EVELEIGH, J., with whom PALMER and HARPER, Js., join, dissenting. I respectfully dissent. The issue presented in this case is whether the punishment of the defendant, Gary C. Bernacki, Sr., for both criminal violation of a protective order, a form of nonsummary criminal contempt of court,[1] and the underlying substantive criminal offense—criminal possession of a firearm—which includes the existence of a protective order as an element, is barred by the double jeopardy clause of the fifth amendment to the United States constitution. I agree with the majority's analysis of the opinion of the Appellate Court. See *State* v. *Bernacki*, 122 Conn. App. 399, 401–402, 988 A.2d 262 (2010). I further agree with the majority that, contrary to the conclusion reached by the Appellate Court, there is no clear indication in the legislative history to the effect that the legislature intended to impose multiple punishments for this offense, nor is there any clear indication that it did not.[2] Thus, I agree with the majority that the result of the double jeopardy inquiry turns on whether the crimes constitute the "same offense" for double jeopardy purposes. I disagree, however, with the majority's conclusion that the crimes are not the same offense for double jeopardy purposes, and thus, I would conclude that a double jeopardy violation exists in the present case, requiring a reversal of the Appellate Court's judgment, which affirmed the trial court's judgment convicting the defendant of criminal possession of a firearm and criminal violation of a protective order. Accordingly, I respectfully dissent.

The defendant was charged with, inter alia, criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (3) (A), and criminal violation of a protective order in violation of General Statutes § 53a-223.[3] I agree with the majority's statement of our basic governing legal principles, recently restated by this court in *State* v. *Gonzalez*, 302 Conn. 287, 315–16, 25 A.3d 648 (2011).[4]

The first prong of the test set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), for evaluating whether two offenses are the same offense for double jeopardy purposes, requires a determination of whether the two offenses arise out of the same act or transaction. I agree with the majority that there is no dispute regarding this issue in the present case. Clearly, the two charges listed in the preceding paragraph arose from the same act—the information lists the same date and same location for both charges. Both charges also list the fact that a protective order had been issued against the defendant. The charge of criminal possession of a firearm indicates that the defendant possessed a firearm when he knew that he

was subject to the protective order. The charge of criminal contempt is not explicit regarding the nature of the violation of the protective order. It is, however, a violation of any such protective order to possess a firearm, the Appellate Court found, and the state does not dispute, that "[t]he basis of the charge of criminal violation of a protective order was the defendant's possession of a firearm . . . ." *State* v. *Bernacki*, supra, 122 Conn. App. 402. Therefore, the first prong of *Blockburger* is satisfied in that the two counts arose out of the same act.

The second prong of *Blockburger* requires a determination of whether the two charged crimes are the same offense. *Blockburger* v. *United States*, supra, 284 U.S. 304. I agree with the majority that, in the present case, a *Blockburger* analysis looking only to the particular criminal statutes allegedly violated, and to the charging instruments, suggests that these two crimes were not the same offense for double jeopardy purposes, even though the parties agree that in punishing the defendant for both crimes, the same blameworthy conduct, involving the same protective order and the same firearms, is proscribed.[5] The majority, of course, is correct when it observes that the broad language of § 53a-223 (a),[6] "only the intent to perform the act constituting the violation" is required, "and says nothing about the possession of firearms, and it is therefore possible to violate a General Statutes § 46b-38c protective order without possessing a firearm. The problem with the majority's analysis, however, is that the converse is not true: it is not possible to possess a firearm while subject to a protective order under § 46b-38c without violating that protective order. The Appellate Court noted this when it observed that "[t]he basis of the charge of criminal violation of a protective order was the defendant's possession of a firearm, *which specifically is prohibited by anyone against whom a protective order has been issued*." (Emphasis added.) *State* v. *Bernacki*, supra, 122 Conn. App. 402. The majority is also correct that "the language of § 53a-217 (a) (3)[7] 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 restraining or protective order of a court of this state that has been issued against such person . . . .' " The majority's observation is inapposite, however, as the possession of a firearm is not a violation of merely "a particular protective order," but a violation of any § 46b-38c protective order. Presuming the majority's analytical approach is the proper one, the analysis turns on the availability of this truth.

In my view, however, by employing the proper analytical approach, it is plain that as applied here the two crimes are for the same offense, stated in two different ways, one specifically and one generally. Pursuant to § 53a-217 (a) (3) (A), the defendant is guilty if he pos-

sesses a firearm while he knows that he is subject to a protective order. Pursuant to § 53a-223 (a), the defendant is guilty of violating a protective order if he violates one of the provisions therein by virtue of his intended act. *State* v. *Fagan*, 280 Conn. 69, 77, 905 A.2d 1101 (2006) ("the intent required to prove a violation of § 53a-223 [a] is only that the defendant intended to perform the activities that constituted the violation of the protective order"), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007). As violated by the defendant, both statutes require proof of the same elements and are violated by the same act, in this case the possession of a firearm. Because the analytical approach embraced by the majority ignores precisely what the state must prove to demonstrate nonsummary criminal contempt, ordinarily the analysis will turn on the specificity of the charging instrument. In the present case, if the charging instrument for violation of a protective order described the underlying criminal violation, which it admittedly did not, I would conclude that the majority's interpretation of the *Blockburger* two-prong test had been satisfied, the two crimes charged represented the same offense and that, accordingly, a rebuttable presumption arose that double jeopardy barred the multiple punishment of the defendant. It seems both incongruous and patently unfair that whether a defendant receives additional incarceration would be dependent upon the existence of a bill of particulars in his case.

