PALMER, J., with whom ZARELLA, J., joins, concurring. The majority concludes that counsel for the plaintiff in error, Lamar Rowe (plaintiff), properly objected to the trial court's second contempt finding on the ground that that finding violated the common-law prohibition against multiple findings of contempt arising out of a witness' blanket refusal to answer questions or refusal to answer repeated questions pertaining to the same area or subject of inquiry. Having determined that this claim was preserved for purposes of appeal, the majority resolves the claim in favor of the plaintiff. I disagree with the majority that the plaintiff's counsel raised the common-law claim in the trial court that the plaintiff now raises on appeal. Although that claim is therefore unpreserved, the record is adequate for review of the plaintiff's constitutional claims, which, I believe, are meritorious.[1] Accordingly, I would reverse the second finding of contempt but do so on constitutional, rather than common-law, grounds.[2]

Most of the essential facts and procedural history are set forth in the majority opinion. On April 18, 2005, the plaintiff was interviewed by detectives of the New Haven police department concerning a murder that had occurred the day before. Hilbert Roberts was a suspect in, and later charged with, that murder. During his interview, the plaintiff told the detectives that, between 9 and 10 p.m. on Saturday, April 16, 2005, he had seen Roberts and other men in a black Acura Integra that was located in the rear of a housing project on Congress Avenue in New Haven. The plaintiff also told the detectives that he had seen the black Acura on Sunday morning, April 17, 2005, between 9:30 and 11 a.m.

Thereafter, during Roberts' murder trial, the senior assistant state's attorney[3] called the plaintiff as a witness. Outside the presence of the jury, the plaintiff, who was not represented by counsel at that time, answered several questions, but, when asked about Roberts, he asserted his fifth amendment privilege against self-incrimination, indicating that he did not want to testify. Even though the court informed the plaintiff that the fifth amendment was inapplicable and that he could be held in contempt of court if he refused to answer questions for which no valid privilege existed, the plaintiff nevertheless persisted in his refusal to testify. The trial court denied the assistant state's attorney's request to hold the plaintiff in contempt at that time, however, and indicated that counsel would be appointed for him.

The next day, the plaintiff appeared in court with appointed counsel, Thomas Farver. After the plaintiff resumed the witness stand outside the presence of the jury, Farver informed the court that, although he believed that the plaintiff potentially had the right to

invoke his fifth amendment privilege against self-incrimination, the plaintiff did not wish to assert that privilege. The court apprised the plaintiff that he could be held in contempt and sentenced to up to six months in prison for each refusal to answer a question posed to him. The assistant state's attorney then asked the plaintiff whether he had seen Roberts driving a black Acura Integra on April 16, 2005, but the plaintiff stated that he did not wish to answer the question. The plaintiff made it clear, however, that he was not invoking his fifth amendment privilege against self-incrimination. The court then directed the plaintiff to answer the question, but he refused. The court asked the plaintiff if he had anything to say before being held in contempt and having sentence imposed. The plaintiff stated: "Yeah. I don't want to be asked no more questions." The court then held the plaintiff in contempt of court and imposed a six month term of imprisonment.

The assistant state's attorney then asked the plaintiff whether he had seen Roberts driving a black Acura Integra on the morning of Sunday, April 17, 2005. The plaintiff again refused to answer the question. The court directed him to do so, stating that "[i]t involves a separate date from the first [question]." When the plaintiff again refused, the court stated: "All right. Do you want to consult with [Attorney] Farver or be heard at all before I make a finding of contempt and pass sentence on you?" The plaintiff stated that he did not. Farver, however, interjected, stating, "Your Honor, I'd like to be heard . . . before you pass sentence." The court instructed Farver to proceed, and Farver stated: "I understand that the likelihood is that the court will find us in contempt, but I think that . . . this question basically, it's essentially the same fact scenario and it is just rewording the question, and under those circumstances I would ask the court not to impose a sentence that is consecutive to the prior contempt because it's all one set of circumstances that's being questioned about, and obviously, [the assistant state's attorney] can ask the question fifteen different ways or more, and . . . it would be unfair to impose . . . any additional time for that." The court responded: "I agree with that except we haven't reached that point, [Attorney] Farver. This is a separate date than the first question. They are both relevant. They are independently relevant, and while I am concerned about the possibility . . . you raise, this is not that situation." After holding the plaintiff in contempt of court a second time, the court sentenced him to a term of imprisonment of six months, to run consecutively to his first contempt sentence.[4]

