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LAVINE, J., concurring. I agree with the majority that the state presented sufficient evidence to convict the defendant, Eddie A. Perez. I also agree that the defendant's judgments of conviction should be reversed and that the cases should be remanded for separate trials on the bribery and extortion charges, but for different reasons. I conclude that the trial court did not abuse its discretion on November 4, 2009, by granting the state's motion to join the bribery and extortion charges for trial, but that the court improperly denied the defendant's motion to sever the cases on May 20, 2010, when the defendant provided the court with a detailed explanation of the reasons he wanted to testify in the bribery case, but not the extortion case.[1] See footnotes 57 and 58 of the majority opinion. Moreover, I would resolve the defendant's claims on constitutional grounds, rather than on an analysis of the *Boscarino* factors.[2] I therefore concur in the majority opinion.

I

I disagree that the court abused its discretion when it granted the state's motion to consolidate the bribery and extortion charges against the defendant in a single trial. I briefly review the procedural issues relevant to this claim. In its motion to consolidate, the state asserted that joinder was appropriate because (1) it would foster judicial economy and administration, (2) the charges set out discrete, easily distinguishable factual scenarios, (3) the crimes alleged were not of a brutal or violent nature, (4) the presentation of the evidence in an orderly sequence would contribute to the distinguishability of the facts alleged in each information, and (5) the court's instructions would enable the jury to consider the cases separately. The state indicated that it submitted the motion for consolidation pursuant to Practice Book § 41-19 and *State* v. *Davis*, 286 Conn. 17, 26–38, 942 A.2d 373 (2008).

In his objection to the motion to consolidate, the defendant identified the key prejudicial factor as follows: "[I]f there were separate trials the evidence from either case would be completely inadmissible," but without addressing the character of the evidence or its effect on his defense. He also asserted that consolidation implicated a host of his "constitutional rights under the fifth, sixth and fourteenth amendments to the federal constitution and article [first, §§ 9 and 20] of the state constitution, including his rights to due process, a fair trial, confrontation, equal protection, the effective assistance of counsel, and the ability to exercise his right to testify." Although the defendant cited the law generally in his memorandum of law with regard to the cross admissibility issue,[3] he did little more than list the constitutional rights he claimed to be at issue. On

November 4, 2009, at the hearing on the motion to consolidate, counsel for the defendant addressed concerns over the length of jury selection, consolidation of the charges pending against Abraham Giles with the extortion case, discovery and trial preparation concerns, and defense counsel's trial schedule. Counsel did not address the issues raised in the defendant's memorandum of law in objection to the motion to consolidate.

In granting the state's motion to consolidate, the court stated, in part: "I view the crimes as distinct. I am going to rely on the *Davis* claim with all due respect, counsel. I have to do what the Chief Justice says is the law, and I never disagree with the [United States Court of Appeals for the] Second Circuit; they are distinct crimes. I don't view a problem with cross contamination; they're not crimes of a brutal or shocking nature. Other jurisdictions have . . . consolidated white collar crimes. In fact, I wrote a consolidation of white collar crimes in cases in this [judicial] district, so the consolidation is going to happen. I'm granting the motion to consolidate."

This procedural history places the issues on appeal in context. The court granted the motion to consolidate on November 4, 2009. *State* v. *Davis*, supra, 286 Conn. 17, was the then state of the law on joinder. Our Supreme Court's decision in *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012), was released on January 24, 2012, subsequent even to the defendant's having filed his main brief in this court on January 9, 2012.

First, I consider the discretion that pertains to consolidation or joinder of cases for trial. In her concurring opinion in *Davis*,[4] Justice Katz took the "opportunity to clarify the standard that the reviewing court must apply in considering a challenge to a trial court's decision granting joinder or denying severance. Our case law has tended to conflate what should be a two part inquiry. Consistent with the reviewing court's role in examining any other claim of nonconstitutional error, it is clear that there are two questions that must be addressed in the affirmative before a defendant is entitled to a new trial: First, did the trial court abuse its discretion in granting joinder or denying severance? Second, did that decision result in harmful error?" *State* v. *Davis*, supra, 286 Conn. 39.[5]