In my view, the vindication of the defendant's double jeopardy protections is not, however, solely dependent upon the level of detail provided in the charging instruments. The majority acknowledges the United States Supreme Court's fractured opinion in *United States* v. *Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). The present case, as in *Dixon*, involves prosecution for violation of a type of court order that prohibited the defendant from engaging in conduct, where such conduct also constituted the underlying substantive crime. Therefore, I agree with the majority that we are required to analyze the defendant's multiple punishments in light of that opinion.[8] In determining whether prosecutions for both violation of a court order and the underlying substantive crime were barred by the double jeopardy clause of the fifth amendment, a majority of the United States Supreme Court held, in *Dixon*, that the protections of the double jeopardy clause attach to such contempt prosecutions just as they do in other criminal prosecutions.[9] Id., 699–700. Nevertheless, no majority of that court agreed on the precise application of double jeopardy clause jurisprudence to the situation present therein.[10] In part I of this dissent, I analyze the present case as the majority claims to and as the state urges us, following the analytical approach of Chief Justice Rehnquist in *Dixon*. In part II, I analyze the present case as Justice Scalia did for the court in *Dixon*, and as urged by the defendant

herein. Under either analytical model, I conclude that, in the present case, the *Blockburger* test raises a rebuttable presumption against multiple punishments.

I

In the present case, the majority "conclude[s] 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[s] that approach as [it confines its] '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)." The refusal of the majority to go beyond the traditional analysis in a case of multiple punishments for a violation of a court order and the underlying substantive crime is inconsistent with the result in *Dixon*, namely, that at least some prosecutions for both a violation of a court order and the underlying substantive crimes are, in fact, barred by the double jeopardy clause. Further, the majority fails to acknowledge 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.

The essence of Chief Justice Rehnquist's concurring and dissenting opinion in *Dixon* is that, in applying the *Blockburger* test, a court must "focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense." *United States* v. *Dixon*, supra, 509 U.S. 714 (Rehnquist, C. J., joined by O'Connor and Thomas, Js., concurring and dissenting); see also *Commonwealth* v. *Yerby*, 544 Pa. 578, 584, 679 A.2d 217 (1996). Applying the *Blockburger* same elements test strictly in *Dixon*, Chief Justice Rehnquist concluded: "[I]t is clear that the elements of the governing contempt provision are entirely different from the elements of the substantive crimes. [Nonsummary] [c]ontempt of court comprises two elements: (i) a court order made known to the defendant, followed by (ii) [wilful] violation of that order. . . . Neither of those elements 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." (Citations omitted.) *United States* v. *Dixon*, supra, 716. Therefore, it is the opinion of a *minority* of justices in *Dixon* that, because nonsummary criminal contempt merely consists of a violation of a court order known to the defendant, no prosecution and punishment for an underlying substantive crime that could be committed in the absence of a court order could *ever* violate double jeopardy. There are two problems with applying this analysis to the

present case.

First, in the present matter, the underlying substantive crime cannot be committed in the absence of a particular court order. Contrary to the claims of the state, proof of the elements necessary to show that the defendant has committed the underlying substantive offense specified in the information, § 53a-217 (a) (3) (A), *does* necessarily satisfy the elements of the contempt offense. In order to be found guilty of a violation of § 53a-217 (a) (3) (A), a person must be both "subject to . . . a restraining or protective order of a court of this state that has been issued against such person . . . in a case involving the use, attempted use or threatened use of physical force against another person," and in wilful violation of such order. We know 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 . . . ." General Statutes § 29-28 (b) (6);[11] see, e.g., General Statutes § 29-32 (b)[12] and General Statutes (Sup. 2012) § 29-36k.[13] The possibility that the defendant could also be guilty of violation of a restraining or protective order in some other fashion, or of some other court order, can not diminish the sufficiency of proof of guilt of § 53a-217 (a) (3) (A) in establishing guilt under § 53a-223 (a). Chief Justice Rehnquist's analysis in *Dixon* depended on a reciprocal independence of elements that does not appear in the present case because, in *Dixon*, unlike the present case, the underlying substantive crimes had no court order element that, through examination of our statutes rather than the evidence presented at trial, we know prohibited the underlying substantive crime itself. "[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." *State* v. *Gonzalez*, supra, 302 Conn. 316. Although the firearms statutes are not the criminal statutes themselves, I consider §§ 29-28 (b) (6), 29-32 (b) and § 29-36k to be "the statutes . . . as opposed to the evidence presented at trial"; id.; and relevant to a full understanding of the elements of the criminal statutes themselves.[14]

