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STATE OF CONNECTICUT *v.* GARY C. BERNACKI, SR.*
(SC 18674)

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

*Argued January 9—officially released September 26, 2012****

Glenn W. Falk, special public defender, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Kevin D.*

Lawlor, state's attorney, and *Kimberley Perrelli*, senior assistant state's attorney, for the appellee (state).

Opinion

NORCOTT, J. The sole issue in this certified appeal is whether the defendant's conviction of, and punishment for, both criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (3) (A)[1] and criminal violation of a protective order in violation of General Statutes § 53a-223 (a),[2] violate his federal and state constitutional protections against double jeopardy. The defendant, Gary C. Bernacki, Sr., appeals, upon our grant of his petition for certification,[3] from the judgment of the Appellate Court affirming the judgment of the trial court convicting him of violating both §§ 53a-217 (a) (3) (A) and 53a-223 (a). See *State* v. *Bernacki*, 122 Conn. App. 399, 988 A.2d 262 (2010). On appeal, the defendant contends that the Appellate Court improperly concluded that the legislature clearly intended to permit multiple punishments for the same offense and, therefore, that his two convictions are not a double jeopardy violation. Because we agree with the state's contentions that §§ 53a-217 (a) (3) (A) and 53a-223 (a) are not the "same offense" under *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), as applied by Chief Justice Rehnquist in his concurring opinion in *United States* v. *Dixon*, 509 U.S. 688, 713, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), and there is no evidence that the legislature clearly intended to preclude defendants from being convicted of, and punished for, committing both offenses, we affirm the judgment of the Appellate Court.

The record and the Appellate Court's opinion reveal the following undisputed facts and procedural history relevant to our resolution of this appeal. In connection with criminal charges that had been brought against the defendant, on June 14, 2005, the trial court, *Sylvester, J.*, issued a family violence protective order against him pursuant to General Statutes § 46b-38c (d) and (e). The protective order directed the defendant to, inter alia, "surrender or transfer all firearms" in accordance with the instructions enumerated on page two thereof.[4] Subsequently, on August 10, 2005, Shelton police officers, acting on a tip about the presence of guns in the defendant's apartment, obtained and executed a search warrant therein. The police officers who searched the defendant's apartment found that, while subject to the protective order, he was in possession of two antique guns, which were heirlooms from his father's service in World War II, specifically a Colt Woodsman .22 caliber pistol and a Mauser Machine Pistol, both of which later were determined to be in operable condition, along with holsters and ammunition.

The state charged the defendant in a three count substitute information with: (1) possession of a machine gun for an offensive or aggressive purpose in violation of General Statutes § 53-202 (c); (2) criminal possession of a firearm in violation of § 53a-217 (a) (3)

(A); and (3) criminal violation of a protective order in violation of § 53a-223 (a).[5] The case was tried to a jury, which returned a verdict finding the defendant not guilty on the first count but guilty on the second and third counts of the information. The trial court, *Cronan, J.*, rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of four years imprisonment, execution suspended after the mandatory minimum of two years required by § 53a-217 (b), and four years probation.[6]

The defendant appealed from the judgment of conviction to the Appellate Court, claiming that his conviction of, and his punishment for, both criminal possession of a firearm in violation of § 53a-217 (a) (3) (A) and criminal violation of a protective order in violation of § 53a-223 (a), "violates double jeopardy because the crimes, as charged, constitute the same offense."[7] *State* v. *Bernacki*, supra, 122 Conn. 402–403. Applying the *Blockburger* rule, the Appellate Court first followed its decision in *State* v. *Quint*, 97 Conn. App. 72, 77–83, 904 A.2d 216, cert. denied, 280 Conn. 924, 908 A.2d 1089 (2006), and determined that the crimes "constituted the same offense" because "the defendant could not have committed one of these crimes without having committed the other." *State* v. *Bernacki*, supra, 404–405. The Appellate Court then determined, however, that "the language, structure and legislative history of §§ 53a-217 (a) (3) (A) and 53a-223 (a)" evinced the legislature's intent to permit multiple punishments for the same offense. Id., 406–408. The Appellate Court emphasized that the legislative history indicated that "the legislature knew of both statutes at issue in this case and that it intended to permit multiple punishments when a person who was subject to a protective order possessed firearms," especially given the existence of separate, unrelated penalties for the violation of each statute. Id., 409. Thus, the Appellate Court concluded that the defendant's conviction of both offenses did not violate his double jeopardy rights and affirmed the judgment of the trial court. Id., 410. This certified appeal followed. See footnote 3 of this opinion.

On appeal, the defendant contends that the Appellate Court improperly concluded that the legislative history of the 2002 amendments to § 53a-223 indicates that the legislature intended multiple punishments in the same trial for violations of §§ 53a-223 (a) and 53a-217 (a) (3) (A), which he posits are the "same offense" under the analysis articulated by Justice Scalia's separate opinion in part III of *United States* v. *Dixon*, supra, 509 U.S. 697–700. The defendant further relies on the South Dakota Supreme Court's reading in *State* v. *Dillon*, 632 N.W.2d 37 (S.D. 2001), of *Missouri* v. *Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), and *Ball* v. *United States*, 470 U.S. 856, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985), for the proposition that there is insufficient

evidence of legislative intent to rebut the *Blockburger* presumption against multiple punishments for the same offense, particularly given that the Connecticut statutes at issue in the present case lack language making "explicitly" clear the legislature's intention to impose multiple punishments. The defendant further relies on the rule of lenity as described in *Whalen* v. *United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980), and contends that we should resolve any ambiguity about the legislature's intention to impose multiple punishments in his favor.

In response, the state first contends that the Appellate Court improperly relied on its decision in *State* v. *Quint*, supra, 97 Conn. App. 72, in concluding that §§ 53a-223 (a) and 53a-217 (a) (3) (A) are the same offense under the *Blockburger* analysis. Advocating for the analytical approach of Chief Justice Rehnquist in his concurring opinion in *United States* v. *Dixon*, supra, 509 U.S. 715–17, the state argues that they are not the same offense under *Blockburger* because each of the statutes contains an element that the other does not and that the statutes also differ as to their prescribed mental states. In addition, both being class D felonies, they are not lesser included offenses of each other. Citing our decision in *State* v. *Alvaro F.*, 291 Conn. 1, 966 A.2d 712, cert. denied, U.S. , 130 S. Ct. 200, 175 L. Ed. 2d 140 (2009), the state then contends that the defendant has failed to produce sufficient evidence of legislative intent to rebut the presumption that results from the *Blockburger* analysis, namely, that the legislature intends to allow multiple punishments for violations of multiple statutes. In particular, the state relies on *State* v. *Kirsch*, 263 Conn. 390, 820 A.2d 236 (2003), and emphasizes that the legislature uses distinct statutory language when it desires to preclude multiple punishments, as well as the fact that each of the statutes are intended to protect different interests, namely, vindication of court orders by § 53a-223, and protection of individuals by § 53a-217.[8] We agree with the state and conclude that the defendant's constitutional protections against double jeopardy were not violated by his conviction of, and punishment for, violating §§ 53a-223 (a) and 53a-217 (a) (3) (A), because they are not the same offense and there is no evidence of clear legislative intent to preclude multiple punishments.