Justice Katz also stated that "[i]n this court's early case law on joinder, the court recognized that the reviewing court's determination as to whether the trial court abused its discretion *necessarily must be based on the evidence before the court when ruling on the motion*: Where from the nature of the case it appears that a joint trial will probably be prejudicial to the rights of one or more of the parties, a separate trial should be granted when properly requested. *The discretion of the court is necessarily exercised before the trial*

begins, and with reference to the situation as it then appears . . . . The controlling question is whether it appears that a joint trial will probably result in substantial injustice. It is not necessarily a ground for granting a separate trial that evidence will be admissible against one of the accused which is not admissible against another. . . . *When the existence of such evidence is relied on as a ground for a motion for separate trials, the character of the evidence and its effect upon the defense intended to be made should be stated, so that the court may be in a position to determine the probability of substantial injustice being done to the moving party from a joint trial. It does not appear from the record that the trial court was so advised in this case, and on that ground alone it is impossible to say that the court abused its discretion in denying* [*the defendant's*] *motion*. . . . *State* v. *Castelli*, 92 Conn. 58, 63, 101 A. 476 (1917); accord *State* v. *Holup*, 167 Conn. 240, 245, 355 A.2d 119 (1974) (Because a preliminary motion for separate trials obviously must be decided before the actual trial, the merits of the motion can be determined only on the basis of whether at that time it appears that injustice is likely to result unless separate trials are held. It is for this reason that in support of such a motion the court must be fully informed of any and all circumstances which indicate that injustice to the parties requires separate trials.).

"Indeed, were the reviewing court not to limit its initial abuse of discretion determination to the evidence then before the trial court, there would be a grave damage of mistrials from causes which were unknown to the trial court at the time when it was required to decide the question. *State* v. *Castelli*, supra, 92 Conn. 65. The trial court's rulings on such motions usually are predicated on the face of the charging document and whatever information is provided to the court regarding evidence to be adduced at trial. Therefore, the reviewing court necessarily must base its determination as to whether the trial court abused its discretion by looking to the state of the record at the time the trial court acted, not to the fully developed record after trial." (Emphasis altered; internal quotation marks omitted.) *State* v. *Davis*, supra, 286 Conn. 46–47.[6]

Given the discretionary standard articulated by Justice Katz in *Davis*, I cannot agree that the trial court abused its discretion by *initially* consolidating the bribery case and the extortion case. Although the defendant listed a number of state and federal rights that he claimed would be prejudiced by a consolidated trial, he did little more than that in his objection to consolidation. During the hearing on the state's motion to consolidate, defense counsel did not mention the right to testify, or refrain from testifying, at trial. Without the benefit of specific facts and the full circumstances to evaluate the injustice to which the defendant alluded, the court lacked a basis upon which to respond to the

defendant's claimed desire to testify in one case and not the other. See *State* v. *Chance*, 236 Conn. 31, 46, 671 A.2d 323 (1996) (defendant failed to divulge clear intent to testify as to one count but no other count).[7] Indeed, the defendant himself may not have decided that he might want to testify in one case and not the other until the trial was in progress. It was not until May 18, 2010, that the defendant raised the specter of testifying in one case but not the other. And when he did, it was to put the court on notice that he was reserving the right to move to sever at the conclusion of the bribery case. See footnote 40 of the majority opinion. Consequently, I agree with the majority's analysis of the court's denial of the defendant's May 20, 2010 motion to sever.

As to the defendant's claim that the court improperly granted the motion to consolidate because the evidence was not cross admissible, the memorandum of law in opposition tracked the general rules of law pertaining to joinder. It did not specify the evidence the state was going to present. See *State* v. *Chance*, supra, 236 Conn. 46. The focus of the defendant's attack on the motion to consolidate at the November 4, 2009 hearing was the lack of judicial economy and defense counsel's trial schedule. Because the defendant's objection to the state's motion to consolidate was of a general nature, there was an insufficient proffer of evidence to move the question beyond the realm of speculation. I conclude that the court did not abuse its discretion by granting the state's motion to consolidate, but that it improperly denied the motion to sever when the defendant informed the court that he wanted to testify as to one case but not the other.