Second, as I have explained previously herein, a majority of the Supreme Court in *Dixon* made clear that convictions for violations of court orders do give rise to double jeopardy protections and at least some prosecutions for both nonsummary contempt of court and the underlying substantive crimes are barred. The analysis of the double jeopardy issue in Chief Justice Rehnquist's opinion, while ostensibly affirming such protections, fails to account for this possibility and the result in *Dixon*. Even so, the present case, involving an underlying substantive crime that depends upon the existence of a court order that must prohibit the very act proscribed by that underlying substantive crime, may be the only situation where Chief Justice

Rehnquist's approach would result in double jeopardy protection.

Further, I note that Chief Justice Rehnquist emphasized that, prior to the Supreme Court's decision in *Grady* v. *Corbin*, 495 U.S. 508, 521–22, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990) (supplementing *Blockburger* "same element" test with "same conduct" test), a decision overturned by the court in *Dixon*, "every Federal Court of Appeals and state court of last resort to consider the issue . . . agreed that there is no double jeopardy bar to successive prosecutions for [nonsummary] criminal contempt and substantive criminal offenses based on the same conduct." *United States* v. *Dixon*, supra, 509 U.S. 715. Among those cases cited was the Pennsylvania case of *Commonwealth* v. *Allen*, 506 Pa. 500, 511–16, 486 A.2d 363 (1984), cert. denied, 474 U.S. 842, 106 S. Ct. 128, 88 L. Ed. 2d 105 (1985). Not only has *Allen* been overruled,[15] but its holding reflected the reasoning of Justice Blackmun in *Dixon*; see footnote 10 of this dissenting opinion; not Chief Justice Rehnquist. Accordingly, there was no pre-*Grady* unanimous agreement among the states on Chief Justice Rehnquist's approach.

Following Chief Justice Rehnquist's approach, the majority in the present case compares the literal elements of the violation of a protective order statute—ignoring the terms of both the actual protective order and §§ 29-28 (b) (6), 29-32 (b) and 29-36k—against those of criminal possession of a firearm, the substantive criminal offense at issue, finding that the elements are not the same because "the language of § 53a-217 (a) (3) does not criminalize the violation of the terms of a *particular* protective order. . . ." (Emphasis in original.) Viewing the elements of every nonsummary contempt of court crime in this manner will result in there *never* being a presumed double jeopardy bar to such prosecutions under the *Blockburger* same elements test. Not even Chief Justice Rehnquist would set so high a bar. In *Dixon*, Chief Justice Rehnquist observed that proving the general elements of nonsummary criminal contempt will not be necessary in establishing the underlying substantive criminal offense or vice versa because the underlying substantive criminal offenses contained additional, if not entirely different elements. *United States* v. *Dixon*, supra, 509 U.S. 716 (Rehnquist, C. J., concurring in part and dissenting in part). Accordingly, Chief Justice Rehnquist's approach renders double jeopardy protections in nonsummary criminal contempt circumstances wholly nugatory when a court order is not an element of the underlying substantive offense.[16]

In the present case, the majority goes one step further, rendering double jeopardy protections in nonsummary criminal contempt circumstances wholly nugatory even when a court order is an element of the underlying

substantive offense, even in situations wherein examination of our statutes pursuant to statutory construction of the criminal statutes at issue reveals that the underlying substantive offense violates any such order. In the present case, the underlying substantive criminal offense *does* require the person to be subject to a restraining or protective order in a case involving the use, attempted use or threatened use of physical force against another person, and reference to the relevant related statutes shows that such orders always prohibit the possession of firearms.[17] Therefore, proving this particular underlying substantive criminal offense also proves the violation of a protective order. Nevertheless, the majority in the present case asserts that, because § 53a-217 (a) (3) (A) does not criminalize the violation of the terms of any *particular* protective order, the traditional *Blockburger* test does not result in a double jeopardy bar. I respectfully suggest that either approach is untenable because the United States Supreme Court decided in *Dixon* that a nonsummary criminal contempt conviction for a violation of a court order does give rise to double jeopardy protections—not merely in theory but in practice—even when the underlying substantive offense does not include the court order, and even when our relevant related statutes make plain that the act constituting the underlying substantive offense is prohibited by the court order.