"A 'defendant's double jeopardy claim presents a question of law, over which our review is plenary.' *State* v. *Burnell*, 290 Conn. 634, 642, 966 A.2d 168 (2009). '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. . . . Although the Connecticut constitution does not include a double jeopardy provision, the due process guarantee of article first, § 9, of our state constitution encompasses protection against double jeopardy. . . .

" '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. Multiple punishments are forbidden only if both conditions are met. . . .

" 'Traditionally we have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, [supra, 284 U.S. 304]. This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial.' . . . *State* v. *Nixon*, 231 Conn. 545, 549–51, 651 A.2d 1264 (1995). Significantly, '[t]he *Blockburger* rule is not controlling when the legislative intent [permitting a defendant to be prosecuted under both statutes] is clear from the face of the statute or the legislative history.' . . . Id., 555, quoting *Garrett* v. *United States*, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985). This is because '[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.' . . . *State* v. *Greco*, [216 Conn. 282, 290, 579 A.2d 84 (1990)]." *State* v. *Gonzalez*, 302 Conn. 287, 315–16, 25 A.3d 648 (2011); see also *United States* v. *Dixon*, supra, 509 U.S. 704 (overruling " 'same-conduct' " test of *Grady* v. *Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 [1990], and retaining *Blockburger* rule as federal double jeopardy analysis).

Beyond these well established general principles, this appeal, considering the double jeopardy implications of multiple punishments for violations of both §§ 53a-217 (a) and 53a-223 (a), presents the particularized question of whether the *Blockburger* "same offense" analysis should be conducted considering the language and elements of § 53a-223 (a), which criminalizes the violation of a protective order in broad terms, or in light of the specific proscriptions in the underlying protective order violated by the defendant in the present case.[9] As is shown by its fractured decision in part III of *United States* v. *Dixon*, supra, 509 U.S. 688, considering the

analogous crime of nonsummary criminal contempt, the United States Supreme Court is divided on this analytical point. In *Dixon*, which was a consolidation of two separate cases, the United States Supreme Court considered whether the double jeopardy clause barred subsequent prosecution for the statutory crimes underlying criminal contempt convictions arising from the violation of two court orders, in the first case, an order of conditional release that was violated by the statutory offense of narcotics possession, and in the second case, a protective order that was violated by the commission of the statutory offense of simple assault. See id., 697–98, 700. Chief Justice Rehnquist and Justice Scalia authored divergent opinions on the proper application of the *Blockburger* rule in determining whether the subsequent prosecutions, following the contempt convictions, were for the "same offense."

The defendant argues that we should follow the approach of part III of Justice Scalia's opinion in *Dixon*, which is a part of the opinion not joined by a majority of the court. In part III of *Dixon*, with respect to the narcotics possession prosecution following a criminal contempt conviction, Justice Scalia, joined by Justice Kennedy, observed that the "statute applicable in [the defendant's] contempt prosecution provides that '[a] person who has been conditionally released . . . and who has violated a condition of release shall be subject to . . . prosecution for contempt of court.' . . . Obviously, [the defendant] could not commit an 'offence' under this provision until an order setting out conditions was issued. The statute by itself imposes no legal obligation on anyone. [the defendant's] cocaine possession, although an offense under [the narcotics statutes], was not an offense under [the contempt statute] until a judge incorporated the statutory drug offense into his release order." (Citations omitted.) Id., 697–98. Justice Scalia further emphasized that "the 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition. . . . [T]he underlying substantive criminal offense is 'a species of lesser-included offense.' "[10] Id., 698. Justice Scalia then applied this analysis in the second case to determine that a subsequent conviction of simple assault following a contempt conviction based on the violation of a protective order that prohibited "assault" similarly violated the double jeopardy clause. See id., 700. Thus, following the approach of Justice Scalia, rather than looking to the language and elements of § 53a-223 (a), which criminalizes the violation of a protective order in broad terms, the defendant would have us instead look to the specific proscriptions in the underlying protective order in conducting our *Blockburger* analysis.

In contrast, the state contends in its supplemental brief that we should adopt the approach of Chief Justice Rehnquist, who, joined by Justices O'Connor and Thomas, concluded that, "*Blockburger*'s same-elements

test requires us to focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense," determining that, "[b]ecause the generic crime of contempt of court has different elements than the substantive criminal charges in this case . . . they are separate offenses under *Blockburger*."[11] Id., 714 (Rehnquist, C. J., concurring); see also id., 717 ("[b]y focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of the crime of contempt of court, Justice Scalia's double jeopardy analysis bears a striking resemblance to [the same-conduct test] found in *Grady* [v. *Corbin*, supra, 495 U.S. 508]—not what one would expect in an opinion that overrules *Grady*").

Relying on *State* v. *Bletsch*, 281 Conn. 5, 28–29, 912 A.2d 992 (2007), the defendant contends that Justice Scalia's approach is more consistent with our double jeopardy jurisprudence than is Chief Justice Rehnquist's more restrictive analysis, noting that we did not confine ourselves in *Bletsch* to the statutory elements, but also looked to the facts alleged in the information in determining that, when fellatio was alleged, the defendant's convictions of risk of injury to a child in violation of General Statutes § 53-21 (2) and sexual assault in the second degree in violation of General Statutes § 53a-71 (a) did not violate his double jeopardy rights. We disagree. *Bletsch* merely restates the well established principle that the *Blockburger* "test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial."[12] (Internal quotation marks omitted.) Id., 27–28. The double jeopardy analysis in *Bletsch* did not involve consideration of any evidence adduced at trial—an action that the defendant seeks in having us consider the terms of the protective order herein. See also id., 29 n.24 ("[w]e note that, although the allegation in the substitute information as to the risk of injury count charged the defendant with having contact with the victim's intimate parts, *the evidence adduced at trial, which may not be considered for Blockburger purposes* . . . demonstrated that the November 19, 1999 incident involved only one act, to wit: the victim performing fellatio on the defendant" [citation omitted; emphasis added]). Thus, we agree with the state that our well established technical double jeopardy analysis after our discussion in *State* v. *Alvarez*, 257 Conn. 782, 778 A.2d 938 (2001); see footnote 16 of this opinion; which focuses on the elements of the statutes at issue and the charging instruments without regard to the evidence adduced at trial, is more consistent with the approach of Chief Justice Rehnquist than that of Justice Scalia. Cf. *State* v. *Brandt*, 393 S.C. 526, 539, 713 S.E.2d 591 (2011) ("We, however, need not choose between the divergent views of Chief Justice Rehnquist and Justice Scalia as this case does not involve a violation of a

court order as in *Dixon*. Furthermore, even if we were to choose between the two views, we find this state's post-*Dixon* jurisprudence definitively establishes that our courts have adopted a traditional, strict application of the *Blockburger* 'same elements test.' ").