I

On the basis of this record, the majority concludes that Farver properly raised the claim that the plaintiff now pursues on appeal, namely, that he lawfully could

not be held in contempt a second time because his refusal to answer the question that resulted in the second contempt finding "was part of a single, continuous act of contempt." In other words, the majority concludes that Farver's argument placed the trial court on notice of the plaintiff's claim that the court was barred from holding him in contempt a second time. I respectfully submit that the record does not support the majority's conclusion.

As the record unambiguously demonstrates, Farver never maintained that the plaintiff was not subject to being held in contempt a second time. Indeed, Farver *never even suggested* that a second contempt finding would be improper; he indicated, in fact, that he expected the court to hold the plaintiff in contempt, and he sought to be heard only with respect to the appropriate sentence. Specifically, Farver argued that the plaintiff's refusal to answer the assistant state's attorney's question about the events of April 17, 2005, did not warrant the imposition of a sentence to run *consecutively* to the sentence that already had been imposed on the plaintiff for his refusal to answer the question about the events of April 16, 2005. The record is perfectly clear in this regard: Farver "ask[ed] the court not to impose a *sentence* that is *consecutive*" because, under the circumstances, it would have been "unfair" to do so. (Emphasis added.) The record is devoid of any claim or contention that a second contempt finding was improper; Farver's argument addressed only the fairness of the *sentence* to be imposed, not the impropriety of the underlying contempt *finding*.

Thus, the flaw in the majority's reasoning and conclusion stems from its failure to acknowledge the distinction between a finding of contempt, on the one hand, and the sentence imposed in connection with that contempt finding, on the other. In the trial court, Farver challenged only the propriety of a particular sentence; on appeal, the plaintiff challenges only the propriety of the second *finding* of contempt. Even if, consistent with Farver's request, the trial court had imposed no sentence, a suspended sentence or a concurrent sentence for that second contempt, the plaintiff's claim on appeal would be the same: the court lawfully could not make a second contempt *finding* because the plaintiff's refusal to answer the question about the events of April 17, 2005, was part of single act of contempt.[5] The majority fails to explain how Farver's request that the trial court impose no consecutive prison time in connection with the second contempt finding can be equated with the plaintiff's claim on appeal, namely, that the second contempt finding was improper.

In fact, the majority skirts this issue by broadly characterizing Farver's argument as one predicated on the contention that the plaintiff "should not be *punished for multiple contempts* when the [assistant state's attor-

ney] was seeking to elicit essentially the same information, or information on the same subject, by posing the question differently." (Emphasis added.) The majority's use of the term "punished for multiple contempts" blurs the distinction between a finding of contempt and the sentence imposed for the contempt. As I have explained, in the present case, Farver did not object to a second contempt finding; he merely sought a sentence for the second contempt that was not consecutive to the sentence imposed for the first contempt. In other words, contrary to the assertion of the majority, Farver never maintained that the plaintiff could not be "punished for multiple contempts . . . ." Farver argued, rather, that the appropriate punishment for the second contempt was a punishment *other than* a consecutive sentence.

Despite the clarity of Farver's argument seeking to dissuade the trial court from imposing a consecutive sentence, the majority attempts to justify its result by asserting that, although Farver's claim was "somewhat ambiguous"; footnote 6 of the majority opinion; the argument nevertheless was sufficiently clear to place the trial court on notice that Farver *actually* was raising the same claim that the plaintiff raises on appeal, that is, that the trial court properly could not make a second contempt finding. In particular, the majority states: "Farver appears to have conceded initially that the trial court properly could make a second finding of contempt . . . but then argued that the trial court should not impose a second sentence. Because a second sentence *necessarily* would have been imposed as a result of a second finding of contempt, this argument is somewhat ambiguous and appears internally inconsistent." (Emphasis in original.) Id. For a variety of reasons that have nothing to do with the record of this case, the majority "decline[s] to construe this ambiguity against the plaintiff," concluding that the trial court should have "understood the essence of [Farver's] claim" as one challenging the propriety of a second contempt finding rather than one requesting a sanction other than consecutive prison time. Id.