In following Chief Justice Rehnquist's analytical approach[18] to this issue, the conclusion of the majority in the present case has been squarely rejected by New York courts. *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). At issue in *Wood* was whether a prosecution on criminal contempt charges and the underlying substantive crimes of harassment constituted double jeopardy where a family court had previously found the defendant guilty of contempt for wilfully violating a family court order of protection based upon the same underlying conduct. Id., 104–105. As in the present case, there was no dispute that the charges arose from the same act.[19] The New York courts determined that, because of the prior nonsummary contempt conviction for violation of a court order in family court, the subsequent nonsummary criminal contempt charges were barred, although charges for the underlying substantive crimes were not.[20] Id., 108; *People* v. *Wood*, supra, 95 N.Y.2d 513–14. The New York Court of Appeals noted that application of its *Blockburger* test was complicated by the presence of multiple contempt prosecutions, stating: "The application of the *Blockburger* test in this case is unusual in that two successive contempt prosecutions are involved, rather than prosecutions for contempt and an underlying substantive offense (see, *United States* v. *Dixon*, [supra, 509 U.S. 688]). A comparison of the two statutes in this case similarly reveals that *each* provision

does not contain an additional element which the other does not. First degree criminal contempt contains the additional element of proof of a defendant's prior contempt conviction and can be based on violation of an order of protection from one of several enumerated courts, including a [f]amily [c]ourt order . . . . The [f]amily [c]ourt contempt provision contains no other element different from [first degree criminal contempt], but must be based on an order issued by [f]amily [c]ourt. As enumerated, the statutory elements of the [f]amily [c]ourt provisions are subsumed by those of [first degree criminal contempt].

"Because the same acts violated both orders, it would be impossible for [the] defendant to be guilty of first degree criminal contempt for violating the [c]ity [c]ourt order of protection without concomitantly being guilty of contempt for violating the [f]amily [c]ourt order of protection . . . ." (Citation omitted; emphasis in original.) *People* v. *Wood*, supra, 95 N.Y.2d 513–14. In the present case, it would likewise be impossible for the defendant to be guilty of § 53a-217 (a) (3) (A), criminal possession of a firearm while subject to a restraining or protective order "in a case involving the use, attempted use or threatened use of physical force against another person," without concomitantly being guilty of contempt for violating a restraining or protective order, because examination of our statutes shows that possession of a firearm is always a violation of such a restraining or protective order.[21] Further, *Wood* demonstrates that the majority's reference to a "particular protective order" is unavailing. See *People* v. *Wood*, supra, 95 N.Y.2d 515 ("the [p]eople cannot circumvent the double jeopardy bar simply by seeking to prosecute the criminal action for violation of another court order based on the same conduct"). Accordingly, *Wood* demonstrates that, even under Chief Justice Rehnquist's analytical approach, the crimes in the present case are the "same offense" for double jeopardy purposes.[22]

The remaining cases cited by the majority in support of following the approach of Chief Justice Rehnquist also fail to support the conclusion of the majority in the present case because, unlike here, the substantive underlying crimes in the cited cases did not include a violation of a court order element. In *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), the Ohio Court of Appeals concluded that "[u]nder the contempt statute, for example, the state had to prove that [the defendant] was subject to a lawful court order, and that he had disobeyed that order. Proof of these elements, however, was not required to support the convictions for criminal trespassing." In *State* v. *Warren*, 330 S.C. 584, 599, 500 S.E.2d 1258 (App. 1998), rev'd on other grounds, 341 S.C. 349, 534 S.E.2d 687 (2000), the South Carolina Court

of Appeals concluded that "[a]pplying the traditional *Blockburger* test, as explained by [Chief] Justice Rehnquist, it is clear the elements of the contempt offense are different from the elements of the charge of second-degree criminal sexual conduct with a minor. Contempt results from the [wilful] disobedience of a court order. . . . In comparison, the elements of second-degree criminal sexual conduct with a minor are as follows: (1) the actor engages in sexual battery, (2) with a victim who is at least fourteen years of age, but who is less than sixteen years of age, and (3) the actor is in a position of familial, custodial, or official authority to coerce the victim to submit or is older than the victim. . . . Clearly, the offenses are separate and distinct, and prosecution for both does not violate the [d]ouble [j]eopardy [c]lause." (Citations omitted.)

In the present case, one element of the underlying substantive crime was that the defendant was subject to a particular type of lawful court order—a restraining or protective order in a case involving the use, attempted use or threatened use of physical force against another person—and the other element was that the defendant was in possession of a firearm, which is always a violation of that particular type of lawful court order. Accordingly, the elements of the underlying substantive crime included the elements of the violation of protective order charge.

The Florida Supreme Court also followed the approach set forth by Justice Scalia in *State* v. *Johnson*, 676 So. 2d 408, 411 (Fla. 1996), when it considered the offense actually deemed to have been violated in the contempt proceeding, and noted: "[c]riminal contempt requires proof of entering the residential premises, which the aggravated stalking offense does not; aggravated stalking requires proof of maliciousness which the contempt offense does not." Even though double jeopardy did not bar the subsequent prosecutions at issue in *Johnson*, it did so for the reasons that Justice Scalia concluded that various subsequent prosecutions against a corespondent in *Dixon* were not barred. *United States* v. *Dixon*, supra, 509 U.S. 702–703. Chief Justice Rehnquist, looking only to the general elements of the contempt statute, would not have observed that "[c]riminal contempt requires proof of entering the residential premises"; *State* v. *Johnson*, supra, 411; as this proof is an element of the particular violation of the court order, not an element of the statute.