We further disagree with the defendant's contentions that Justice Scalia's approach is "the more logical and meaningful one for broadly worded statutes such as those in Connecticut" and that Chief Justice Rehnquist's "approach is too rigid to afford meaningful double jeopardy protection in prosecutions under broadly worded statutes." With regard to multiple punishments emanating from a single trial, constitutional double jeopardy protections are coterminous with the legislature's intent; see, e.g., *State* v. *Greco*, supra, 216 Conn. 290; and should the legislature desire to preclude multiple punishments for the same underlying criminal conduct, it remains free to do so either in specific contexts; cf. footnote 18 of this opinion (General Statutes cited therein); or more broadly by legislating a variant of the "same-conduct" test articulated in, inter alia, *Grady* v. *Corbin*, supra, 495 U.S. 508; cf. N.Y. Crim. Proc. Law § 40.20 (2) (a) (McKinney 2003) ("[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless . . . [t]he offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other"); see also Ohio Rev. Code Ann. § 2941.25 (A) (West 2006) ("[w]here the same conduct by the defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one").

Moreover, adoption of Justice Scalia's approach in *Dixon* raises the concern of inconsistent and confusing double jeopardy analyses from case to case, depending on the vagaries of the protective orders at issue. See D. Zlotnick, "Battered Women & Justice Scalia," 41 Ariz. L. Rev. 847, 925–26 (1999) (criticizing Justice Scalia's test as "theoretically flawed because it requires the inherently problematic comparison of the terms of civil protection orders with the elements of criminal offenses," "unworkable" and "likely to produce inconsistent results because slight changes in the wording or interpretation of a protection order would lead to different outcomes in similar cases"); see also id., 930–31 (Observing that "confusion spawned by [Justice] Scalia's *Dixon* test has undermined the effectiveness of the contempt remedy, which often provides the swiftest relief. Because the double jeopardy consequences of a contempt motion can no longer be easily predicted, some victims' advocates and prosecutors have altered their strategy, either watering down contempt motions, or hesitating to seek the swift but relatively light sentences provided by contempt, for fear of barring more

serious criminal punishment, particularly for protection order violations involving violent conduct."). Accordingly, and notwithstanding the dissent's somewhat conclusory endorsement of Justice Scalia's approach, we conclude that Chief Justice Rehnquist's *Blockburger* analysis in *United States* v. *Dixon*, supra, 509 U.S. 688, is more consistent with Connecticut's contemporary double jeopardy jurisprudence and adopt that approach as we confine our "same offense" analysis in this case to the statutes and charging documents, without regard to the specific terms of the protective order that the defendant was convicted of violating under § 53a-223 (a).[13]

Thus, with respect to the first step of the double jeopardy analysis, it is undisputed that the defendant's convictions arose from the same act or transaction. Thus, we proceed to analyze §§ 53a-223 (a) and 53a-217 (a) (3) (A), to determine whether "each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, supra, 284 U.S. 304. Section 53a-217 provides in relevant part: "(a) A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and . . . (3) knows that such person is subject to (A) a restraining or protective order of a court of this state that has been issued against such person, after notice and an opportunity to be heard has been provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person . . . ." In contrast, § 53a-223 (a) is worded more generally and provides: "A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c, or section 54-1k or 54-82r has been issued against such person, and such person violates such order."

The broad language of § 53a-223 (a) requires only the intent to perform the act constituting the violation,[14] and says nothing about the possession of firearms; in contrast, the language of § 53a-217 (a) (3) does not criminalize the violation of the terms of a particular protective order, but rather, criminalizes the possession of a firearm by a person who "knows that such person is subject to (A) a restraining or protective order of a court of this state that has been issued against such person . . . ."[15] Further, the charging document essentially tracked the elements of the statutes. See footnote 5 of this opinion. Inasmuch as it "is irrelevant that the state may have relied on the same evidence to prove that the elements of both statutes were satisfied";[16] *State* v. *Kirsch*, supra, 263 Conn. 421; application of the *Blockburger* test demonstrates that each statute contains a different statutory element requiring proof of a fact that the other does not, leading us to presume that they are not the same offense for double jeopardy purposes.[17]

Nevertheless, our inquiry is not yet complete, because the "*Blockburger* test creates only a rebuttable presumption of legislative intent, [and] the test is not controlling when a contrary intent is manifest. . . . When the conclusion reached under *Blockburger* is that the two crimes do not constitute the same offense, the burden remains on the defendant to demonstrate a clear legislative intent to the contrary." (Citation omitted; internal quotation marks omitted.) *State* v. *Alvaro F.*, supra, 291 Conn. 12–13. "The language, structure and legislative history of a statute can provide evidence of this intent." *State* v. *Greco*, supra, 216 Conn. 293, citing *Garrett* v. *United States*, supra, 471 U.S. 779. Having reviewed the language, structure and legislative history of the statutes at issue, we conclude that the defendant has failed to rebut the *Blockburger* presumption.

First, and most significantly, we note that the statutory scheme lacks language expressly indicating that the legislature intended to preclude multiple punishments for violating both §§ 53a-223 (a) and 53a-217 (a) (3) (A), when those violations arise out of the same act or transaction. We repeatedly have observed that the lack of statutory language providing that the conviction of one offense precludes conviction of, or punishment for, committing a seperate offense in the same act or transaction is a strong indication that the legislature intended to permit multiple punishments. For example, in *State* v. *Kirsch*, supra, 263 Conn. 418–19, we "note[d] the absence of any language in [General Statutes] § 53a-56b to indicate expressly that the legislature intended that a person convicted of second degree manslaughter with a motor vehicle could not also be convicted of first degree manslaughter. By contrast, however, our Penal Code is replete with other statutes in which the legislature expressly has barred conviction of two crimes for one action.[18] . . . In view of this common practice, we ordinarily presume that the legislature's failure to include such terms in § 53a-56b indicates that it did not intend a similar result."[19] (Citations omitted.) See also *State* v. *Nixon*, supra, 231 Conn. 563 ("[s]ince the legislature has shown that it knows how to bar multiple punishments expressly when it does not intend such punishment, the absence of similar language . . . provides evidence that the legislature intended cumulative punishment" [internal quotation marks omitted]); *State* v. *Greco*, supra, 216 Conn. 295 (same).

Moreover, there is nothing in the legislative history of either statute clearly indicating the legislature's intent to preclude multiple convictions and punishments for violations of §§ 53a-217 (a) (3) (A) and 53a-223 (a), arising from the same conduct. This is particularly striking, given that the House of Representatives debates on Public Acts 2002, No. 02-127, § 3, which increased the penalty for violating § 53a-223 (a) from that of a class A misdemeanor to a class D felony,

indicated that the legislature had more than a passing familiarity with the fact that persons subject to protective orders are statutorily prohibited from possessing firearms. In answering questions from Representative Stephen Dargan about the effect on gun owners of the proposed legislation, § 1 of which created a new crime of violating a civil restraining order; see General Statutes § 53a-223b; Representative Michael Lawlor remarked that the bill "does rewrite the domestic violence laws considerably. However, it doesn't change any of the existing firearms laws as they relate to the domestic violence laws.

"In other words, under our current law, if you're convicted of any of these crimes, you would already lose your right to have a firearm. *Once you're subject to a restraining order or a protective order, you're not permitted to have a firearm*. In fact, you're obligated to turn in your firearm within a relatively short period of time.