II

I disagree with the majority's conclusion that the bribery and extortion cases were so complex that the jury was not able to consider each charge separately and distinctly and that, consequently, it was an abuse of discretion for the trial court to permit the cases to be tried together pursuant to the requirements of *State* v. *Boscarino*, 204 Conn. 714, 723, 529 A.2d 1260 (1987). To be sure, there were numerous witnesses who described many transactions over a period of approximately two and one-half years, but as white collar or corruption cases go, there was nothing unduly complex or confusing about the evidence in these two cases.

My search of our case law has not revealed an explanation or discussion of what constitutes a "complex" case. The term complex has been used in cases where expert testimony has been required, as the evidence "is not the kind of evidence that readily may be understood and evaluated by a fact finder on the basis of common sense or independent powers of observation or comparison." (Internal quotation marks omitted.) *Milton* v. *Robinson*, 131 Conn. App. 760, 781 n.20, 27 A.3d 480

(2011) (evidence involving complex and intricate details regarding multiple Food and Drug Administration regulations), cert. denied, 304 Conn. 906, 39 A.3d 1118 (2012); see also *State* v. *Radzvilowicz*, 47 Conn. App. 1, 38, 703 A.2d 767 (Internal Revenue Code has complex statutory and regulatory scheme), cert. denied, 243 Conn. 955, 704 A.2d 806 (1997). Obviously, every case must be evaluated in light of its own facts and circumstances; no mechanical test can be applied.

Basically, the cases here involved two distinct scenarios—a bribery case involving a kitchen renovation; and a larceny case relating to charges of extortion stemming from the parking lot transaction. Nothing about the length of the trial, or number of exhibits, or testimony by numerous witnesses concerning many interactions over an extended period of time changes my assessment. In *Boscarino*, our Supreme Court stated that in "a joint trial . . . an omnipresent risk is that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all. . . . This risk is greatly enhanced when the offenses joined are factually similar, but legally unrelated." (Citation omitted; internal quotation marks omitted.) *State* v. *Boscarino*, supra, 204 Conn. 721–22; see also *Drew* v. *United States*, 331 F.2d 85, 89 (D.C. Cir. 1964).[8] Unlike the four informations in *Boscarino* that each included charges of sexual assault, which our Supreme Court described as "factually similar, but legally unrelated"; *State* v. *Boscarino*, supra, 715; the scenarios set forth in the informations before the court in the case before us are separate and quite distinct—a kitchen renovation and streetscape project and a parking lot purchase.[9]

I am concerned that the majority's assertion that the jury was not able to consider each charge separately and distinctly due to the complexity of the evidence fails to provide concrete guidance to courts facing this issue in the future. It is not clear to me precisely why the majority concludes that the facts presented were so complex as to undermine the jury's ability to properly perform its fact-finding function. At least one federal circuit court of appeals has stated, "[w]eighing the danger of confusion and undue cumulative inference is a matter for the trial judge within his sound discretion. His denial of severance is not grounds for reversal unless clear prejudice and abuse of discretion is shown." *Johnson* v. *United States*, 356 F.2d 680, 682 (8th Cir. 1966).

Our review is not plenary. The question we are asked to answer is whether, under *Boscarino*, the trial court initially *abused its discretion* in permitting the cases to be tried together. The fact that another judge or set of judges might have ruled differently does not constitute an abuse of discretion. "[I]n reviewing a claim of

abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Jacobson*, 283 Conn. 618, 627, 930 A.2d 628 (2007).

I also believe that the majority's conclusion pursuant to its *Boscarino* analysis significantly underestimates the ability of juries to understand judicial proceedings and properly evaluate evidence. Collectively, juries tend to be smart and perceptive, and jurors take their responsibilities very seriously. The jury here was aided by the trial court's extensive efforts to manage carefully the way in which evidence was presented and continuous reminders that the charges were to be assessed separately. See *State* v. *Davis*, supra, 286 Conn. 35 (trial court's thorough and proper jury instructions cured any risk of prejudice); see also *United States* v. *Pacente*, 503 F.2d 543, 551 (7th Cir.) (en banc) (trial judge's instructions provided meaningful protection against cumulation of evidence), cert. denied, 419 U.S. 1048, 95 S. Ct. 623, 42 L. Ed. 2d 642 (1974). Moreover, the jury here demonstrated that it could not only keep the cases separate, but also the counts within the informations. The jury found the defendant not guilty of count two in the bribery case.[10] In sum, I cannot agree that the court abused its discretion by initially failing to require separate trials pursuant to *Boscarino*.[11]