II

Although I conclude that, by refusing to examine all of our relevant statutes, the majority has improperly concluded that Chief Justice Rehnquist's approach to the second prong of the *Blockburger* "same elements" test does not result in a double jeopardy bar in the present case, I maintain that Chief Justice Rehnquist's approach is improper in a case involving violation of a

court order and the underlying substantive crime. As the only analytical framework in *Dixon* consistent with the result—i.e., reversal of some convictions, but not all—was expressed by Justice Scalia, I would apply his analytical framework to such cases.[23] See *United States* v. *Dixon*, supra, 509 U.S. 697–700. Thus, rather than a mechanical comparison of the general elements of the nonsummary contempt crime with the specific elements of the underlying substantive crime, I would "compare the elements of the offense actually deemed to have been violated in th[e] contempt proceeding against the elements of the substantive criminal offense(s)." *Commonwealth* v. *Yerby*, supra, 544 Pa. 588. "In other words, we must look to the specific offenses at issue in the contempt proceeding and compare the elements of those offenses with the elements of the subsequently charged criminal offenses. If they are the same, or if one is a lesser included offense of the other, double jeopardy attaches and the subsequent prosecution is barred [or a presumption arises against multiple punishment, as the case may be]. The focus, then, is on the offense(s) for which the defendant was actually held in contempt." Id., 587–88.

The statute applicable in the defendant's violation of protective order prosecution provides that "[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." General Statutes § 53a-223 (a). Obviously, the defendant could not commit this crime until a protective order setting out conditions was issued. The statute by itself imposes no legal obligation on anyone, but requires a court order. Accordingly, the crime of violation of a protective order cannot be abstracted from the element of the violated condition described in the order, so the terms of the court order must be incorporated into the crime. Further, the defendant's possession of a firearm was not an offense under § 53a-217 (a) (3) (A) until "a restraining or protective order of a court of this state . . . has been issued against [him] . . . in a case involving the use, attempted use or threatened use of physical force against another person . . . ." The second page of the protective order informed the defendant in detail of the steps necessary to comply with statutory firearms restrictions[24] imposed on all persons subject to restraining or protective orders.[25] Because the defendant's contempt offense did not include any element not contained in his criminal possession of a firearm offense (once the protective order is incorporated into each offense, as it must be), or because the converse is true as well, under Justice Scalia's analytical model in *Dixon*, the crimes constitute the same offense and, because there is no evidence that the legislature clearly intended punishment under both statutes, his punishment for both violates the double

jeopardy clause of the constitution of the United States.[26]

In the present case, therefore, whether applying either Chief Justice Rehnquist's or Justice Scalia's analytical approach in *Dixon*, these offenses are the same offense. In the absence of evidence of a clear legislative intent to rebut the presumption that therefore arises under the *Blockburger* test, double jeopardy bars the imposition of multiple punishments for the same offense. I would reverse the judgment of the Appellate Court with instruction to remand the matter to the trial court for resentencing on one charge only. In accordance with *State* v. *Miranda*, 274 Conn. 727, 735, 878 A.2d 1118 (2005), I would leave the charge to be sentenced to the discretion of the sentencing court and dismiss the charge that is not the subject of the sentencing.

Therefore, I respectfully dissent.

[1] Notwithstanding the legislature's intent to create a separate criminal offense for violation of a protective order, I refer herein to the crime of violation of a protective order as a form of nonsummary criminal contempt. In doing so, I am not unaware that the statute under which the defendant is charged, General Statutes § 53-223, violation of a protective order, is a separate statute from General Statutes § 51-33a, our nonsummary contempt of court statute. Nevertheless, it is axiomatic that wilfully disobeying any court order is a nonsummary criminal contempt of court. See, e.g., *State* v. *Murray*, 225 Conn. 355, 362, 623 A.2d 60 (1993) ("[t]he inherent power of a Connecticut trial court nonsummarily to punish, as criminal contempt of court, conduct occurring outside the court's presence, such as disobedience to a judicial order, has been recognized in an unbroken line of authority from the earliest days of our judiciary to the present"); Practice Book §§ 1-13A through 1-21A. For purposes of our double jeopardy analysis, the same issues arise whether prosecution for violation of a particular judicial order proceeds under § 51-33a or any other criminal offense statute prohibiting disobedience to a judicial order. See footnotes 18 and 19 of the majority opinion and the accompanying text.

[2] In fact, both the defendant and the state agree that the Appellate Court misconstrued the legislative hearing testimony for a clear indication of legislative intent to impose multiple punishments for this offense.