"*This doesn't change those laws. However, it is relevant to those laws*." (Emphasis added.) 45 H.R. Proc., Pt. 16, 2002 Sess., pp. 5193–95. Particularly given the legislature's awareness of the relationship between the protective order and firearms statutes, we cannot infer from the silence in the legislative history that it clearly intended to preclude convictions, and punishment, for violations of both §§ 53a-217 (a) (3) (A) and 53a-223 (a).[20] See *State* v. *Kirsch*, supra, 263 Conn. 420; see also *Garrett* v. *United States*, supra, 471 U.S. 793 ("[t]he presumption when Congress creates two distinct offenses is that it intends to permit cumulative sentences, and legislative silence on this specific issue does not establish an ambiguity or rebut this presumption").

Finally, the legislative history of these two offenses indicates that, although they share a general purpose of increasing the protection for victims of domestic violence, the legislature has classified both as class D felonies, indicating that they address different harms of equal import in reaching that general end. Specifically, the legislature enacted § 53a-223 (a) as a new crime, through Public Acts 1991, No. 91-381, § 1, because of perceptions, demonstrated in the hearings before the judiciary committee,[21] that protective orders had insufficient deterrent value because the courts' contempt power did not provide an adequate enforcement mechanism—particularly given the reluctance of many police officers' to make arrests for violations of protective orders through conduct that was not independently criminal. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 3. 1991 Sess., pp. 853–55, remarks of Representative Richard Tulisano and Nusie Halpine, family violence victim advocate; see also id., p. 859, remarks of Norine Fuld, family violence victim advocate ("The point of protective orders is to prevent additional violence from occurring. For police to feel that they have

to wait until another assault has occurred before they can take action is extremely problematic. . . . We need to give the police stronger and more explicit tools to use when the conditions of a protective order are not being adhered to by the offender; or the effectiveness of protective orders as a deterrent to continue threats and violence will be totally lost."); id., p. 866, remarks of Anne Menard, executive director of Connecticut Coalition Against Domestic Violence (describing enforcement as "the Achilles heel of the protective order process"). The subsequent amendment to § 53a-223 (b), rendering violation of § 53a-223 (a) a class D felony rather than a class A misdemeanor, reflected the legislature's view that violation of a protective order is by itself a serious offense because such orders are specifically imposed in conjunction with criminal prosecutions wherein "there's already an identifiable individual who is a victim of a family violence crime . . . ."[22] 45 H.R. Proc., supra, p. 5197, remarks of Representative Lawlor.

The legislature enacted § 53a-217 (a) (3) (A) as part of Public Acts 2001, No. 01-130, § 15, to augment the enforcement of existing statutes[23] requiring persons subject to protective or restraining orders to surrender pistol permits and transfer or surrender their firearms. See 44 H.R. Proc., Pt. 15, 2001 Sess., pp. 5070–71, remarks of Representative Ronald S. San Angelo (noting that bill would "make sure we can do the best job we can in protecting, in most cases, women's lives away from husbands who might have these firearms"). The legislation, which addresses the more specific danger of potentially violent persons possessing firearms, was passed in response to the death of Josephine Giamo, an East Haven resident, at the hands of her husband, whose guns had not been confiscated following the issuance of a restraining order against him. See id., pp. 5075–76, remarks of Representative Lawlor. Speaking in support of the bill, Representative Lawlor noted that the new statute would facilitate "much more aggressive" approaches taken by police departments to protect victims "where they know the subjects of these restraining orders actually have access to firearms." Id., p. 5077.

We acknowledge that §§ 53a-217 (a) (3) (A) and 53a-223 (a) are located in the same chapter of the Penal Code, chapter XXI, "Miscellaneous Offenses." Nevertheless, that the statutes were "designed to protect separate and distinct interests of society," "rather than where they are situated is more indicative of whether the legislature intended to create separate crimes and separate punishments." *State* v. *Woodson*, 227 Conn. 1, 12, 629 A.2d 386 (1993); see also id. (The court concluded that the defendant could be convicted of two counts of first degree arson under General Statutes § 53a-111 (a) (3) and (4) because "[t]he obvious purpose of subdivision (3) is to prevent and punish fraud against the fire insurance industry, fraud for which the public

pays in the long run. In contrast, the purpose of subdivision (4) is to protect the life and limb of those public servants charged with the dangerous duty of fighting fires. The two subdivisions therefore are directed at and punish distinct societal harms that do not necessarily coexist in every arson in the first degree."). Accordingly, we conclude that the defendant has failed to produce clear evidence of legislative intent sufficient to rebut the *Blockburger* presumption that, because §§ 53a-217 (a) (3) (A) and 53a-223 (a) are not the same offense, the legislature intended to permit multiple convictions and punishments for violations of both statutes in the same transaction.[24] The Appellate Court properly determined, therefore, that the convictions and punishments for both offenses did not violate the defendant's constitutional protections against double jeopardy.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and ZARELLA and McLACHLAN, Js., concurred.

* As was noted at oral argument before this court, the name of this case has been listed inconsistently in court documents, including those available on the docket page of the judicial branch website, as either *State* v. *Bernacki* or *State* v. *Gary C.B.* We note that the prepared record, briefs and appendices have been redacted to eliminate all references to information protected by General Statutes § 54-86e, none of which is relevant to our decision herein. Accordingly, we recite the defendant's full name, consistent with earlier published decisions in this case. See *State* v. *Bernacki*, 122 Conn. App. 399, 988 A.2d 262, cert. granted, 298 Conn. 912, 4 A.3d 833 (2010).

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

*** September 26, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] General Statutes § 53a-217 (a) provides in relevant part: "A person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and . . . (3) knows that such person is subject to (A) a restraining or protective order of a court of this state that has been issued against such person, after notice and an opportunity to be heard has been provided to such person, in a case involving the use, attempted use or threatened use of physical force against another person . . . ."

[2] General Statutes § 53a-223 (a) provides: "A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c, or section 54-1k or 54-82r has been issued against such person, and such person violates such order."

[3] We granted the defendant's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly conclude that the defendant's conviction of, and punishment for, both criminal possession of a firearm pursuant to . . . § 53a-217 (a) (3) (A), and criminal violation of a protective order pursuant to . . . § 53a-223 (a), did not violate double jeopardy?" *State* v. *Bernacki*, 298 Conn. 912, 4 A.3d 833 (2010).

[4] Page two of the protective order informed the defendant in detail of the steps necessary to comply with statutory firearms restrictions imposed on persons subject to restraining or protective orders; see, e.g., General Statutes §§ 29-28, 29-32, and General Statutes (Sup. 2012) § 29-36k; and the consequences for their violation, and warned: "If you are subject to a restraining or protective order involving the use, attempted use or threatened use of physical force against another person:

"1. You are not eligible to receive a permit or eligibility certificate allowing you to carry a pistol or revolver . . .

"2. Any permit or eligibility certificate which you now hold shall be revoked and you must surrender such permit or eligibility certificate to the authority that issued it within five (5) days of being notified that it has been revoked. If you do not surrender such permit or eligibility certificate as required, you will be guilty of a class C misdemeanor which is punishable by a fine of up to five hundred dollars or imprisonment of up to three months or both. . . .