Contrary to the majority's conclusion, Farver's argument was not even slightly ambiguous. After holding the plaintiff in contempt of court for a second time, the trial court could have imposed a concurrent sentence, a fine, or no sanction at all beyond the contempt finding itself. See General Statutes § 51-33.[6] The majority simply is wrong, therefore, that the court "necessarily" would have imposed a second sentence, let alone a consecutive one, following the second contempt finding. As I have explained, moreover, the record is crystal clear that Farver was seeking *any* sanction *other than a consecutive sentence.*

Indeed, under the majority's reading of the trial record, the plaintiff's claim on appeal would be deemed

preserved *even if* the trial court had done exactly as Farver had requested and acceded to the argument that it would be unfair to impose any consecutive prison time in connection with the second contempt finding. In other words, if, in accordance with Farver's request, the trial court had agreed to impose a small fine, a concurrent sentence or no additional sanction at all, the majority nevertheless would conclude that the trial court should have known that Farver *really* was challenging the propriety of the second contempt finding itself rather than seeking to have the court impose something other than a consecutive sentence in connection with the second contempt finding. This fact highlights why the majority's analysis is so obviously in error. The record hardly could be clearer that Farver's *only* request was a sanction that did not include consecutive prison time.

It is readily apparent, moreover, that the trial court did not understand Farver's argument as embodying the claim that the plaintiff raises on appeal. On the contrary, after Farver had requested that the court spare the plaintiff any consecutive prison time because, according to Farver, both contempt findings involved "one set of circumstances," the court acknowledged Farver's concern but explained that the two separate contempt findings were based on the plaintiff's refusal to answer two separate questions involving two separate incidents, each of which had independent significance.[7] At that point, Farver made no attempt to explain that the court had misunderstood his claim or to clarify that he *actually* was arguing that it would be improper for the court to make a second contempt finding because, even though the two questions were predicated on different facts involving different dates, the plaintiff's refusal to answer those questions constituted a single instance of contempt. Instead, Farver allowed the court to proceed on the understanding that he was questioning the fairness of a consecutive sentence, not that he was challenging the propriety of the second contempt finding. Indeed, if Farver had been challenging the propriety of that second finding of contempt, he easily could have, and undoubtedly would have, said so; he did not, however. Consequently, the only plausible explanation for Farver's failure to clarify his position is that Farver himself did not believe that the trial court had misunderstood his claim. In sum, there is nothing in the record of the trial court proceedings to support the majority's conclusion that Farver was disputing the lawfulness or propriety of the second finding of contempt.[8]

"Appellate review of [trial court] rulings is ordinarily limited to the specific legal [ground] raised by the objection of trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair both to the trial court and to the opposing party." (Citation

omitted; internal quotation marks omitted.) *State* v. *Sandoval*, 263 Conn. 524, 556, 821 A.2d 247 (2003). The majority's conclusion that Farver's objection was sufficiently clear to have alerted the trial court of the plaintiff's claim on appeal, namely, that the court lawfully could not hold the plaintiff in contempt of court for a second time, is belied by the unambiguous record. Consequently, the majority's conclusion is manifestly unfair to the trial judge, who could not possibly have divined such a claim from Farver's remarks. Unfortunately, the majority's conclusion also sends the wrong message to trial judges generally. It is one thing to hold our judges accountable for their decisions on claims that have been presented to them; it is another matter entirely to hold them responsible for failing to decide claims that never were raised. I submit that that is precisely what the majority has done in the present case.[9]

II

I therefore would review, under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989),[10] the plaintiff's claim that the trial court's second contempt finding violated his right to due process under the fourteenth amendment to the United States constitution[11] and his rights under the double jeopardy clause of the fifth amendment to the United States constitution.[12] I agree with the plaintiff that the trial court's second contempt finding was barred by those constitutional provisions.[13]