[3] The second count of the information charges as follows: "And the 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 [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 an 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) . . . ."

The third count of the information charges as follows: "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 [General Statutes §] 46b-38c had been issued against [him] and [he] violated such order in violation of [§] 53a-223 (a) . . . ."

[4] "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*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). 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)]." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 302 Conn. 315–16.

[5] The consequence of averting our eyes from the obvious under the traditional *Blockburger* test has prompted one commentator to observe: "*Blockburger* permits judges to answer the same-offense question without thinking about substantive sameness. It is a mechanical solution. The act-type that we call larceny could, by virtue of additional trivial descriptive elements, be held to be several different offenses. This seems wrong. If 'offense' is a substantive concept, which it is in criminal law, it is a mystery why courts and commentators rely on mechanical tests to measure the double jeopardy sameness of different statutory offenses." G. Thomas III, Double Jeopardy: The History, the Law (1998) p. 138.

[6] 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." "We note that in each case, the order is issued for the protection of an identified victim or victims. In the case of General Statutes § 54-1k, such an order is issued to protect a stalking victim; in the case of General Statutes § 54-82r, an order is issued to protect an identified witness in a criminal prosecution; and in the case of General Statutes § 46b-38c, a family violence protective order is issued to protect a named victim who, by statutory definition, is a member of a statutorily defined group." *State* v. *Charles*, 78 Conn. App. 125, 136 n.5, 826 A.2d 1172, cert. denied, 266 Conn. 908, 832 A.2d 73 (2003).

[7] General Statutes § 53a-217 (a) provides: "A person is guilty of criminal possession of a firearm or electronic defense weapon when such person possesses a firearm or electronic defense weapon and (1) has been convicted of a felony, (2) has been convicted as delinquent for the commission of a serious juvenile offense, as defined in section 46b-120, (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, or (B) a foreign order of protection, as defined in section 46b-15a, that has been issued against such person in a case involving the use, attempted use or threatened use of physical force against another person, (4) knows that such person is subject to a firearms seizure order issued pursuant to subsection (d) of section 29-38c after notice and an opportunity to be heard has been provided to such person, or (5) is prohibited from shipping, transporting, possessing or receiving a firearm pursuant to 18 USC 922 (g)(4). For the purposes of this section, 'convicted' means having a judgment of conviction entered by a court of competent jurisdiction."

[8] Although *Dixon* involved a subsequent prosecution rather than multiple punishments, a majority of the Supreme Court of the United States concluded that the test for double jeopardy is the same. See *United States* v. *Dixon*,

supra, 509 U.S. 696 (Scalia, J., joined by Kennedy, J., in part II, joined by Rehnquist, C. J., and O'Connor and Thomas, Js.) ("[i]n both the multiple punishment and multiple prosecution contexts, this [c]ourt has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same elements' test, the double jeopardy bar applies"). But see id., 735 (White, J., joined by Stevens, J., concurring in the judgment in part and dissenting in part) ("To focus on the statutory elements of a crime makes sense where *cumulative* punishment is at stake, for there the aim simply is to uncover legislative intent. The *Blockburger* inquiry, accordingly, serves as a means to determine this intent . . . . But . . . adherence to legislative will has very little to do with the important interests advanced by double jeopardy safeguards against *successive* prosecutions. . . . The same-elements test is an inadequate safeguard [in the successive prosecution context], for it leaves the constitutional guarantee at the mercy of a legislature's decision to modify statutory definitions. . . . [E]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." [Citations omitted; emphasis in original; internal quotation marks omitted.]); id., 741 (Blackmun, J., concurring in the judgment in part and dissenting in part) ("I agree with Justice Souter that 'the *Blockburger* test is not the exclusive standard for determining whether the rule against successive prosecutions applies in a given case' "); id., 747 (Souter, J., joined by Stevens, J., concurring in the judgment in part and dissenting in part) ("while the government may punish a person separately for each conviction of at least as many different offenses as meet the *Blockburger* test, we have long held that it must sometimes bring its prosecutions for these offenses together").

[9] Justices Scalia, Kennedy, White, Stevens and Souter all voted to bar the subsequent prosecution of the respondent for the underlying substantive crime. See *United States* v. *Dixon*, supra, 509 U.S. 700 (Scalia, J., joined by Kennedy, J.) ("[b]ecause [the respondent's] drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution [for the underlying criminal offense] violates the [d]ouble [j]eopardy [c]lause"); id., 731–32 (White, J., joined by Stevens, J., concurring in the judgment in part and dissenting in part) ("The prohibitions imposed by the court orders, in other words, duplicated those already in place by virtue of the criminal statutes. . . . [T]he distinction between being punished for violation of the criminal laws and being punished for violation of the court orders, therefore, is simply this: Whereas in the former case the entire population is subject to prosecution, in the latter such authority extends only to those particular persons whose legal obligations result from their earlier participation in proceedings before the court. . . . But the *offenses* that are to be sanctioned in either proceeding must be similar, since the contempt orders incorporated, in full or in part, the criminal code." [Citation omitted; emphasis in original; internal quotation marks omitted.]); id., 744 (Souter, J., joined by Stevens, J., concurring in the judgment in part and dissenting in part) ("I would hold . . . the prosecution of [the respondent] . . . under all the counts of the indictment against him to be barred by the [d]ouble [j]eopardy [c]lause").