"3. You must transfer all pistols, revolvers and other firearms which you

possess to a person who is eligible to possess them or surrender them to the Commissioner of Public Safety within two (2) business days of becoming subject to such order. If you do not do so, you will be subject to a fine of up to five thousand dollars or imprisonment of up to five years or both . . . and

"4. If you possess any pistol or revolver, or any firearm or electronic defense weapon, after you have had notice of such order and an opportunity to be heard, you will be guilty of criminal possession of a pistol or revolver or criminal possession of a firearm or electronic defense weapon. These crimes are class D felonies which are punishable by a fine of up to five thousand dollars or a term of imprisonment of up to five years or both . . . . Two years of the sentence imposed for criminal possession of a firearm or electronic defense weapon may not be suspended or reduced by the court . . . ." (Citations omitted.)

[5] As the Appellate Court noted, the operative information stated in relevant part: "Second Count. And the [senior assistant state's] attorney aforesaid further accuses [the defendant] of criminal possession of a firearm and charges that in the [t]own of Shelton on or about August 10, 2005, the said [defendant] possessed a firearm and knew that [he] was subject to a protective order of a [c]ourt of this [s]tate that had been issued against such person, after notice and opportunity to be heard had been provided to such person, in a case involving the use of physical force, attempted use or threatened use of physical force against another person in violation of [§] 53a-217 (a) (3) (A) . . . .

"Third Count. And the attorney aforesaid further accuses [the defendant] of criminal violation of a protective order and charges that in the [t]own of Shelton on or about August 10, 2005, an order issued pursuant to [s]ubsection (e) of . . . [§] 46b-38c had been issued against [him] and [he] violated such order in violation of [§] 53a-223 (a) . . . . " (Internal quotation marks omitted.) *State* v. *Bernacki*, supra, 122 Conn. App. 401–402.

[6] Specifically, the trial court sentenced the defendant to concurrent sentences of: (1) on count two, criminal possession of a firearm in violation of § 53a-217, four years imprisonment, execution suspended after the mandatory two years, and four years probation; and (2) on count three, criminal violation of a protective order in violation of § 53a-223 (a), four years imprisonment, execution suspended after one year, and four years probation.

[7] The Appellate Court granted the defendant's request for review of this unpreserved constitutional claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). See *State* v. *Bernacki*, supra, 122 Conn. 403.

[8] The state also contends that the rule of lenity does not apply in this case because it is clear that the two offenses are not the same under *Blockburger* and that there is no other ambiguity remaining after resort to all other tools of statutory construction.

[9] On July 5, 2012, after oral argument in this case, we ordered the parties to file simultaneous supplemental briefs limited to the following question: "In determining whether criminal possession of a firearm in violation of . . . § 53a-217 (a) (3) (A), and criminal violation of a protective order in violation of . . . § 53a-223 (a) are the 'same offense' for double jeopardy purposes under the rule of *Blockburger* v. *United States*, [supra, 284 U.S. 299], should the [c]ourt adopt the approach of Chief Justice Rehnquist in *United States* v. *Dixon*, [supra, 509 U.S. 688], or that of Justice Scalia therein?"

[10] In so concluding, Justice Scalia determined that, "this situation, in which the contempt sanction is imposed for violating the order through commission of the incorporated drug offense, the later attempt to prosecute [the defendant] for the drug offense resembles the situation that produced our judgment of double jeopardy in *Harris* v. *Oklahoma*, 433 U.S. 682 [97 S. Ct. 2912, 53 L. Ed. 2d 1054] (1977) (per curiam)," which "held that a subsequent prosecution for robbery with a firearm was barred by the [d]ouble [j]eopardy [c]lause, because the defendant had already been tried for felony murder based on the same underlying felony. We have described our terse per curiam in *Harris* as standing for the proposition that, for double jeopardy purposes, 'the crime generally described as felony murder' is not 'a separate offense distinct from its various elements.' *Illinois* v. *Vitale*, 447 U.S. 410, [420–21, 100 S. Ct. 2260, 65 L. Ed. 2d 228] (1980)." *United States* v. *Dixon*, supra, 509 U.S. 698 (Scalia, J.).

[11] Chief Justice Rehnquist disagreed with Justice Scalia's reliance on *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), emphasizing first that *Harris* was of limited precedential value because it was a summary per curiam opinion in an unargued case. See *United States*

v. *Dixon*, supra, 509 U.S. 716 (Rehnquist, C. J., concurring). Chief Justice Rehnquist would have "limit[ed] *Harris* to the context in which it arose: where the crimes in question are analogous to greater and lesser included offenses," and observed that Justice Scalia's decision "upset [the] previously well-settled principle of law" that "as a general matter, double jeopardy does not bar a subsequent prosecution based on conduct for which a defendant has been held in criminal contempt." Id., 714; see also id., 716 ("Neither of those elements [of criminal contempt] is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no element of either of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court."); id., 717 ("Close inspection of the crimes at issue in *Harris* reveals, moreover, that our decision in that case was not a departure from *Blockburger*'s focus on the statutory elements of the offenses charged" because of the felony murder statute's "generic reference to some felony as incorporating the statutory elements of the various felonies upon which a felony-murder conviction could rest. . . . The criminal contempt provision involved here, by contrast, contains no such generic reference which by definition incorporates the statutory elements of assault or drug distribution." [Citation omitted.]).

[12] Thus, we similarly disagree with the defendant's assertion that *United States* v. *Liller*, 999 F.2d 61, 63 (2d Cir. 1993), and *State* v. *Culver*, 97 Conn. App. 332, 339–41, 904 A.2d 283, cert. denied, 280 Conn. 935, 909 A.2d 961 (2006), stand for the proposition that a post-*Dixon Blockburger* analysis requires a deeper factual inquiry than that utilized herein. Both cases conducted *Blockburger* analyses in the context of factual allegations contained in charging documents, and neither case examined the terms of an underlying court order that had been admitted into evidence at trial.