My conclusion is dictated by *Yates* v. *United States*, 355 U.S. 66, 73, 78 S. Ct. 128, 2 L. Ed. 2d 95 (1957), in which the court held that multiple refusals to testify are to be treated as a single act of contempt when the witness asserts a blanket refusal to testify or when the witness refuses to answer questions relating to a particular area or subject of inquiry. Although the majority is not required to address the constitutional implications of *Yates*, I agree with those courts that have concluded that the decision in *Yates* rested on principles of constitutional due process. See, e.g., *United States* v. *Coachman*, 752 F.2d 685, 688 n.20 (D.C. Cir. 1985) ("[s]ince [the petitioner in *Yates*] had argued that the multiple contempt convictions violated the [f]ifth [a]mendment's [d]ue [p]rocess [c]lause, the [c]ourt rested its decision [on] that provision"); *People* v. *Fields*, 177 Ill. App. 3d 129, 135, 533 N.E.2d 48 (1988) ("[the] [c]ourt [in *Yates*] held [that] the imposition of [eleven] consecutive findings of contempt of a party for refusing to answer questions as to whether [eleven] different people were members of the Communist [p]arty deprived [her] of due process"), review denied, 125 Ill. 2d 569, 537 N.E.2d 814 (1989); see also *Ex parte Thompson*, AP-75720, 2008 WL 696476, *3 (Tex. Crim. App. March 5, 2008) ("*Yates* establishes, as a matter of due process, that only one contempt occurs" when a witness refuses to answer question and consistently

maintains that position). Although the court in *Yates* did not state expressly that its decision was based on due process grounds, all of the claims that the petitioner raised in that case were predicated on alleged violations of her constitutionally protected right to due process or her right to be free from cruel and unusual punishment;[14] *Yates* v. *United States*, supra, 71; and the court never suggested that it was resolving the issues presented by those claims on any alternative, nonconstitutional grounds. It appears, therefore, that the rule enunciated in *Yates* is a constitutional one.

The state contends that the plaintiff's due process claim is "factually baseless" because it "depends [on] the erroneous factual predicate that, prior to being held in contempt for a second time, the plaintiff clearly had refused to be examined or clearly had refused to be examined regarding a specific area of inquiry, and the state had artificially multiplied contempts by rephrasing the same or similar question twice." I reject this contention because I agree with the majority that, fairly viewed, the plaintiff's refusals to testify constituted either a blanket refusal to testify or a refusal to testify about anything relating to the case against Roberts.

The state also asserts that the plaintiff's due process claim is legally unfounded because, notwithstanding *Yates*, "two adjudications of contempt for successive refusals to answer two questions [are] not so numerous or oppressive as to constitute a denial of due process." I also disagree with this contention because it is contrary to *Yates*. As a general matter, a witness who either refuses to answer any questions or refuses to answer any questions about a particular subject or area of inquiry is subject to only one contempt finding.[15] See *Yates* v. *United States*, supra, 355 U.S. 73.

Even if *Yates* does not control, I also agree with the plaintiff's claim that the second contempt finding violated his rights under the double jeopardy clause of the fifth amendment to the United States constitution. For the reasons set forth by the majority, the plaintiff's refusal to testify on the second occasion was not subject to a second contempt finding because, under the common law, that refusal did not represent conduct that was separate and distinct from his first refusal to testify. In other words, the second refusal to testify was part of a single, continuing act of contempt. It seems clear that the imposition of multiple sentences for one act of contempt cannot be squared with the constitutional protection against double jeopardy. "The federal and state constitutions prohibit multiple punishments if: (1) the charges arise out of the same act or transaction; and (2) the charged crimes are the same offense." *State* v. *Mullins*, 288 Conn. 345, 378, 952 A.2d 784 (2008). The trial court's action in the present case satisfies the foregoing test because the plaintiff was subjected to multiple counts of criminal contempt for what properly

should have been adjudged to be the same conduct.

Accordingly, I concur in the majority opinion insofar as the majority grants the writ of error and reverses the second finding of contempt. I also agree with the majority that the plaintiff is entitled to have that second finding of contempt vacated.

[1] Our jurisprudence concerning unpreserved constitutional claims is well established. Under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), "a defendant may prevail on unpreserved claims only if: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. The first two *Golding* requirements involve whether the claim is reviewable . . . and the second two involve whether there was constitutional error requiring a new trial." (Internal quotation marks omitted.) *State* v. *Foreman*, 288 Conn. 684, 692–93 n.6, 954 A.2d 135 (2008).

[2] I agree with the majority's threshold conclusion in part I of its opinion that this appeal challenging the trial court's second contempt finding is not moot.