[10] Justice Scalia, joined by Justice Kennedy, would incorporate the court order in the criminal charge for violation of a court order. See *United States* v. *Dixon*, supra, 509 U.S. 698 ("the 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition."). Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, concurring in part and dissenting in part, would "focus, not on the terms of the particular court orders involved, but on the elements of contempt of court in the ordinary sense" and thus criminal contempt and underlying substantive criminal prosecutions do not violate the double jeopardy clause. Id., 714. Justice White, joined by Justice Stevens, concurring in the judgment in part and dissenting in part, would "put to the side the [court order] (which, as it were, triggered the court's authority to punish the defendant for acts already punishable under the criminal laws) and compared the substantive offenses of which [the respondent] stood accused . . . ." Id., 734. Justice Blackmun, concurring and dissenting, would not conclude that criminal contempt and the underlying substantive crime are the same offense, because "[t]he purpose of contempt is not to punish an offense against the community at large but rather to punish the specific offense of disobeying a court order." Id., 742. Justice Souter, joined by Justice Stevens, concurring in part and dissenting in part, concedes that a traditional application of the

Blockburger test does not show that a criminal contempt prosecution and subsequent underlying crime prosecution are the same offense, but "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved in the first." (Internal quotation marks omitted.) Id., 748.

[11] General Statutes § 29-28 (b) provides in relevant part: "Upon the application of any person having a bona fide residence or place of business within the jurisdiction of any such authority, such chief of police, warden or selectman may issue a temporary state permit to such person to carry a pistol or revolver within the state, provided such authority shall find that such applicant intends to make no use of any pistol or revolver which such applicant may be permitted to carry under such permit other than a lawful use and that such person is a suitable person to receive such permit. No state or temporary state permit to carry a pistol or revolver shall be issued under this subsection if the applicant . . . (6) is 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 . . . ."

[12] General Statutes § 29-32 (b) provides in relevant part: "Any state permit or temporary state permit for the carrying of any pistol or revolver may be revoked by the Commissioner of [Emergency Services and Public Protection] for cause and shall be revoked by said commissioner upon conviction of the holder of such permit of a felony or of any misdemeanor specified in subsection (b) of section 29-28 or upon the occurrence of any event which would have disqualified the holder from being issued the state permit or temporary state permit pursuant to subsection (b) of section 29-28. . . ."

[13] General Statutes (Sup. 2012) § 29-36k provides in relevant part: "(a) Not later than two business days after the occurrence of any event that makes a person ineligible to possess a pistol or revolver or other firearm, such person shall (1) transfer . . . all pistols and revolvers . . . and transfer . . . all other firearms . . . and submit a sale or transfer of firearms form . . . or (2) deliver or surrender such pistols and revolvers and other firearms to the Commissioner of Emergency Services and Public Protection. . . .

"(c) Any person who fails to transfer, deliver or surrender any such pistols and revolvers and other firearms as provided in this section shall be subject to the penalty provided for in section 53a-217 or 53a-217c."

[14] The majority criticizes my consideration of §§ 29-28 (b) (6), 29-32 (b) and § 29-36k in my analysis as "overbroad," claiming that "the related firearms statutes . . . are not relevant to the double jeopardy analysis." The majority, however, has cited to the description in *Gonzalez* of our *Blockburger* test, a description with which I agree, and has not cited any authority for the proposition that a *Blockburger* analysis of two criminal statutes precludes statutory construction of terms and phrases in those statutes to clarify their meaning or that, in particular, our firearm statutes are more akin to "the evidence presented at trial" than "statutes."

A closer question than consideration of the firearms statutes is whether the terms of the Superior Court's family violence protective order form JD-CR-58 may be considered in our comparison of the two criminal statutes. While the completed form is clearly "evidence presented at trial," the blank form itself is an official court form on the public record. Reference to the blank form reveals ten optional orders and a single mandatory order, which is presented in boldface and all capital letters: "SURRENDER OR TRANSFER ALL FIREARMS." Although the result of my analysis does not depend upon consideration of the blank family violence protective order form, I view it as appropriate to consider given its relevance to construing the meaning of the phrase "an order issued pursuant to subsection (e) of section 46b-38c" in § 53a-223 (a), and the phrase "a restraining or protective order of a court of this state that has been issued . . . in a case involving the use, attempted use or threatened use of physical force against another person," in § 53a-217 (a) (3) (A). I would conclude that form JD-CR-58 is further evidence that possession of a firearm is a violation of a family violence protective order.