[13] In the wake of the Supreme Court's divided decision in *Dixon*, our research reveals that there is a split among the states about the proper *Blockburger* analysis to apply in determining whether prosecutions for violations of both criminal contempt statutes and statutes criminalizing the underlying conduct violate constitutional double jeopardy protections. For states following Justice Scalia's approach, see *Penn* v. *State*, 73 Ark. App. 424, 428, 44 S.W.3d 746 (2001); *State* v. *Johnson*, 676 So. 2d 408, 410–11 (Fla. 1996); *Tanks* v. *State*, 292 Ga. App. 177, 179, 663 S.E.2d 812 (2008); *State* v. *Rincon*, Iowa Court of Appeals, Docket No. 2-132/11-0612, 2012 Iowa App. LEXIS 303 (April 25, 2012); *State* v. *Gonzales*, 123 N.M. 337, 340–41, 940 P.2d 195 (App. 1997); *State* v. *Gilley*, 135 N.C. App. 519, 526–27, 522 S.E.2d 111 (1999), cert. denied, 353 N.C. 528, 549 S.E.2d 860 (2001); *Commonwealth* v. *Yerby*, 544 Pa. 578, 587–88, 679 A.2d 217 (1996); *Ex parte Rhodes*, 974 S.W.2d 735, 740–41 (Tex. Crim. App. 1998); see also *People* v. *Allen*, 868 P.2d 379, 384–85 (Colo.) (describing divergent approaches of Chief Justice Rehnquist and Justice Scalia and assuming applicability of Justice Scalia's approach in rejecting double jeopardy claim on ground that trial court order did not incorporate "all elements" of criminal trespass), cert. denied, 513 U.S. 842, 115 S. Ct. 129, 130 L. Ed. 2d 73 (1994). For states preferring the approach of Chief Justice Rehnquist, as more consistent with their jurisdictions' narrower, more technical approaches to the double jeopardy analysis under *Blockburger*, see *University of Cincinnati* v. *Tuttle*, Ohio Court of Appeals, Docket No. C-080357, 2009 Ohio App. LEXIS 3819, *8–9 (September 2, 2009), appeal denied, 124 Ohio St. 3d 1416, 919 N.E.2d 215 (2009); *State* v. *Warren*, 330 S.C. 584, 598–99, 500 S.E.2d 128 (App. 1998), rev'd on other grounds, 341 S.C. 349, 534 S.E.2d 687 (2000); see also *People* v. *Wood*, 260 App. Div. 2d 102, 107–108, 698 N.Y.S.2d 122 (1999) (adopting Chief Justice Rehnquist's approach in determining that defendant's double jeopardy rights were violated by separate criminal contempt convictions arising from conduct that violated two protective orders issued separately by two distinct state courts), aff'd, 95 N.Y.2d 509, 742 N.E.2d 114, 719 N.Y.S.2d 639 (2000) (per curiam).

Having reviewed all of these decisions, we find that none engage in particularly persuasive or comprehensive analyses of either side of this issue. That being said, the most well reasoned decision to adopt Justice Scalia's approach is that of the Pennsylvania Supreme Court in *Commonwealth* v. *Yerby*, supra, 544 Pa. 578, which was followed in detail on this point by the North Carolina intermediate appeals court in *State* v. *Gilley*, supra, 135 N.C. App. 525–27. In *Yerby*, the Pennsylvania Supreme Court adopted Justice Scalia's approach after criticizing Chief Justice Rehnquist's approach as "render[ing] double jeopardy protections illusory at best" under *Blockburger* because "neither of the [contempt statute] elements will ever be necessary

in proving a substantive criminal offense and every substantive criminal offense will contain additional elements." *Commonwealth* v. *Yerby*, supra, 585–86. Noting concerns attendant to successive prosecution, the Pennsylvania court observed that "[t]o apply the *Blockburger* test in the literalist and formalistic manner espoused by [Chief Justice Rehnquist] would simply undercut the very foundation of the guarantee sought to be protected. . . . [I]t would be folly to conclude that the leader of our nation's highest court is not fully aware of the true focus of the law of double jeopardy and successive prosecution." Id., 589. This analysis suggests, however, that the Pennsylvania Supreme Court would not have these concerns in a case of multiple punishment, such as the present case. Moreover, in our view, these concerns might well be mitigated in a successive prosecution case by the application of the related doctrine of collateral estoppel. See, e.g., *State* v. *Garner*, 270 Conn. 458, 482, 853 A.2d 478 (2004) ("In a criminal case, [however], collateral estoppel is a protection included in the fifth amendment guarantee against double jeopardy. . . . Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." [Internal quotation marks omitted.]).

The remainder of the decisions adopting Justice Scalia's approach simply do not analyze this issue in sufficient depth to be persuasive on this point. For example, the intermediate appeals courts in Arkansas, Georgia and New Mexico did not consider the relative merits of the two approaches or even acknowledge the existence of Chief Justice Rehnquist's opinion; the Arkansas court simply followed the Texas Court of Criminal Appeals' decision in *Ex parte Rhodes*, supra, 974 S.W.2d 735. See *Penn* v. *State*, supra, 73 Ark. App. 428; *Tanks* v. *State*, supra, 292 Ga. App. 179; *State* v. *Gonzales*, supra, 123 N.M. 340–41. The state high court decisions of Florida and Texas on this point similarly are flawed. In *Ex parte Rhodes*, supra, 735, the Texas Court of Criminal Appeals acknowledged the confusion wrought by the "[United States] Supreme Court's fragmented and rather confusing decision," but it did not consider the merits of Justice Scalia's and Chief Justice Rehnquist's approaches, instead tallying the Supreme Court's fractured votes as to result, without according weight or principled analysis as to rationale, in divining the "holding" of the court. Id., 740–42. In *State* v. *Johnson*, supra, 676 So. 2d 410–11, the Florida Supreme Court approved the decision of the intermediate appeals court in *State* v. *Miranda*, 644 So. 2d 342, 344 (Fla. App. 1994), which had adopted Justice Scalia's approach, but neither the high nor the intermediate court proffered any specific analysis as to why. Finally, the Iowa intermediate appellate court recently adopted Justice Scalia's approach on the basis of a predictive reading of dicta in that state's Supreme Court decisions in *State* v. *Kraklio*, 560 N.W.2d 16, 19–20 (Iowa 1997), and *State* v. *Sharkey*, 574 N.W.2d 6, 8–9 (Iowa 1997), which had acknowledged, but did not need to resolve the issue on the ground that the court orders at issue were narrow and not duplicative of the criminal statutes. See *State* v. *Rincon*, supra, Iowa Court of Appeals, Docket No. 2-132/11-0612. The Iowa court's reliance on the analysis in *Kraklio* and *Sharkey* may well prove to be misplaced, however, because those high court decisions were based on a determination that the defendants therein could not prevail even under the assumption that they were correct that Justice Scalia's approach applied.

[14] Unlike § 53a-217 (a) (3) (A), § 53a-223 (a) lacks a prescribed mental state, which renders it a general intent crime that requires the state to prove that the "defendant intended to perform the activities that constituted the violation of the protective order." *State* v. *Fagan*, 280 Conn. 69, 77, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). Even if we assume, however, that, for due process purposes, the state is required to prove the defendant's knowledge of the order to establish a violation of § 53a-223 (a); see, e.g., *State* v. *Esquivel*, 132 Wn. App. 316, 328, 132 P.3d 751 (2006); we agree with the state's observation that each statute continues to contain an element that the other does not, which renders them not the "same" for *Blockburger* purposes.

[15] We disagree with the dissent's conclusion that, even under Chief Justice Rehnquist's approach in *Dixon*, violations of §§ 53a-217 (a) (3) (A) and 53a-223 (a) are the "same offense." The dissent's conclusion is grounded in its determinations that "the possession of a firearm is not a violation of merely 'a particular protective order' but a violation of any § 46b-38c protective order" and "proof of the elements necessary to show that the defendant has committed . . . § 53a-217 (a) (3) (A), does necessarily satisfy the elements of the contempt offense," meaning that, "even under an application

of the same elements test focusing on the statutes at issue, the elements of this particular underlying substantive crime prove the contempt crime and, therefore, the charged crimes are the same offense." In our view, the flaws in the dissent's analysis stem from its overbroad reliance on the related firearms statutes that are not relevant to the double jeopardy analysis.

