not to testify and that threatening one not to go to the police is not enough, by itself, to span the evidentiary gap between talking with the police and testifying at an official proceeding.

Similarly, I believe that, in order to be found guilty under Connecticut's witness tampering statute, the evidence, and reasonable inferences to be drawn from it, must support a finding that a defendant sought to prevent a witness from testifying.[3] As in *Bailey*, and notwithstanding the broad language of *Pommer*, not every circumstance in which a defendant attempts to induce a person not to talk with the police will support such a conviction. Rather, the state should be required to prove, either by direct or circumstantial evidence, that by inducing a person not to talk with the police a defendant has also sought to induce that person not to be a witness in an official proceeding. Perhaps buoyed by the breadth of *Pommer*'s language, the state believes that, in order to convict a defendant of witness tampering, it need not make the connection between not cooperating in a police investigation and not testifying at an official proceeding.

In making its argument, the state equates a police investigation with an official proceeding. Doing so, the state ignores the plain language of the statute. And as a result of the majority's acceptance of the state's argument, a person who simply asks another person not to talk with the police during an investigation when the actor knows an official proceeding is going to be

instituted may now be found guilty of tampering with a witness without regard to whether the actor further intends for the witness not to testify at trial. In reaching its conclusion, relying solely on *Pommer*, which, in turn, relied solely on *Foreshaw*, the majority has acceded in *Pommer*'s expansion of the scope of Connecticut's witness tampering statute beyond its legislative bounds.

Notwithstanding my concerns with *Pommer*, I believe that, in this case, the jury reasonably could have determined, from the evidence and allowable inferences, that the defendant believed that a proceeding was "about to be instituted" and that the jury could reasonably have inferred in this instance that the defendant's inducement to the witness not to talk with the police was, as well, an attempt to induce her not to testify at trial—the "official proceeding" that would follow his arrest. The jury could reasonably have come to this conclusion based on the court's recitation of the statute's proscriptions as well as the court's more general charge on circumstantial evidence and, in particular, the right of the jury to draw reasonable inferences from proven facts. Because, in this case, I believe that such an inference could reasonably be drawn from the evidence, I agree with the result of this appeal. I believe, however, that, unlike the evidence tampering situation, such an inference is neither mandatory nor invariably appropriate in every circumstance, and that if it should be criminal behavior for a person who believes he is likely to be arrested to ask a person, without threat or coercion, not to participate in a police investigation, such behavior should be criminalized by statute and not by ignoring the plain limits of the statute's reach. Accordingly, I respectfully concur.

[1] It is noteworthy that our Supreme Court, in *State* v. *Cavallo*, 200 Conn. 664, 513 A.2d 646 (1986), held that the tampering statute is a specific intent statute that requires proof that the defendant specifically intended to affect the testimony of a witness at an official proceeding. In *Cavallo*, the defendant police officer had been dismissed for entertaining and giving liquor to an underage female in his police cruiser. Following his discharge, the defendant told the woman that he was going to seek arbitration, and that, if investigators questioned her, she should tell them that she had never been in his police cruiser. Thereafter, when police questioned the woman, she denied ever having been in the cruiser. Later, the defendant asked that she continue to remain silent about their relationship. Once the defendant commenced arbitration proceedings, however, the woman gave police a full account of her visits with the defendant in his police cruiser, and she also informed them of the defendant's attempts to persuade her to deny these activities. On appeal, the *Cavallo* court held that a defendant is guilty of tampering with a witness "only if he intends that his conduct directly cause[d] a particular witness to testify falsely or to refrain from testifying at all." Id., 672. The court concluded that the evidence was adequate to convince a reasonable fact finder that, "at the time of his attempts to so induce the woman, the defendant had known that an arbitration proceeding would soon be pending and that, during the hearing, the woman would probably be called to testify about her meetings with the defendant in the cruiser. From this evidence, the jury could reasonably have inferred that the defendant intended to induce the woman to testify falsely." Id., 673–74. The holding of *Cavallo* is entirely consistent with my view of the scope of the witness tampering statute. It does not appear, however, to be in harmony with this court's later opinion in *Pommer*.

[2] In *State* v. *Foreshaw*, supra, 214 Conn. 540, the defendant had been convicted of murder, carrying a pistol without a permit, and tampering with

physical evidence in violation of § 53a-155 (a) (1). The evidence tampering charge was based on the state's claim that, after the defendant had shot the victim and fled by motor vehicle, she threw the murder weapon out of her motor vehicle so that the police would not find it. There, the court properly instructed the jury regarding the elements of the offense of tampering with physical evidence, stating: "If you find that the State has proved beyond a reasonable doubt that the defendant did conceal this gun . . . with the purpose of impairing its availability in this trial, or an official proceeding which would be taking place at some later time—if you find that beyond a reasonable doubt, then you can find the defendant guilty of tampering with physical evidence." (Internal quotation marks omitted.) Id., 547–48. On appeal, the defendant claimed that the tampering evidence was insufficient because the trial evidence demonstrated that, at the time she discarded the murder weapon, she had not yet had any contact with law enforcement officers or the judicial system, and, therefore, she could not have believed an official proceeding was about to be instituted. Her instructional and sufficiency claims were interrelated. She argued that the language of the statute, "about to be instituted," connoted temporal proximity between the alleged act and an official proceeding and not one that would be taking place at some future indefinite time. She additionally argued that the evidence would be insufficient even if it could be demonstrated that she had acted with the intent to make the gun unavailable to the police. *State* v. *Foreshaw*, supra, 551. In rejecting the defendant's claims, the court stated: "It is true that at the time the defendant discarded the gun, no official proceeding had in fact been instituted. The statute, however, speaks to that which is readily apt to come into existence or be contemplated and thus plainly applies to the official proceeding arising out of such an incident. The crucial role police involvement would play in that process cannot be disputed." Id.

[3] In making this point, I am not suggesting that inducing a person not to talk with the police during an investigation is benign behavior or reflects good citizenship. My point, rather, is that our witness tampering statute, as presently written, does not proscribe such behavior unless the inducement is done in a manner to implicate other provisions of our Penal Code. To the extent that my point reveals a shortcoming in our witness tampering statute, I believe the solution should come from the General Assembly and not by judicial legislation.