III

I agree with the majority's conclusion; see part II C of the majority opinion; that the defendant's rights were undermined and that he suffered substantial prejudice because his right to testify in the bribery case—but not the extortion case—was compromised. I concur with the majority's analysis on this issue and believe that it provides a separate, independent basis for reversal. See *State* v. *Chance*, supra, 236 Conn. 47–48. I conclude, therefore, that the trial court improperly denied the defendant's motion to sever at the conclusion of the state's bribery case.

For the foregoing reasons, I respectfully concur.

[1] In this case, I believe that there are two decisions of the trial court that are relevant to the defendant's claims on appeal: Did the court abuse its discretion by (1) granting the state's motion to consolidate and (2) denying the defendant's May 20, 2010 motion to sever. I believe that the majority's conclusion that "the court improperly joined the defendant's two criminal cases for a single trial" is a global *Boscarino* analysis rather than an independent analysis of the two motions facing the court. Moreover, the majority's analysis considers the entirety of the trial and does not restrict its review of the facts before the court. The trial court is not prescient and able to look beyond the allegations of informations that allege factually and legally distinct cases; see *State* v. *Boscarino*, 204 Conn. 714, 715, 529 A.2d 1260 (1987). The burden is on counsel to provide the court with a factual and

legal basis to support the client's position that joinder is warranted or is unduly prejudicial to the defense. See *State* v. *Davis*, 286 Conn. 17, 47, 942 A.2d 373 (2008) (*Katz, J.*, concurring).

[2] See *State* v. *Boscarino*, 204 Conn. 714, 723, 529 A.2d 1260 (1987).

[3] The defendant's objection was filed more than two years prior to our Supreme Court's decision in *State* v. *Payne*, 303 Conn. 538, 34 A.2d 370 (2012).

[4] The language and cases cited by Justice Katz concern cases in which two defendants are tried within one trial. The issue, however, relates to the cross admissibility of evidence.

[5] I note that *Davis* was decided more than twenty years after *Boscarino* and therefore informs our understanding of joinder and severance. I also recognize that Justice Katz relies on cases that predate *Boscarino* by decades, but those cases stand for the proposition that counsel must specifically identify the factual basis that supports their position. The issue addressed by Justice Katz in *Davis*, in part, was the obligation of counsel to inform the court of "the character of the evidence and its effect upon the defense" that must be proffered to the court. (Emphasis omitted; internal quotation marks omitted.) *State* v. *Davis*, supra, 286 Conn. 46. The issue in the *Davis* concurrence, the cases cited therein, and the present case concerns evidence that may come before the jury if the cases are consolidated.

[6] "For the same reason, the reviewing court cannot consider the remedial effect of a curative instruction by the trial court when determining whether it had abused its discretion at the time it made a ruling on the motion before it. To the contrary, it is only after the reviewing court determines that the trial court had abused its discretion that such subsequent actions become relevant to a determination of whether, despite the abuse of discretion, the defendant obtained a fair trial." *State* v. *Davis*, supra, 286 Conn. 47 n.7 (*Katz, J.*, concurring).

[7] "[N]o need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information—regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other—to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of economy and expedition in judicial administration against the defendant's interest in having a free choice with respect to testifying." (Internal quotation marks omitted.) *State* v. *Schroff*, 198 Conn. 405, 409, 503 A.2d 167 (1986).

[8] In *Drew*, the United States Court of Appeals for the District of Columbia Circuit stated that two questions needed to be answered: (1) whether evidence of the other crimes would be admissible even if a severance was granted; and (2) if not, whether "the evidence of each crime is simple and distinct . . . ." *Drew* v. *United States*, supra, 331 F.2d 91; id., 91 n.14, quoting *Dunaway* v. *United States*, 205 F.2d 23, 27 (D.C. Cir. 1953) ("evidence is so separable and distinct with respect to each crime, and so uninvolved, and the offenses are of such nature, that the likelihood of the jury having considered evidence of one as corroborative of the other is insubstantial").