To begin, the dissent cites General Statutes §§ 29-28 (b) (6), 29-32 (b) and General Statutes (Sup. 2012) § 29-36k for the proposition that "possession of a firearm is *always* a violation of 'a restraining or protective order issued by a court in a case involving the use, attempted use or threatened use of physical force against another person.' " (Emphasis in original.) Acknowledging that these "firearms statutes are not the criminal statutes themselves," the dissent nevertheless "consider[s] §§ 29-28 (b) (6), 29-32 (b) and 29-36k to be 'the statutes . . . as opposed to the evidence presented at trial' . . . and relevant to a full understanding of the elements of the criminal statutes themselves." (Citation omitted.) Nothing in these statutes, the full text of which are cited in footnotes 11 through 13 of the dissenting opinion, stands for the proposition that "possession of a firearm is *always* a violation of 'a restraining or protective order issued by a court in a case involving the use, attempted use or threatened use of physical force against another person.' " (Emphasis in original.) Rather, the statutes provide as follows: (1) § 29-28 (b) (6) precludes the issuance of a permit to carry a pistol or revolver to an "applicant . . . subject to a restraining or protective order issued by a court in a case involving the use, attempted use or threatened use of physical force against another person"; (2) § 29-32 (b) requires the revocation of pistol or revolver permits already issued to persons who subsequently become disqualified to receive permits under § 29-28 (b), such as by becoming subject to a protective order; and (3) § 29-36k requires those who become ineligible to possess pistols, revolvers or other firearms to "surrender" or "transfer" their pistols, revolvers or other firearms, with noncompliance punishable under § 53a-217 or General Statutes § 53a-217c.

None of these statutes renders a firearm restriction a *mandatory* term of protective orders issued by courts pursuant to § 46b-38c, or "make plain that the act constituting the underlying substantive offense is prohibited by the court order," meaning that, contrary to the dissent's observation, possession of a firearm is *not* always a violation of such an order. Put differently, and quite hypothetically, particularly given the "technical" nature of the *Blockburger* analysis, were a creative trial judge to strike the portions of the preprinted protective order—a form promulgated by the judicial branch for the convenience of litigants and the bench—that direct the subject to "surrender or transfer all firearms"; see footnote 4 of this opinion; prior to issuing it, it would *not* be a violation of the *protective order* punishable under § 53a-223 (a) for the subject thereof to possess a firearm. Such conduct would, however, remain independently punishable under § 53a-217 (a) (3) (A), which reflects the legislature's policy judgment that the possession of firearms by persons subject to restraining orders is itself an independently dangerous act requiring criminal sanction.

[16] In his reply brief, the defendant criticizes the state's *Blockburger* analysis as superficial and "unworkable because it would prevent a tribunal from determining whether multiple counts or two successive violation of protective order prosecutions were for the same substantive violation." He relies primarily on *State* v. *Neisner*, 189 Vt. 160, 169, 16 A.3d 597 (2010), wherein the Vermont Supreme Court concluded that the defendant's double jeopardy rights were violated by his convictions, arising from the same conduct, of the two statutory offenses of "giving false information to law enforcement authorities" and "impeding a public officer . . . ." Applying a *Blockburger* analysis, the Vermont court stated that, "[a]t first blush, each of these two crimes involves an element that the other does not," but went on to note that, "here, the hindering act underlying the impeding charge was the giving of false information. . . . While impeding and false information may be independent statutory crimes, as specifically charged here, all the elements of the false information charge were contained in the impeding charge. Thus, both crimes punished the same offense. In effect, the impeding charge incorporates the false information charge, making false information a predicate offense to [the] defendant's conviction for impeding. In such circumstances, a guilty verdict obtained on both the predicate and compounding offense violates the [d]ouble [j]eopardy [c]lause." Id., 169–70.

We do not find *Neisner*'s application of the *Blockburger* test to be persuasive. First, its emphasis on the conduct at issue, rather than purely on the statutory language and charging instruments, is not consistent with our well established case law holding that the *Blockburger* analysis is theoretical in

nature and not dependent on the actual evidence adduced at trial. See, e.g., *State* v. *Alvaro F.*, supra, 291 Conn. 11 n.12 (concluding that risk of injury to child and sexual assault in fourth degree are not same offense, despite fact that "in practice it may be difficult, although not impossible, for the state to prove the specific intent requirement [for sexual assault in the fourth degree] . . . without also proving the 'sexual and indecent manner likely to impair the health or morals of such child' requirement . . . and vice versa"). Indeed, the Vermont court's emphasis on the conduct at issue, rather than a strict adherence to the statutory elements, is akin to the now defunct analytical approach of *State* v. *Lonergan*, 213 Conn. 74, 566 A.2d 677 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2586, 110 L. Ed. 2d 267 (1990). *Lonergan* was, however, overruled eleven years ago by *State* v. *Alvarez*, supra, 257 Conn. 782, wherein we followed *United States* v. *Dixon*, supra, 509 U.S. 703–704, and "reinstate[d] the *Blockburger* test as the exclusive test for determining whether two offenses are the same offense for double jeopardy purposes." *State* v. *Alvarez*, supra, 795.

Thus, what the defendant endorses as the "less technical approach to construing the state's legislative scheme" taken by the Appellate Court in this case cannot be squared with our post-*Alvarez* case law. Accordingly, we agree with the state that the Appellate Court's *Blockburger* analysis determining as a threshold matter that, the "defendant could not have committed one of these crimes without having committed the other," was improper because, in relying on *State* v. *Quint*, supra, 97 Conn. App. 80 and n.5, which was founded on a concession by the state, the Appellate Court focused on the facts of the case, rather than a technical analysis of the statutory elements. See *State* v. *Bernacki*, supra, 122 Conn. App. 405; see also *State* v. *Quint*, supra, 83 (rejecting double jeopardy claim because statutory structure and legislative history indicated "legislature's intent to provide cumulative punishments for the single act of trespass in violation of a protective order").

Finally, to the extent the defendant relies on *State* v. *Miranda*, 260 Conn. 93, 122–24, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002), *State* v. *Beaulieu*, 118 Conn. App. 1, 11, 982 A.2d 245, cert. denied, 294 Conn. 921, 984 A.2d 68 (2009), and *State* v. *Howard F.*, 86 Conn. App. 702, 710–12, 862 A.2d 331 (2004), cert. denied, 273 Conn. 924, 871 A.2d 1032 (2005), for the proposition that "Connecticut courts have not hesitated to dig deeper when necessary to ensure that the guarantee against double jeopardy is honored," that reliance is grossly misplaced because they are not *Blockburger* cases. Rather, those cases focused on the first step of the double jeopardy inquiry—one not at issue in this appeal—namely, determining whether the multiple charges at issue arose from the same transaction such that it would be necessary even to reach the *Blockburger* test. See, e.g., *State* v. *Gonzalez*, supra, 302 Conn. 315.