[3] In the interest of simplicity, I refer to the senior assistant state's attorney as the assistant state's attorney throughout this opinion.

[4] Following the imposition of this second sentence, and after the plaintiff had stated that he did not intend to answer any further questions, the assistant state's attorney indicated that he had no additional questions for the plaintiff, who then was excused.

[5] Indeed, as the majority correctly concludes, this case is properly before us only because of the collateral consequences attendant to "a conviction of criminal contempt . . . ." In other words, the contempt finding *itself* is the harm on which this appeal is predicated. The consecutive six month sentence that the court imposed in connection with the second contempt finding has no bearing on the merits of this appeal.

[6] General Statutes § 51-33 provides: "Any court, including a family support magistrate, may punish by fine and imprisonment any person who in its presence behaves contemptuously or in a disorderly manner; but no court or family support magistrate may impose a greater fine than one hundred dollars or a longer term of imprisonment than six months or both."

[7] As I previously indicated, in his interview with the police, the plaintiff had reported seeing the black Acura Integra sometime between 9 and 10 p.m. on April 16, 2005, and again on April 17, 2005, between 9:30 and 11 a.m.

[8] The majority asserts that I have focused improperly on the "*relief* being sought, without considering the court's understanding of the *basis* of that request for relief." (Emphasis in original.) Footnote 6 of the majority opinion. On the contrary, it is entirely proper to focus on the relief requested in the trial court because that request necessarily is central to the determination of how the trial court reasonably understood the claim raised in that court. In the present case, the trial court necessarily understood Farver to be claiming that a consecutive sentence was unwarranted because, simply stated, that is the claim that Farver articulated. The fact that Farver's argument in support of that claim might also support *another*, *different* claim—in this case, the claim that the plaintiff raises on appeal—is no reason to conclude that the trial court should have understood Farver to be making a claim other than the one that he had articulated. The majority, however, employs the same flawed reasoning, which leads to an equally flawed conclusion.

[9] The majority asserts that this court should apply a less stringent preservation standard to claims involving nonparties. See footnote 6 of the majority opinion. Whether a more liberal test is appropriate in such cases is irrelevant to our resolution of the present appeal because no matter how generously one construes the colloquy between Farver and the trial court, a fair reading of the transcript of that colloquy leads to only one logical conclusion, namely, that Farver never raised the claim in the trial court that is the subject of this appeal.

[10] See footnote 1 of this opinion. The state concedes that the plaintiff's constitutional claims are reviewable under the first two prongs of *Golding*.

[11] The fourteenth amendment to the United States constitution provides

in relevant part: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

[12] The fifth amendment to the United States constitution provides in relevant part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

The fifth amendment guarantee against double jeopardy is made applicable to the states through the due process clause of the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[13] The plaintiff also contends that the second contempt finding violated his state constitutional right to due process. In view of my conclusion that he has established a due process violation under the federal constitution, I do not address his state constitutional claim.

[14] The court in *Yates* characterized the claims of the petitioner in that case as follows: "This case presents three issues. [The] [p]etitioner claims that the sentences were imposed to coerce her into answering the questions instead of to punish her, making the contempts civil rather than criminal and the sentences to a prison term after the close of the trial a violation of [f]ifth [a]mendment due process. Second, [the] petitioner argues that her several refusals to answer on both June 26 and June 30 [1952] constituted but a single contempt which was total and complete on June 26, so that imposition of contempt sentences for the June 30 refusals was in violation of due process. Finally, [the] petitioner contends that her one-year sentences were so severe as to violate due process and constitute cruel and unusual punishment under the [e]ighth [a]mendment." *Yates* v. *United States*, supra, 355 U.S. 71.

[15] To support its claim, the state relies on *State* v. *Vickers*, 309 A.2d 324 (Me. 1973), and *United States ex rel. Ushkowitz* v. *McCloskey*, 359 F.2d 788 (2d Cir. 1966). In each case, however, the court expressly distinguished the facts involved from those of *Yates*. See *United States ex rel. Ushkowitz* v. *McCloskey*, supra, 789; *State* v. *Vickers*, supra, 329. The facts of the present case, by contrast, cannot be distinguished from the facts of *Yates*.