[9] The majority also cites *State* v. *Ellis*, 270 Conn. 337, 852 A.2d 676 (2004), for the proposition that its decision here is consistent with *Boscarino* analysis. Like *Boscarino*, *Ellis* also is a case involving multiple sexual assault informations that were consolidated for trial. In both cases, the informations were factually similar but legally unrelated. But also, in *Ellis*, before deciding the state's motion to consolidate; id., 369; the court ruled on the defendant's motion in limine regarding the testimony of one of the victims. Id., 352–68. The trial court, therefore, had significant factual information to consider beyond that alleged in the informations. That is not the procedural posture in the present case.

[10] In the bribery case, the defendant was accused of bribe receiving in violation of General Statutes § 53a-148 (a), fabricating physical evidence in violation of General Statutes § 53a-155 (a) (2), fabricating physical evidence in violation of General Statutes §§ 53a-8 and 53a-155 (a) 2), and conspiracy to commit fabricating physical evidence in violation of General Statutes §§ 53a-48 and 53a-155 (a) (2). The jury found the defendant not guilty of fabricating physical evidence in violation of § 53a-155 (a) (2).

[11] With respect to his objection to consolidation, had the defendant more specifically addressed the charges in the two informations and the inferences regarding intent that the jury would be required to consider, consolidation of the cases may have been an abuse of discretion. As a general proposition,

I believe that it is an inherently suspect practice to require a defendant charged with political corruption to defend against multiple informations in one trial. In the cases at issue, the defendant's intent to be inferred from circumstantial evidence was *the* key issue. Unlike other sorts of crimes—burglary, for example, where keeping the facts separate is key; see generally *State* v. *Rodriguez*, 91 Conn. App. 112, 881 A.2d 371, cert. denied, 276 Conn. 909, 886 A.2d 423 (2005)—in corruption cases, the jury is asked to draw inferences with respect to intent, sometimes subtle ones, from circumstantial evidence.

"Substantial prejudice does not necessarily result from [joinder] even [if the] evidence of one offense would not have been admissible at a separate trial involving the second offense. . . . Consolidation under such circumstances, however, may expose the defendant to potential prejudice for three reasons: First, when several charges have been made against the defendant, *the jury may consider that a person charged with doing so many things is a bad* [*person*] *who must have done something, and may cumulate evidence against him* . . . . Second, the jury may have used the evidence of one case to convict the defendant in another case even though that evidence would have been inadmissible at a separate trial. . . . [Third] joinder of cases that are factually similar but legally unconnected . . . present[s] the . . . danger that a defendant will be subjected to the omnipresent risk . . . that although so much [of the evidence] as would be admissible upon any one of the charges might not [persuade the jury] of the accused's guilt, the sum of it will convince them as to all." (Emphasis added; internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 155–56, 51 A.3d 1048 (2012).

It is precisely for the first reason that joinder is harmful and inherently unfair to a defendant in cases such as the ones underlying this appeal. There is simply too great a risk, under our system, that a jury will conclude that while a defendant may have lacked the intent to engage in corrupt conduct as to *one* charge, he could not have lacked the intent to engage in corrupt conduct as to a *second* charge. Stated otherwise, the mere fact that a defendant in cases of this sort is charged with two offenses in and of itself creates an unacceptable level of ineradicable prejudice, notwithstanding the degree of complexity involved. Moreover, if a jury can be expected to fairly evaluate two noncomplex cases joined together, why not three, or four, or five? Why not ten or twenty? Common sense informs us that this cannot be so. The fairest solution consistent with the presumption of innocence, in my view, would simply be to extend the logic of *Payne* and establish a rule that in all criminal cases in which joinder is not premised on cross admissibility there is a presumption *against* joinder. I am not suggesting that one category of cases—political corruption cases—should be treated differently from any other case. I would apply the same rule in *all* criminal cases in which evidence is not claimed to be cross admissible.