[17] We disagree with the dissent's extensive reliance on the New York appellate courts' decision in *People* v. *Wood*, 260 App. Div. 2d 102, 107–108, 698 N.Y.S.2d 122 (1999), aff'd, 95 N.Y.2d 509, 742 N.E.2d 114, 719 N.Y.S.2d 639 (2000) (per curiam), in support of the proposition that application of Chief Justice Rehnquist's analytical approach in this case should lead to the conclusion that §§ 53a-223 (a) and 53a-217 (a) (3) (A) are the same offense. *Wood* does not support the dissent because, to the extent the New York courts found a double jeopardy violation therein, that holding did not apply to convictions for both a substantive crime and a contempt offense arising from the same conduct, but rather, involved two successive contempt convictions arising from the same harassing conduct that violated separate restraining orders contemporaneously issued by two state courts with concurrent jurisdiction, family court and city court, under two separate contempt statutes that differed only with respect to the named issuing court. See *People* v. *Wood*, supra, 95 N.Y.2d 513–14 (noting that "comparison of the two statutes in this case similarly reveals that *each* provision does not contain an additional element which the other does not" [emphasis in original]); see also id., 514–15 ("[U]nder *Blockburger*, a lesser included offense is the 'same' as a greater offense and, thus, the successive prosecution and cumulative punishment for a greater offense after conviction for a lesser included offense is barred by the [d]ouble [j]eopardy [c]lause . . . . Comparing the elements, we conclude that the contempt provision of the Family Court Act . . . is clearly a lesser included offense of criminal contempt in the first degree." [Citation omitted.]). Indeed, with respect to separate, noncontempt criminal charges of aggravated harassment arising from the defendant's contemptuous conduct, the Appellate Division of the Supreme Court of New York emphasized that "[t]here was no need to join

the aggravated harassment charges with the contempt charges because those crimes have different elements. The two types of charges did not violate the [d]ouble [j]eopardy [c]lause . . . .” (Citations omitted.) *People* v. *Wood*, supra, 260 App. Div. 2d 110. Thus, we conclude that the New York decisions in *Wood* provide no support for the dissent's arguments.

[18] Examples of statutory language to this effect include: “General Statutes § 53a-55a (a) (‘[n]o person shall be found guilty of manslaughter in the first degree and manslaughter in the first degree with a firearm upon the same transaction’); General Statutes § 53a-59a (b) (‘[n]o person shall be found guilty of assault in the first degree and assault of an elderly, blind, disabled, pregnant or mentally retarded person in the first degree upon the same incident of assault’); General Statutes § 53a-59b (b) (‘[n]o person shall be found guilty of assault in the first degree and assault of an employee of the Department of Correction in the first degree upon the same incident of assault’); General Statutes § 53a-72b (a) (‘[n]o person shall be convicted of sexual assault in the third degree and sexual assault in the third degree with a firearm upon the same transaction’); General Statutes § 53a-92a (a) (‘[n]o person shall be convicted of kidnapping in the first degree and kidnapping in the first degree with a firearm upon the same transaction’).” *State* v. *Kirsch*, supra, 263 Conn. 418–19.

[19] The defendant contends, however, that we should infer from the legislature's failure to include specific language *authorizing* multiple convictions and punishments that the legislature did not intend to permit multiple convictions and punishments for violations of §§ 53a-217 (a) (3) (A) and 53a-223 (a). He relies on the decisions of the Washington Supreme Court in *State* v. *Kelley*, 168 Wn. 2d 72, 76–78, 226 P.3d 773 (2010), and the South Dakota Supreme Court in *State* v. *Dillon*, supra, 632 N.W.2d 46–47. In *Dillon*, the South Dakota court concluded that the defendant's convictions of first degree rape and criminal pedophilia constituted a double jeopardy violation, observing that “[n]o words in our rape and pedophilia statutes make it clear that cumulative punishments are explicitly intended.” Id., 44–45, citing *Missouri* v. *Hunter*, supra, 459 U.S. 368–69 (describing legislative intent as “crystal clear” when statute specifically stated that punishment for armed criminal action was “in addition to” punishment for accompanying felony). Similarly, in *Kelley*, the Washington court rejected a defendant's claim that a double jeopardy violation results from the imposition of a firearm enhancement when the use of a firearm is an element of the underlying crime, noting that the legislature's “intent to impose multiple punishments could hardly be clearer” because the “statute unambiguously states that firearm enhancements are mandatory: ‘[N]otwithstanding any other provisions of law, all firearm enhancements under this section are mandatory.’ . . . Where exceptions are intended, they are expressly stated . . . .” (Citation omitted.) *State* v. *Kelley*, supra, 78–79.

We disagree with the defendant's reliance on these cases. First, the defendant does not reconcile *Dillon* and *Kelley* with our cases standing for the opposite proposition, such as *State* v. *Kirsch*, supra, 263 Conn. 418–19, and *State* v. *Greco*, supra, 216 Conn. 295. Second, both courts' approaches are fundamentally at odds with our well established double jeopardy analysis; see, e.g., *State* v. *Gonzalez*, supra, 302 Conn. 315; *State* v. *Alvaro F.*, supra, 291 Conn. 12–13; as they engaged in a legislative intent determination without first obtaining the prism of a rebuttable presumption through application of the *Blockburger* rule. See *State* v. *Dillon*, supra, 632 N.W.2d 45–46; *State* v. *Kelley*, supra, 168 Wn. 2d 77–78.

[20] We agree, however, with the defendant's argument, and the state's concession, that the Appellate Court improperly read an exchange between Representative Lawlor and Representative Kosta Diamantis in the House debate on Public Act 02-127, as standing for the proposition that the legislature clearly intended to allow multiple punishments for violations of §§ 53a-217 (a) (3) (A) and 53a-223 (a), despite the fact that they are the same offense. See *State* v. *Bernacki*, supra, 122 Conn. App. 408–409. Rather, that exchange was limited to clarifying that violations of “partial protective orders,” which permit defendants to remain at home so long as they do not, for example, assault their spouses, are punishable equally to those of “full protective order[s]” that preclude all contact. See 45 H.R. Proc., supra, p. 5199.

[21] “[I]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or pur-

poses for which the legislature used the language in question." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 314, 819 A.2d 260 (2003).

[22] See also 45 H.R. Proc., supra, p. 5204, remarks of Representative Lawlor (Stating that protective orders differ from civil restraining orders because they involve pending criminal charges and "the fact that a crime at least has been alleged. Now there's a criminal charge pending and you in effect, have violated the conditions of your release, one of which now is to abide by a protective order."); id., p. 5210, remarks of Representative Kosta Diamantis (discussing suggestions by victim advocates that increasing penalty "may relieve the number of protective order violations because it makes a more serious offense").

[23] See General Statutes §§ 29-28 (b) (6), 29-32 (b) and General Statutes (Sup. 2012) § 29-36k.

[24] Finally, we disagree with the defendant's reliance on the rule of lenity, because that principle is inapplicable given the lack of ambiguity in the statutory scheme after application of the *Blockburger* analysis and review of the legislative history. See, e.g., *State* v. *Alvaro F.*, supra, 291 Conn. 14 n.16; see also *Albernaz* v. *United States*, 450 U.S. 333, 342, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981) ("Where [the legislature] has manifested its intention, we may not manufacture ambiguity in order to defeat that intent. . . . Lenity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." [Citation omitted; internal quotation marks omitted.]).