Moreover, contrary to the majority, I would conclude that statutory construction of the two criminal statutes and the firearms statutes is appropriate under the *Blockburger* test, and that such construction is consistent with Chief Justice Rehnquist's approach.

[15] "[S]ince a majority of the United States Supreme Court in [*Dixon*] failed to embrace the analysis suggested by our court in *Allen* with respect to the application of *Blockburger*, and explicitly rejected the reasoning and analysis

of *Allen* with respect to the vindication of the distinct interests involved, this court's decision therein can no longer be deemed valid. Accordingly, that decision is hereby overruled." *Commonwealth* v. *Yerby*, supra, 544 Pa. 587.

[16] The underlying substantive offense in *Dixon* was possession of cocaine with intent to distribute, D.C. Code Ann. § 33-541 (a) (1) (1988), an offense without a court order element. *United States* v. *Dixon*, supra, 509 U.S. 691.

[17] See footnotes 11, 12 and 13 of this dissenting opinion.

[18] "In *People* v. *Arnold* [174 Misc. 2d 585, 592, 664 N.Y.S.2d 1068 (1997)], Justice Leventhal relied on Chief Justice Rehnquist's concurring in part and dissenting in part plurality opinion in *Dixon* . . . . We agree that the same analysis should be applied in this case." *People* v. *Wood*, 260 App. Div. 2d 102, 107, 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).

[19] "Applying the same elements test to [the] defendant's prosecution for criminal contempt in the first degree, we conclude that the only conduct involved is the making of telephone calls in the early morning of December 25, 1996 [which lead to the family court's finding the defendant guilty of contempt]." *People* v. *Wood*, supra, 260 App. Div. 2d 108.

[20] "The conviction of criminal contempt in the first degree . . . under counts one through five of the indictment should be dismissed. [The prior nonsummary contempt conviction for violation of the family court order] is a lesser included offense of criminal contempt in the first degree. Once [the] defendant was found guilty of the lesser included offense, the [d]ouble [j]eopardy [c]lause prohibited the subsequent prosecution for the greater offense (see, [*Brown* v. *Ohio*, 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)]). Thus, [the] defendant's conviction of criminal contempt in the first degree is unconstitutional." *People* v. *Wood*, supra, 260 App. Div. 2d 108.

[21] See footnotes 11 and 12 of this dissenting opinion.

[22] The majority claims that it "disagree[s] with the dissent's extensive reliance on the New York appellate courts' decision in [*Wood*], 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." The majority further asserts that *Wood* is inapplicable because "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 . . . under two separate contempt statutes that differed only with respect to the named issuing court." Although I concede differences between *Wood* and the present case, I would conclude that *Wood* is relevant for two reasons. First, it is uncontroverted that the *Blockburger* test applies to both successive prosecution and multiple punishment cases. See footnote 8 of this dissenting opinion. Second, in the present case, as in *Wood*, it is impossible for the defendant to be guilty of one crime involving violation of a court order without being guilty of the crime of violation of a court order.

[23] In the wake of *Dixon*, many of our sister states have come to the same conclusion and adopted Justice Scalia's analytical model. See *Penn* v. *State*, 73 Ark. App. 424, 428, 44 S.W.3d 746 (2001); *People* v. *Allen*, 868 P.2d 379, 384–85 (Colo. 1994), cert. denied, 513 U.S. 842, 115 S. Ct. 129, 130 L. Ed. 2d 73 (1994); *State* v. *Johnson*, supra, 676 So. 2d 410–11; *State* v. *Powers*, 126 N.M. 114, 121, 967 P.2d 454 (App. 1998); *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*, supra, 544 Pa. 587–88; *Ex parte Rhodes*, 974 S.W.2d 735, 740–41 (Tex. Crim. App. 1998).

[24] See footnotes 11, 12 and 13 of this dissenting opinion.

[25] See footnote 4 of the majority opinion for the text of page two of the family violence protective order form JD-CR-58 Rev. 10-03, elaborating in detail the steps necessary to comply with statutory firearms restrictions imposed on all persons subject to family violence protective orders. I further note that on page one, at the top of the page, centered, outlined in a box, in all capital letters, boldfaced, the family violence protective order form provides: "****ATTENTION DEFENDANT** SEE PAGE 2 FOR FIREARMS RESTRICTIONS AND OTHER INFORMATION CONCERNING ORDERS OF PROTECTION.**" At the bottom of page one, in boldface and larger font size, the protective order itself reads: "**SURRENDER OR TRANSFER ALL FIREARMS font b="1" i="1"(See page 2, call 860 685-8400 for assistance).**

[26] **Justice Scalia apparently was not troubled by the distinction**

between the prescribed mental states of the offenses in the *Dixon* case. See *United States* v. *Dixon*, supra, 509 U.S. 697–703; see footnote 10 of the majority opinion.